

**Public Consultation on the draft  
BEREC Guidelines on the Implementation of  
the Open Internet Regulation**

10 October 2019

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## Executive Summary

BEREC has prepared an update to the BEREC Net Neutrality Guidelines that have been re-named the BEREC Guidelines on the Implementation of the Open Internet Regulation. BEREC is now inviting all stakeholders to submit their observations and contributions regarding the draft Guidelines.

This document serves three purposes. Firstly, it provides information regarding the on-going public consultation and the work done in BEREC. Secondly, it provides information regarding the draft guidelines identifying and explaining the major clarifications performed. Thirdly, it describes additional questions regarding paragraphs 69 and 70 (the paragraphs that address the issue of monitoring of specific content) for which BEREC is also interested in receiving feedback from the stakeholders.

### 1. Introduction

As already mentioned in the BEREC Opinion<sup>1</sup>, BEREC concludes that the application of both the Open Internet Regulation<sup>2</sup> and the BEREC Net Neutrality Guidelines (NN Guidelines)<sup>3</sup> is working well. It is clear that both the Regulation and the Guidelines could be considered as striking a balance between the views of many stakeholders. Nevertheless, BEREC concluded that the NN Guidelines could, after their application during the first two years, be clarified in certain instances.

BEREC has evaluated the application of the BEREC NN Guidelines with the intention of assessing whether these should be adapted to provide clarity and optimum support for the objectives enshrined in the Regulation: protecting end-users' rights and simultaneously guaranteeing the continued functioning of the internet ecosystem as an engine of innovation.

BEREC has performed this evaluation based on BEREC's experience with the application of the Regulation and the BEREC NN Guidelines, the BEREC Opinion published in 2018 and the feedback and proposals received from stakeholders. Regarding the stakeholder co-operation it is worth noting the public consultation conducted from 14 March to 25 April 2018, the BEREC Workshop on the update of the Net Neutrality Guidelines on 29 May 2019 in Brussels and the numerous contributions received from individual stakeholder organisations.

The objective of this consultation document is to

- provide information regarding the on-going public consultation and the work done in BEREC (Chapters 1 and 2).

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<sup>1</sup> BoR (18) 244 BEREC Opinion for the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines

<sup>2</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015

<sup>3</sup> BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, BoR (16) 127

- provide information regarding the draft guidelines pointing and explain the major clarifications performed (Chapter 3).
- outline some additional questions BEREC is also interested in receiving stakeholder feedback on (Chapter 4).

## 2. Public consultation

BEREC invites all stakeholders to submit their observations and contributions regarding the draft Guidelines. The public consultation is open from 10 October 2019 to 28 November 2019.

Stakeholders are invited to submit their contributions via email to the following [OI-Guidelines-Consultation@berec.europa.eu](mailto:OI-Guidelines-Consultation@berec.europa.eu) address by **17:00 CET 28 November 2019**.

In accordance with the BEREC policy on public consultations, BEREC will publish a summary of all received contributions, respecting confidentiality requests. All contributions will be published on the BEREC website, taking into account requests for confidentiality and publication of personal data. Any such requests should clearly indicate which information is considered confidential.

Stakeholders, who request confidentiality of all or part of the documents submitted to a public consultation, shall indicate this upon submission of the materials. If there is no clear indication that all or part of the documents are confidential, BEREC will presume that the documents can be made available to the public.

## 3. Description of the proposed major clarifications

The following table describes and explains the proposed major clarifications to the current BEREC NN Guidelines:

Topic	Paragraph number(s)	Overall description of the change	Explanation
Name of the document		Name changed to BEREC Guidelines on the Implementation of the Open Internet Regulation	Adapt the name to be in line with the Open Internet Regulation.
Legal references	1, 4, 7, 8, 25, 87, 98, 128, 129 and 134	Minor clarifications regarding references to the Regulation (EU) 2015/2120, EECC Directive, GDPR and new BEREC Regulation	The title of the regulation has been changed, new EECC Directive, GDPR and BEREC Regulation have been adopted.
Provider of electronic communications to the public	10, 11, 12	Minor clarifications: reference to an example case, clarifications to the wording, an addi-	Clarifications based on experience of BEREC considering specific cases.

		tional example when a service is more likely to be considered to be publicly available	
Commercial and technical conditions regarding servers provided by ISPs	32a and 32b	ISPs may provide additional endpoint-based services similarly to CAPs, and this amendment clarifies how NRA should assess blocking of traffic via such servers under Article 3(2).	Linked to paragraphs 78-78b. There has been a need for NRAs to clarify how to assess commercial and technical conditions when ISPs provide these services.
QoS parameters other than volume and speed (application-agnostic QoS levels)	34a – 34c	Clarification that different application-agnostic QoS levels may be offered based on combination of different QoS parameters. This amendment clarifies how NRAs should assess these offers.	ISPs have argued that there is a need to offer IAS subscriptions with different levels of quality.  When different QoS levels are introduced, there is a risk that services requiring a higher level of quality will use the available network capacity resulting in very low network performance for lower quality services. Safeguards may need to be put in place to prevent this happening.
Relationship between Art. 3(1), 3(2) and 3(3)	37	Clarification that neither the rights as set out in Article 3(1) nor the requirements of Article 3(3) can be waived by an agreement or commercial practice otherwise authorised under Article 3(2).	ISPs argue that Art. 3(1) and Art. 3(3) do not automatically apply to cases under Art. 3(2), meaning that Art. 3(2) overrules the other articles. Therefore it was seen as useful to clarify the BEREC position even further.
New variants of zero-rating	40, 42, 43	Minor clarifications to illustrate more examples of commercial practices observed in the market in recent years.	BEREC considers that the Guidelines may benefit from including more guidance on how to approach commercial practices other than zero-rating, which are likely to limit end-user rights.
Zero-rating programmes that are less likely to restrict end-user	42, 42a – 42e and 48	New guidance to provide best practice on open zero-rating programmes that are less likely to restrict end-user	Stakeholders argued that zero-rating programmes are often not transparent, that it is unclear for CAPs if they are eligible to join a programme, and it is unclear how long it

choice or undermine innovation on the internet		choice or undermine innovation on the internet "open programme".	will take to go through the application procedure. BEREC is providing best practices to address these concerns.
Long term effects of commercial practices	48	Clarification to take into account commercial practices' potential future effects on end-users' rights.	NRAs could assess the current effects of the identified practices and the potential risk of the practices resulting in future infringement on end users' rights.
Functionalities that do not affect traffic may run on a permanent basis.	73	Article 3(3) requires that traffic management measures should not be maintained longer than necessary. This does not prevent ISPs from running measures on an ongoing basis as long as the measure is not in effect permanently.	ISPs have argued that there is a need to clarify that technical traffic management in network nodes is running permanently. However, they only have an effect on traffic in times of congestion.
Data compression	77a	ISPs may implement data compression techniques as long as they are lossless i.e the content originally sent reaches its destination unmodified. Forcing adaptive bitrate coding does not represent data compression according to Recital 11.	Some stakeholders argued that application-specific throttling which forces content providers to supply video content at a lower resolution by adaptive bitrate coding represents a form of data compression.
Applicability of the rules against blocking of traffic	78 – 78b	Blocking of traffic is prohibited if it is executed within the network by the ISP. But such filtering is allowed if it is done outside of the network. NRAs need criteria to assess general aspects related to IAS, and specific cases such as HTTP proxy, DNS resolver, access router/modem etc.	Linked to paragraphs 32a-b. There is a need for NRAs to clarify how to assess blocking of traffic in endpoint-based services, in particular regarding how to determine whether the function is provided inside or outside the network.
Monitoring traffic for security reasons	85	In order to identify security threats, traffic must be monitored on an ongoing basis. A clarification that such measures may be implemented in the background on a continuous basis.	ISPs have argued that there is a need to clarify that monitoring components that need to operate on an ongoing basis are permissible.

Footnote added to provide reference to ENISA Guidelines	87	Reference to ENISA “Guideline on assessing security measures in the context of Article 3(3) of the Open Internet regulation”	The ENISA Guidelines propose an evaluation process in order to help NRAs assessing security measures under Article 3.
Specific level of quality for SpS does also include reliability	108 and 108a	Objective technical reasons for justifying a Specialised Service (SpS) are limited to the specific level of quality, which would also cover reliability. This could not be achieved over IAS for resource-constrained devices, due to energy exhaustion, interference or security threats.	Stakeholders have argued, in particular related to 5G, that services like M2M/IoT involve devices that are resource-constrained and that such devices require specific network conditions or behaviour as a result.
Specialised services	110a and 110b	New paragraphs containing clarifications relating to SpS and dedicated connectivity at the application level and logical separation of traffic between IAS and SpS.	The existing Guidelines have been misinterpreted and therefore a clarification is proposed.
Reassessing whether SpS criteria are still met	112	Overall IAS quality will evolve positively over time leading to a situation where a SpS might no longer be necessary. NRAs have to reassess over time whether SpS criteria are still met.	Stakeholders have argued, in particular in relation to 5G, there is a need to clarify that the reassessment of SpS should take place over a larger timescale
SpS should not be included to the detriment of the overall quality of IAS	121, 121a, 124, 125	Where a SpS causes a perceptible decrease in the quality of an IAS, the NRA may choose to intervene. Also the guidance how to assess the degradation has been updated based on NRA experiences and on-going BEREC work.	Stakeholders argued that the wording in the Guidelines is too restrictive and prevents ISPs from implementing SpS, in particular related to 5G.
Transparency measures for ensuring Open Internet access	135	The following topics have been addressed: <ul style="list-style-type: none"> <li>• Data usage caps and the potential speed limits after the cap has been reached</li> <li>• How traffic management measures might</li> </ul>	These issues were included in response to NRAs’ experience in enforcing the transparency aspect of contracts to provide additional guidance regarding the expectations of ISPs

		<p>affect the QoS of the IAS</p> <ul style="list-style-type: none"> <li>Traffic management measured should be defined to be as specific as possible</li> </ul>	
Hybrid and FWA services	141-141b	<p>Clarifications have been added on how BEREC believes Hybrid IAS and certain types of Fixed Wireless Access (FWA) should be treated with regards to the transparency requirements</p>	<p>According to the BEREC Opinion, there may be uncertainty around which transparency rules (those applicable to fixed networks versus those applicable to mobile networks) should be applied in the case of Hybrid services and some FWA services. These modifications aim to clarify the circumstances under which BEREC believes these services to be subject to the requirements for either fixed networks or mobile networks.</p>
Methodology for monitoring IAS performance	164 - 166	<p>Paragraphs 164 and 165 were amended to ensure that full account was taken by NRAs of recent BEREC publications on assessment methodologies and to clarify which factors should be considered when implementing a measurement methodology.</p> <p>Paragraph 166 was updated to ensure that speed measurements should be calculated based on the transport layer protocol payload.</p>	<p>Since the publication of the BEREC Guidelines on the implementation of the Regulation, there have been a number of further publications by BEREC addressing areas such as assessment methodologies and measurement tools. These paragraphs have been updated to take into account these publications.</p>
Step-by-step assessment for zero-rated offers	Annex	<p>The step-by-step assessment is intended to give NRAs a clear tool for assessing zero-rated and other similar offers. The step-by-step assessment shall provide more structure to the analysis especially under para 46 of the Guidelines and provide assistance to</p>	<p>Some stakeholders, as well as NRAs, asked for more guidance regarding the assessment of zero-rating offers.</p>



		NRAs when assessing specific cases.	
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## 4. Questions regarding paragraphs 69 and 70

While consulting the draft Guidelines, BEREC also welcomes feedback on paragraphs with no suggested amendments. BEREC understands that there has been discussion among some stakeholders that the methods mentioned in the paragraphs 69 and 70 of the guidelines would not be sufficient for traffic identification and that e.g. domain names should be considered as generic content:

*69. In assessing traffic management measures, NRAs should ensure that such measures do not monitor the specific content (i.e. transport layer protocol payload).*

*70. Conversely, traffic management measures that monitor aspects other than the specific content, i.e. the generic content, should be deemed to be allowed. Monitoring techniques used by ISPs which rely on the information contained in the IP packet header, and transport layer protocol header (e.g. TCP) may be deemed to be generic content, as opposed to the specific content provided by end-users themselves (such as text, pictures and video).*

Therefore, BEREC has prepared these questions to seek feedback from all stakeholder groups on this particular topic:

- 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.