

DIGITALEUROPE response to BEREC public consultation for the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines

Brussels, 25 April 2018

DIGITALEUROPE appreciates the opportunity to participate in BEREC's consultation on its guidelines for the application of Regulation (EU) 2015/2120 laying down measures concerning open internet access.

DIGITALEUROPE welcomed the adoption of the EU's Open Internet Regulation. We fully support a ban against blocking and anti-competitive behaviour and believe the Regulation as agreed by the European legislators struck a reasonable balance between protecting rights of end-users of Internet Access Services (IAS) and ensuring freedom to continue to innovate and develop new services for the entire ecosystem.

DIGITALEUROPE also supports BEREC's work to provide recommendations to National Regulatory Authorities to have a consistent approach to the Open Internet Regulation across Member States. However, we have concerns both on the consistency and coherency of the guidelines and on the fragmentation effect that's already happening on the market, which goes against the European Commission's objective of a Digital Single Market.

UTMOST IMPORTANCE FOR INTERNET, CONTENT, APPLICATION AND CLOUD SERVICE PROVIDERS TO CONDUCT BUSINESS

As technology innovators, it has always been key for DIGITALEUROPE's members that the rules are applied in a manner that is open to technological developments and enables the entire value chain to flourish and progress in conjunction with such developments.

In this respect, we appreciate that the guidelines do not force any technology mandates now nor ban any particular kind of service other than IAS. The ambiguity lies in some of the wording around these services, where the guidelines interpret the Regulation's Art. 3(5) in a way that is in our view overly restrictive and not in line with the intention of the legislators – leading some national regulators to take a stricter approach that is prohibitive to innovation and the development of new services and business models (including multi-sided business models between service providers).

Furthermore, there does not need to be an NRA decision in order for the guidelines to have a hampering impact on the appetite for Internet Service Providers (ISPs) to apply new technologies for services other than IAS and conduct business with content and application providers. This results from the general uncertainty over the past two years and a number of cases where NRAs have ruled against commercial practices on the basis of the BEREC guidelines, where the partnering ISPs and content providers have designed and marketed them in a manner they have believed to be compliant with the Regulation. Such offers in general provide

additional choice for consumers and businesses and are the area where new partnerships between different parts of the ecosystem have flourished. This shows the benefit of balanced rules to both consumers and the wider ecosystem. These types of collaboration and new partnership models will only increase in importance in a 5G and digitised economy.

The further hampering impact this has had on innovation and the ecosystem's ability to experiment with new services is the indirect effect that most ISPs want to check with the NRAs whether new services are compatible with the Regulation prior to their launch. This is despite the fact that, as confirmed in the BEREC guidelines, the Regulation does not require an ex-ante authorisation in connection to commercial practices, traffic management practices and services other than IAS and that enforcement is ex-post based on real, not assumed, impact in the market. This side effect makes ISPs incredibly hesitant to think in terms of new services and new revenue streams, which in turn will be a huge barrier for 5G investment and the different layers of the value chain to meet customers' demand and freedom to choose. This in turn undermines the business case for 5G as the use of these new technologies relies precisely on new forms of partnerships with content, application and cloud providers to integrate verticals, digitise businesses and bring new content, cloud and other offerings to consumers.

In the event of different interpretations of the guidelines, BEREC said it would be up to the courts to decide any appeals against national regulators' decisions. One may question the objective of effective harmonisation across the Member States as many aspects of the enforcement depend on national laws and market conditions. We already see fragmentation across Member States, which could hamper the development of future cross-border services.

UTMOST IMPORTANCE FOR INTERNET, CONTENT, APPLICATION AND CLOUD SERVICE PROVIDERS TO INNOVATE

Parts of the guidelines are ambiguous on how service providers will be able to innovate to continue delivering services customers demand.

Paragraph 112, for example, states what is today or tomorrow deemed to 'qualify' as optimisation may not be in the future. It is certainly true that, as networks and capacity evolve and expand, more services can be added to and offered over networks; however, it doesn't follow from this that a service which has been optimised up until a given point no longer needs to be optimised for a specific end-to-end QoE. It is not clear on which grounds and evaluation criteria NRAs would base such a decision; furthermore, it is not clear what legal basis exists under the Regulation for taking such decisions. It should be made clear in the guidelines that services other than IAS, once on the market, can only be removed by the NRA if they are found to be in breach of the ex-post conditions of a negative impact on the general quality of IAS for other end-users.

The guidelines should also not refer to any specific technologies, nor should they try to pre-empt what a service other than IAS could be or take a restrictive approach on what 'reasonable' traffic management¹ is. The risk is high in hampering research and innovation for the ICT industry and organising pan-European 5G trials to bring new services to market such as in the area of automated driving, goods delivered by drones or virtual reality for specific professional collaboration.

¹The Broadband Forum issued the [MR-404 Traffic Management in Multi-Service Access Networks](#) white paper. It introduces Traffic Management, and specifically describes the rationale and mechanisms for applying some Traffic Management techniques to access networks in the context of multi-service.

While the guidelines outline that 5G services using network slicing could be provided as specialised services and that the operation of a specific virtual private network (VPN) is considered to be a private network, and as such is out of the scope of the Regulation, much more innovation is happening and expected in networks to cope with more stringent requirements in terms of latency and packet delay variation:

- Network virtualisation and slicing (fixed and mobile – not only 5G);
- Network sharing and fixed-mobile convergence;
- Network data analytics;
- Evolution of protocols (such as TCP) and traffic management;
- Home network management (wireless terminations over unlicensed spectrum).

DIGITALEUROPE would like to see more consistent and non-ambiguous guidelines to support the development of a Digital Single Market and commercial practices for all providers to invest, conduct business and innovate in Europe. DIGITALEUROPE believes this will have a positive impact on driving forward infrastructure investment to meet the European connectivity objectives for 2020 and 2025, which will require €500 billion over the coming decade according to the European Commission.

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ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

DIGITALEUROPE's members include in total over 25,000 ICT Companies in Europe represented by over 60 Corporate Members and 38 National Trade Associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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