Response to public consultation on BEREC Guidelines on the implementation of the Open Internet Regulation

Executive summary

DIGITALEUROPE appreciates the opportunity to participate in BEREC's consultation on its review of the 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 other anti-competitive behaviour that limits the open internet and believe the Regulation as agreed by the European legislators strikes 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 (NRAs) to have a consistent approach to the Open Internet Regulation across Member States. Below we provide recommendations for improving the consistency and coherency of the final Guidelines in order to promote the objective of a Digital Single Market.

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Enterprise services and virtual private networks

We welcome the intentions behind the changes to the BEREC Guidelines regarding VPNs, which presumably aim to provide added clarity as to the demarcation between public and private networks.

It is, however, unclear what the combined effect of the changes to paras 11, 12 and 115 would be.

The changes to para. 11 are minor but do appear helpful in clarifying that the operation of a particular VPN is to be considered private irrespective of whether the offering of the underlying service is publicly available or not. As the operation of a VPN is considered a private network, it is thus out of the Regulation's scope. The addition of the last sentence to para. 115, on the other hand, implies otherwise and thus introduces a new layer of uncertainty.

It is also unclear what the intention of the addition to para. 12 is. In our view, the key determinant of whether services are publicly available or not is whether they are used by a closed group of end-users. Whether it is a paid-for service or not is immaterial in this regard.

In fact, we believe BEREC needs to introduce guidelines to clarify this distinction beyond VPNs.

With software-defined networking and slicing, network as a service (NaaS) becomes more and more prevalent. Where companies in the past purchased connectivity to their campus but otherwise managed their own network, the campus network was clearly a private network; now, operator-offered NaaS can provide not just the connectivity but manage the campus network and offer services on top (e.g. security, data analytics and video conferencing).

More broadly, it is up to individual companies to choose if they wish to manage and operate their own network or whether they wish to use a third-party provider. It is the use of the network and the services running on the network which should determine whether it is a public or private network and a publicly available service or not.

When the use of the network is private and the services are only available to a closed group of end-users, the network is a private network and thus the services running on this network are not publicly available, irrespective of whether the network and/or services are offered or managed through a third-party provider who may unrelatedly happen to offer other ECS to other end-users that are publicly available.

Traffic management

We welcome the clarification in former para. 71 (now 73) that some traffic management measures are implemented on a permanent basis due to the inherent nature of IP traffic (UDP and TCP) and the current control mechanisms.[1]

It should also be highlighted that for the assessment of the admissibility of traffic management measures, some traffic management techniques are always activated as they have a preventive effect. For example, traffic shaping by means of buffering smooths out traffic peaks and avoids hard clipping (policing) of the data – peaks are impossible to predict and hence shaping should always remain enabled.

Assessment of Art. 3(5)

We welcome language in new paras 108/108a outlining that resource management may improve the levels of quality which are not assured by IAS (e.g. latency, jitter and packet loss).

In fact, the network can already improve QoS indirectly and there are many use cases, such as:

▸▸ By moving the content closer to the end-user. Content Delivery Networks (CDNs) help to distribute content globally in a scalable way. In access networks, caching can lower latency, reduce the need for retransmissions and lower the traffic load at interconnection points. Of course, caching will not necessarily address the needs of interactive applications.

▸▸ By constructing IP multicast trees as a way of limiting the load in portions of the network compared to an equivalent set of unicast streams, leaving more capacity for other applications and streams, thereby indirectly improving QoS.

With 5G networks, software-defined networking (SDN) and network function virtualisation (NFV) will play an important role to:

▸▸ Provide extreme agility in the network to meet diverse service needs;

▸▸ Provide massive elasticity in the network to meet very dynamic traffic demands;

▸▸ Expose actionable network insights to application and content providers, businesses and industry verticals;

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[1] See the *Traffic Management in Multi-Service Access Networks* paper from the Broadband Forum, available at https://www.broadband-forum.org/download/MR-404.pdf

▸ Provide full programmability to enable easy integration of new network capabilities, extension of existing capabilities and easy creation of new services and business models;

▸ Intelligently manage and orchestrate resources and capabilities for dynamic (re)configuration of the network to meet end-to-end performance; and

▸ Support a high level of automation powered by advances in analytics and machine learning.

We foresee new services other than IAS related to these new network technologies which will require specific levels of quality to ensure one or more key features. Para. 108a is one specific example for resource-constrained devices in the field of M2M/IoT, but there will be many others to come. It would be helpful If BEREC could make it explicit that the examples provided in paras 108 and 108a are but examples and in no way intend to provide an exhaustive list of potential service parameters.

Again, DIGITALEUROPE would like to see 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. 5G networks are not only communications systems but will also play an important role as a platform for innovation. Experience tells us that it is extremely difficult to predict what will be the major use cases of a new technology. Regulators can promote innovation by providing clear and consistent guidance that enables users and innovators to develop and use services that fulfil their needs in new and better ways.

Customers must be trusted to decide which services or features best meet their needs. This is not only a central tenet of a market economy but also a precondition for innovation. Users can be trusted not to pay for services which are not useful – they are unlikely to contract a more expensive specialised service where IAS is sufficient to cover their demands. If a customer has selected a specific service, then this should be considered as an element of the necessity assessment referred to in Art. 3(5). This could be included in paras 106, 108, 111 and 112.

For example, while performance is related to network capacity, network dimensioning can ensure enhanced performance through effective resource management according to the different market segments/user demands. Paras 116-119 (new numbering) should be applied consistently with the evolution and importance of dynamic resource management in the network.

Zero-rating

DIGITALEUROPE is pleased that paras 40-42e (new numbering) and the new Annex provide additional detail regarding the application of the Open Internet Regulation to zero-rating programmes and similar commercial practices. IAS providers, as well as providers of content and applications, share a desire to innovate and give end-users data options that fit their needs. Zero-rated offers can have positive effects for consumers and competition when they are implemented with regard for open internet principles and treat all providers fairly.

Art. 4(1)(d)

The newly numbered paras 141-141b should be stated in accordance with new para. 111, taking into account that different network technologies might provide different levels of performance.

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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.

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