Factsheet on BEREC's Net Neutrality consultation

What is Net Neutrality?

Net neutrality is a principle whereby Internet Service Providers ('ISPs', e.g. Vodafone or Deutsche Telekom) must treat internet traffic equally. To illustrate, the principle of net neutrality would prohibit the following practices:

- ISPs slowing down or blocking specific online services, such as WhatsApp or Netflix.
- ISPs *speeding up* specific online services, a.k.a. granting them a 'fast lane' connection or miscategorising them as 'specialised services'.
- ISPs charging different rates for specific online services a.k.a. zero-rating

Legislative background

The Net Neutrality Regulation (2015/2120) was first proposed in 2013, and adopted in late 2015. Contrary to its name, it has been criticised for offering a watered-down version of net neutrality suffering from ambiguities and loopholes.

BEREC, the Body of European Regulator of Electronic Communications, which will be tasked with the enforcement of the new rules, must now produce Guidelines setting out their interpretation of the Regulation. As the Guidelines will determine how the Regulation is applied in practice, their decisions will be the make or break moment for net neutrality in the EU.

Before the final Guidelines are adopted, BEREC is required to hold a public consultation to receive input from stakeholders.

Timeline

- 2-3 June: BEREC plenary in Vienna
- 6 June: BEREC Press Conference in Brussels (live stream 14:30)
                       Draft Guidelines published
                       Public consultation starts
- 18 July   Public consultation ends
- 30 August   BEREC publishes final Guidelines

Outstanding issues & Possible lines of questioning

General

- Is it correct to say that the level of pressure BEREC has received from the big telcos in this process has been exceptional?
- Is BEREC confident that the final guidelines will be diligently implemented by its members?

- **How will BEREC ensure that although the consultation is happening at the end of the Guidelines creation process the feedback received by the public is still taken into consideration?**
- BEREC has little over a month to process the results of this consultation, which is likely to elicit thousands of responses in over 20 languages. How does BEREC plan to adequately process these responses?
- Bearing in mind the bureaucratic challenges in agreeing any challenges to this document and the severe time pressure that BEREC will be under, how can people be confident that BEREC has the institutional ability to take feedback into account before 30 August?
- What steps is BEREC taking to encourage a large-scale, diverse response to the consultation?
- When and how will the responses to the consultation be published?

Zero-rating: Overview

Zero-rating is a practice, currently common in large parts of Europe, where traffic from certain sources does not count towards people's monthly data cap. For example, you could have a 2GB limit for 'normal' internet usage, but Spotify would not count against that limit. It is discrimination based on price, rather than speed.

Applications that do not count against people's data caps have a major competitive advantage. In this way, zero-rating allows ISPs to make certain applications more attractive than others, thereby picking winners and losers online. For this reason, this form of discrimination has been outlawed as a net neutrality violation in Brazil, India, The Netherlands, among other countries.

The Regulation is inconclusive on zero-rating, but it does give regulators the room to outlaw this practice. To this end, zero-rating would have to be qualified as a 'commercial practice' which violates internet users' rights.

In leaked drafts of the Guidelines, BEREC has not chosen to prohibit zero-rating. Instead, they appear to be moving towards a 'case-by-case' approach where each offer must be assessed individually by the national telecom regulators with an unknown outcome - creating uncertainty and undermining incentives for startups to be launched.

Zero-rating: Questions

- India and Brazil have banned zero-rating. Is it not strange that the EU has not banned a widespread discriminatory practice?
- **What can a company do when their competitors are zero-rated? Can European start-ups be confident that, when they suffer such discrimination, regulators will act quickly and decisively enough?**
- If networks can handle additional zero-rated traffic, they could also handle more 'regular' traffic instead. What technical or economic advantages are there to allowing ISPs to restrict users' choice to the zero-rated services?
- If zero-rating is permitted, ISPs will no longer compete solely on price and speed, but also on content offerings. Won't this inevitably weaken incentives to invest in network

infrastructure? (Background: Stimulating investment in network infrastructure is a central aspect of the EU's digital single market strategy.)
- How will the Guidelines ensure that the rules on zero-rating remain foreseeable for all involved stakeholders?
- **Bearing in mind the complexity of a case-by-case approach (and the vast amount of duplication and extra cost that this would produce), is this a practical solution, given the lack of resources often experienced by national regulators?**
- Zero-rating has been proven to offer an incentive for ISPs to offer lower data volumes to consumers (as has been shown in recent studies, see for instance dfmonitor.eu). Do regulators have any tools available to them to mitigate such a negative development?

Traffic management: Overview

Rules on network management define the day-to-day operations of an ISP in its network. A neutral way of traffic management makes no distinction between applications; it is application agnostic. More intrusive forms of traffic management discriminate between classes of applications. The problem is how to assess if the requirements of applications are actually similar and if traffic management is not a pretext for discrimination. The regulation requires traffic management to be proportionate, this should be understood as giving priority to application agnostic measures as the least intrusive types of measures.

Traffic management can also be a pretext for discrimination. It can reduce the incentive for ISPs to invest in their network infrastructure; a growing demand for data should not be responded to by slowing down the relevant services under the guise of 'traffic management', but by expanding network capacity.

For these reasons, net neutrality advocates argue that traffic management should be as 'application-agnostic' as possible. ISPs should only differentiate between groups of applications (i.e. voice chat, video, instant messaging, http, smtp) under exceptional circumstances. Day-to-day, optimisation-driven measures should instead be based on *objective requirements* such as required speed and sensitivity to delay or frequency changes (jitter).

The Regulation largely follows these principles. However, the leaked Guidelines leave too much wiggle room for ISPs to conduct application-based discrimination on a day-to-day basis. Under a correct, net neutrality respecting interpretation of the Regulation, application-based management is held to strict necessity requirements and therefore only allowed in exceptional cases of network congestion.

Traffic Management: Questions

- Do the Guidelines give regulators the tools they need to ensure that traffic management is not an excuse to delay necessary infrastructure investment? Follow-up: How will the Guidelines ensure that (such) general principles are

genuinely enforceable in practice, also in light of the lack of resources often experienced by national regulators?
- **What can a start-up do if it finds out that an ISP in another European country is putting their service in the wrong traffic class?**
    - Follow-up question: How can you reassure them that any remedy will be implemented quickly enough to avoid lasting damage being done?
    - Follow-up question: How can BEREC ensure that such a system is not causing lasting damage for the principle of 'innovation without permission'?
- **How should an NRA find out if an ISP is intentionally or unintentionally discriminating against an application by misclassifying it?**
- Does BEREC envisage permitting application-based differentiation of traffic, outside situations of impending congestion?

Specialised Services: Overview

The term 'specialised services, is a new concept in the Net Neutrality debate. It describes an indeterminate group of new services which could not possibly function over the 'regular' internet and would therefore require special treatment. The European legislator has provided precious few examples of what these services might entail: so far, they include remotely-steered cars and remote surgery. However, specialists have criticised these examples for being either technically unfeasible or already possible over the existing internet. 'Specialised services' are exempted from net neutrality rules. Therefore, if defined too broadly, this term can severely undermine the Regulation's purpose.

The Regulation clearly requires that the provision of specialised services not be detrimental to regular internet access services. They may only be offered if the ISP has sufficient network capacity to offer them *in addition* to any internet access service.

The leaked Guidelines largely follow this approach. However, in one of the last negotiations, new clauses were introduced which completely contradict this safeguard. BEREC has decided that specialised services may take away bandwidth from the users' *own* Internet connection, so long as they do not affect the quality of *other* users' Internet access. Specialised services could create major headache for regular internet users and "eat away" the bandwidth of the normal internet.

The leaked Guidelines also contain a loophole regarding the definition of 'specialised services'. According to this definition, 'specialised services' may apply to applications with specific quality of service requirements which cannot be achieved through the ordinary internet. However, in apparent contradiction to the Regulation, the Guidelines suggest that service providers may themselves (arbitrarily) determine the essential quality requirements of their services, instead of an independent assessment based on the objective requirements of the application.

Specialised Services: Questions

- Could a video-on-demand service like Netflix be recognised as a specialised service? If yes, under what conditions?
- Could a new Skype offer that promises the user "crystal clear" audio quality that cannot be assured over the normal internet become a specialised service?
- **Deutsche Telekom announced that they want to sell access to startups'[1] services as "specialised services". Is this possible under the draft guidelines?**
- According to the Regulation, the provision of 'specialised services' must not be detrimental to the quality of internet access services. How will the Guidelines ensure that this general principle is enforced in practice?
- **The Guidelines allow that specialised services can use the bandwidth the user would normally use for Internet access services. Should an access service that is sold separately by an ISP not come width additional separate bandwidth instead of cannibalizing what the user has already paid for?**
- It is to be expected that ISPs will "test the water" by offering numerous new "specialised services", leaving it to the regulators to - eventually - catch up. Under the *ex post* approach, the only option will then be to ban services that have already become established in the market. Is BEREC really convinced that this is a feasible approach?

Further reading

- Net Neutrality Regulation (full text)
- SaveTheInternet.eu
- LEAK: EU's forthcoming net neutrality rules: here's the good, the bad and the ugly.
- EDRi.org: Make-or-break summer for EU net neutrality. First stop: Vienna.

The SaveTheInternet.eu campaign

www.savetheinternet.eu is an international coalition of over 20 civil rights organisations. Our goal is to ensure strong net neutrality rules in Europe. To this end, we want to inform the public and mobilisation all relevant stakeholders to respond to BERECs public consultation.

We are running a campaign at www.savetheinternet.eu in order to make it easier for ordinary citizens to make their voices heard.

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[1] http://www.euractiv.com/section/digital/news/deutsche-telekom-chief-causes-uproar-over-net-neutrality/