

'Telecom Single Market Regulation' policy análisis for appropriate elaboration of application guidelines

Introduction

The net neutrality rules in the EU laid down in the Telecoms Single Market (TSM) regulation¹ contain many ambiguities . The Body of European Regulators on Electronic Communication (BEREC) has the task of adopting Guidelines that clarify these ambiguities. BEREC and its 28 member national regulatory authorities (NRAs) need input from stakeholders to set the level of net neutrality protection in the EU.

Services other than internet access services (“specialised Services”)

Problem

- If the definition of such services is not clear enough to prevent a **reclassification of existing online services** as specialised services, **all other net neutrality safeguards in the regulation are moot.**
- Paid prioritisation, if allowed, would reduce end-user choice, in a similar way to “zero rating.” This would also affect other end-users since specialised services use the same network capacity as internet access services.
- **Specialised services must be offered in a non-discriminatory way.** Anything less could lead to signification power concentration, **restrictions on freedom of expression, protected under the regulation,** (the freedom to impart information is most clearly under threat) and freedom of assembly, market consolidation around existing (non EU) big over-the-top players and fragmentation of the European digital single market.

What BEREC should do?

- Clarify the definition of specialised services to allow this category of access service only for services which are not possible over the open internet. “Necessary” must mean genuinely necessary.
- Clarify the prohibition of sub-internet offers which only contain selected services instead of full internet access.
- Require ex-ante approval of all provisioned specialised services to prevent irreversible harm to the user choice, competition, innovation and investment of the online economy.

¹ EU 2015/2120 <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32015R2120>

How to do that in the framework of TSM?

- Article 3(5) requires that specialised services are offered “where the **optimisation is necessary** in order to meet requirements of the content, applications or services for a specific level of quality”. This provision is a safeguard against offering specialised services to content, applications and services which could also function over the open internet and do not depend on optimisation.
- Specialised services cannot be used to circumvent provisions regarding traffic management (TM) measures applicable to internet access services (IAS) by just giving them priority over comparable content, applications or services available via IAS; (Recital 16).
- Specialised services have to be optimised to assure specific quality of service requirements of the content, application or service, which are objectively necessary for key functionality; (Recital 16).
- Sub-internet offers are not legal; according to Article 3(5) and Recital 17 specialised services cannot be **“usable or offered as a replacement of internet access services”**. This is a clear prohibition for all access services which try to compete with unrestricted internet access services (IAS). This provision has been in the regulation thought the entire legislative process.
- Sub-internet offers can not be a third category of access service; BEREC has discussed which type of access service should be used to connect IoT devices that have only restricted access to a few end-points in the network. There has been a discussion to create a third category of access services for that purpose. Either such sub-internet offers are categorised as internet access offerings – in which case the non-blocking provisions of Article 3 and Article 2(2) would prevent the ISP from restricting access to internet content, application or services – or they are classified as services other than internet access services (specialised services) – in which case, according to Article 3(5), they have to be optimised for certain content application and service and cannot simply grant normal access. Hence, sub-internet offers are not possible under TSM because blocking should not be done in the network, instead it has to happen on the end-users device.
- Specialised services can only be offered if sufficient network capacity is available to offer them in addition to any IAS provided. (Article 3(5) & Recital 17).
- Provision of specialised services cannot be to the detriment of the availability or general quality of IAS. (Recital 17).

Zero-Rating

Problem

- Economic discrimination (commonly known as “zero-rating”) has the same problems as technical discrimination (commonly referred to as

“fast-lanes” or “[paid] prioritisation”). This form of discrimination also creates a double sided market and allows ISPs to monetise their monopoly of access to their customers (essentially a new form of termination monopoly).

- We have to distinguish three forms of zero-rating:
 - o a) zero-rating for a few online services
 - o b) zero-rating some applications, but not similar applications (no fee)
 - o c) zero-rating a whole class of applications (no fee)
- Type a) and b) are particularly worrisome because the ISP can exercise the most control over user choice and discriminate between competing services².

What BEREC should do?

- Establish clear bright-line rules on zero-rating and not a case-by-case rule, which would lead to a high degree of uncertainty and regulatory costs. The telco tactic of using court proceedings and the threat of legislation to chill regulatory interventions is well known to regulators and must be minimised with clear rules.
- Clearly state in the guidelines that zero-rating restricts the right of end-users (most obviously the freedom to impart information) according to Article 3(1) and therefore **has to be prohibited**.

How to do that in the framework of TSM?

- The TSM regulation does not contain the term “zero-rating” but speaks of “commercial practices”. Zero rating is not just a pricing policy for internet access since zero rating directly affects the right to receive and distribute information and other end-user rights under Article 3(1). Any zero rating practice must be within the scope of TSM to guarantee these rights for end-users.
- End-users are defined according to the Telecoms Framework directive as both consumers and Content and Application Providers (CAPs).
- According to Article 3(2) “any commercial practice” should not restrict the exercise of the rights of end-users under Article 3(1) “to access and distribute information and content, use and provide applications and services”.
- Forms of zero-rating which restrict these freedoms of CAPs and consumers are therefore unequivocally illegal commercial practices which no ISP may be allowed to undertake. Such offerings are therefore banned under the TSM regulation, which the Dutch government has acknowledged by replacing their previous national net neutrality law with an implementation of the TSM regulation that also bans zero-

² For the problems with c) class based zero-rating see <https://cyberlaw.stanford.edu/downloads/vanSchewick-2016-Binge-On-Report.pdf>

- rating³.
- Recital 7 states that NRAs and other competent national authorities “should be empowered to intervene against agreements or commercial practices which, by reason of their scale, lead to situations where end-users’ choice is materially reduced in practice.” To this end, NRAs have to take the market position of the respective ISP and CAP into consideration and are required to intervene when the essence of the end-users’ right is undermined. ISPs always have a termination monopoly when receiving communications from outside their networks.
 - Recital 7, together with the clear restriction on commercial practices in Article 3, clearly provides the criteria for the **minimum** regulatory action necessary and defines which detrimental effects commercial practices must have in order for the regulator to act (such as those caused by zero-rating), but Recital 7 does not limit the potential regulatory activities that the NRA can undertake.

Traffic Management

Problem

- The TSM allows two types of Traffic Management (TM):
 - o a) application-agnostic measures; where the ISP makes no distinction between content, application or services, instead all data packages are treated the same (best effort) or TM is based on other criteria⁴.
 - o b) class-based measures; where the ISP gives data packages a quality class, based on their available technical characteristics or the functionality they provide.
- Type b) is problematic because it creates the opportunity for ISPs to discriminate intentionally against competitors by misclassifying them. ISPs could also inadvertently misclassify new services and thereby stifle innovation. This could end-up harming user-choice by prioritising the wrong applications. Class-based traffic management is always inherently less transparent for end-users.
- Type b) also risks discrimination against encrypted traffic because it may be mis-classified. We might end up in a tradeoff between privacy and service quality which creates a dangerous incentive not to encrypt. Large content providers, where the nature of the content is “guessable” would, however, be

³ see <https://edri.org/holland-india-prohibit-zero-rating-first-many/>

⁴ see for example Comcast RFC6057 <https://tools.ietf.org/html/rfc6057> and user-controlled, user paid- quality of Service: Barbara van Schewick: The Case for Meaningful Network Neutrality Rules, Report submitted to FCC as attachment to ex parte letter dated 20 February 2015, page 10; Barbara van Schewick: Network Neutrality and Quality of Service, Stanford Law Review Volume 67, Issue 1, January 2015, page 139, quoting Comcast, the largest ISP in the US.

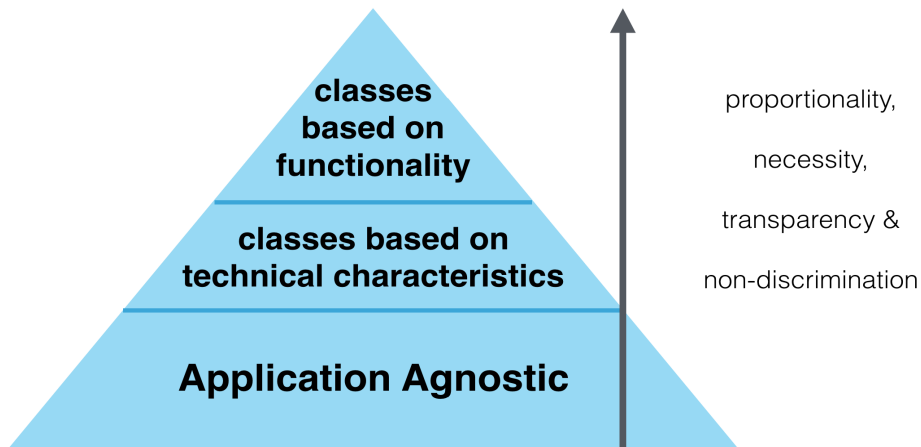
immune from this danger.

BEREC should establish the following rules

- Application-agnostic TM should be the default. Only in cases where these measures do not suffice should an ISP be permitted to resort to class based TM. In such cases they would first have to exhaust class-based measures on the basis of technical characteristics (jitter/delay sensitive) and only then can they treat classes of applications which offer the same functionality (VoIP, video streaming) differently.
- The ISP should have the burden of proof that any implemented class-based measures do not discriminate against encrypted services. Class-based policies for encrypted traffic that depend on the identity of the content provider should not be allowed since this would effectively create a backdoor for discriminatory specialised services.
- TM for reasons of congestion management must not single out particular content, applications or services.
- Class-based TM that is based on the functionality of the application may only be done in temporary or exceptional cases.
- Clarify that since any TM may only process personal data if this is necessary and proportionate, the possibilities for traffic management are limited by Article 3(4) of the TSM regulation.
- BEREC should provide clear guidelines on which TM measures are proportionate and reasonable and in which cases and provide guidelines for implementing strong transparency obligations for ISPs to communicate these policies to their users and the NRA.

How to do that in the framework of TSM?

- There is a clear three-fold hierarchy in Article 3(5) subpara. 1-3 (c) that requires all TM measures to be proportional, necessary, non-discriminatory and transparent (see Figure 1).
- Because class-based TM is inherently intransparent, it can easily be discriminatory and is not always necessary. It is therefore not proportionate to resort to class-based measures if application agnostic measures would suffice.
- Article 3(5)(c) further states that TM based on functionality classes can only be implemented in temporary or exceptional cases
- Recital (15) states that recurrent and long-lasting congestion should be tackled by infrastructure capacity expansion instead of traffic management of scarce network resources.



Article 3 (3) subparagraph 1-3 (c)

Figure 1: three-fold hierarchy of reasonable traffic management

General remarks

- It is important to point out that the TSM regulation has to be interpreted under the light of Recital (1): “This Regulation aims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights. It aims to protect end-users and simultaneously to **guarantee the continued functioning of the internet ecosystem as an engine of innovation.**” Regarding the question of specialised services it is important to highlight the 25 years of innovation and growth in the best effort internet, which contrasts starkly with the many known examples of vertically integrated communications markets.
- BEREC has to interpret the regulation also in regard to fundamental rights according to Recital (33): “This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter, notably the protection of personal data, the freedom of expression and information, the freedom to conduct a business, non-discrimination and consumer protection.”

Further Reading

- European Digital Rights legal analysis for BEREC Stakeholder meeting: http://edri.org/files/BEREC_Hearing2015_EDRiposition.pdf
- Access Now legal analysis for BEREC Stakeholder meeting: https://www.accessnow.org/cms/assets/uploads/2015/12/BERECsubmission_NN_2015.pdf
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- The European Consumer Protection Organisation (BEUC) about the current process: <http://www.beuc.eu/blog/the-eus-net-neutrality-rules-an-unfinished-business/>