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Body of European Regulators for Electronic Communication (BEREC)
Open Internet (OI) Working Group
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Public consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation

Dear Mr. Nieminen,
Dear Ms. Ney,
Dear Sir / Madam,

The German Broadband Association, BREKO, welcomes the opportunity to comment on the recently published draft BEREC Guidelines on the Implementation of the Open Internet Regulation, which update the guidelines in light of two recent European Court of Justice (ECJ) rulings on zero-rating options.
BREKO generally agrees with the ECJ's rulings from 02 September 2021, where the court reacted on questions by two German courts regarding the compatibility of zero-rating/zero tariff options by Vodafone Germany and Deutsche Telekom with the EU Open Internet Regulation (OIR). The decision by the ECJ that zero-rating offers draw a distinction within internet traffic and are therefore not compatible with the obligation to treat traffic equally strengthened net neutrality and was therefore crucial for an equal telecommunications market in the EU in our view.

BREKO's response to the public consultation will be divided into two sections. In the first section, we comment on specific aspects and the most crucial elements of the updated draft guidelines and point

out impacts on alternative network operators. The second section will focus on proposals that recently have been brought forward by large European network operators to involve OTT platforms in network investments. BREKO sees a strong link between this proposal and the updated draft guidelines, especially regarding the impacts of potential “deals” between platforms and network operators on net neutrality. We will give an overview on our position and possible consequences for the European telecommunications market and alternative network operators.

1. Draft BEREC Guidelines on the Implementation of the OIR

BREKO takes note of the updated draft guidelines that reflect the ECJ’s assessment of zero-rating offers and helps national regulatory authorities in their consistent application of the OIR.

We overall welcome the timely consideration of this important topic as well as the comprehensive transposition of the ECJ rulings. Especially the numerous clarifications that zero tariff options are not compatible with the OIR are a crucial element of the updated draft guidelines that help strengthen the implementation of net neutrality rules. We also concur with the newly added clarifications (e.g. “When assessing agreements between ISPs and end-users or commercial practices […]” instead of “When assessing such agreements or commercial practices like zero-rating etc.”[1]), which leave less room for interpretation and make it easier for NRAs to follow the guidelines, therefore also leading to an increased legal certainty for network operators.

BREKO concurs with this clear and concise consideration of the rulings by the ECJ regarding the incompatibility of zero-rating offers with net neutrality. The majority of the 225 network operators organised in BREKO are small and medium sized operators, city and regional carriers as well as municipal utilities. Those alternative network operators neither have the size, number of customers nor the assets to negotiate deals with big content partners. While bigger network operators have a considerable negotiation power when it comes to content for zero-rating offers, this is not possible for the majority of smaller companies. On the retail level, this imbalance would lead to competitive disadvantages. When given multiple tariff options with similar prices, data volumes, speeds etc., zero-rating offers can be a key decisive factor for many customers. This is why zero-rating offers are not only opposed to net neutrality rules, but also to a fair and balanced telecommunications market.

In their clarifications on net neutrality and zero-rating offers, the draft guidelines differentiate between technical and pricing measures. BEREC clarifies “that the general obligation to treat all traffic equally

[1] para. 43, page 14

is not limited to technical traffic management practices but also applies to commercial practices of the ISP such as differentiated pricing"[2]. This consideration of both technical and price-based measures is an important clarification in the draft guidelines: By covering different scenarios regarding the differentiation of internet traffic, net neutrality is being strengthened.

We appreciate that differentiations may still take place in certain cases, as is stated in the "application-agnostic" examples of the guidelines.[3] BREKO thanks BEREC for this clarification. As long as net neutrality and the OIR are respected, network operators require possibilities to make differentiations between different tariffs which take consideration of different customers' needs. This possibility is indispensable for a functioning competitive environment and makes sure that all network operators, regardless of their size or assets, can work out the best tariff options for their respective customer bases. Lastly, we acknowledge that the updated draft guidelines and their application-agnostic approach can make an important contribution to the principles of a free and open internet.

2. Call for the involvement of OTT platforms in network investments

The issue of net neutrality does not only encompass topics like zero tariff plans, technical and non-technical measures or application-agnostic differentiations, but also touches on the proposals by large European network operators with significant market power to involve large OTT platforms (i.e. large platforms that offer media content directly to their customers over the internet) in investments in broadband infrastructure. These proposals were brought forward, among others, in an article for the Financial Times from February 2022, where CEOs of large European network operators ask for the "investment burden [to] be shared in a more proportionate way"[4]. Details of the proposals, e.g. regarding specific areas or technologies to invest in, are generally left open. However, looking at the context of the proposals, it is safe to assume that the network operators call for a participation in all of their currently largest areas of deployment, including fibre networks and 5G.

Even though the proposals themselves do not mention specific OTT platforms, they are most likely aimed at streaming platforms and large social networks: Studies show that video services account for around 80% of today's internet traffic.[5]

[2] para. 49, page 17
[3] para. 35, page 12
[4] https://www.ft.com/content/68f989f5-96e6-440e-90f4-2a11840d9c99, last checked 30.03.2022
[5] Cisco study: https://www.cisco.com/c/dam/m/en_us/solutions/service-provider/vni-forecast-highlights/pdf/Global_2021_Forecast_Highlights.pdf, last checked 30.03.2022

Regarding these proposals, we would like to raise attention to a number of potential risks and concerns. These relate to current investment dynamics, net neutrality, competitive distortions, peering agreements, regional disparities and concerned technologies (5G/fibre).
In general, BREKO would like to point out the strong momentum of fibre deployment which we currently see in the market. There is sufficient capital available for investments in fibre networks, especially by private investors. The BREKO Market Study 21 underlines this argument: In 2020, German competitors invested €5.9 billion in broadband network infrastructure[6]. From the €2.9 billion investments in network deployment by BREKO members, only a minority of 10% was financed by public funding, while 90% was realised through economically viable deployment. For investors and network operators alike, it is self-evident that the investment in network deployment is not attached to any conditions regarding a differentiation of internet traffic. Furthermore, the current investment momentum demonstrates that strong fibre deployment does not rely on specific agreements with OTT platforms and is currently being put forward without any impacts on the equal treatment of internet traffic.

However, *if* OTT platforms were to be involved in investments in network deployment, their involvement would have to be subject to certain conditions (as laid down in the following paragraphs), first and foremost compliance with net neutrality, a fair inclusion of all network operators and the prevention of market distortions. If these conditions were not met, the proposals by large European network operators would have to be rejected.

As a first condition, we underline the importance of coherence with the net neutrality guidelines. The notion that all internet traffic from all actors, irrespective of their size, their sales revenue or their political influence is treated equally might be counteracted by possible “deals” between network operators and OTT platforms. Similarly to zero-rating tariffs, there is a disparity between large and small or medium network operators. While large companies have a significant negotiating power due to their larger customer base and their assets, small and medium operators would not be able to reach the same kind of conditions with large OTT platforms. These agreements could potentially consist of OTT platforms contributing to network deployment if their traffic is then given priority in return. This is in contrast to the updated draft guidelines which strengthen the “obligation on ISPs to

[6] BREKO Market Study 21, page 9, https://www.brekoverband.de/site/assets/files/13870/breko_broadband_study_21.pdf, last checked 30.03.2022

treat all traffic equally when providing IAS"[7]. Technical or non-technical discrimination that differentiates between services, applications or websites is not compatible with net neutrality rules. Therefore, investment deals between network operators and OTT platform which include preferential treatment of the platforms' services would stand in stark contrast with the newly consolidated principles of net neutrality and must be avoided.

Apart from net neutrality concerns, BREKO sees the risk that involvement of OTT platforms only includes the biggest network operators and leaves out smaller companies. This would lead to a serious competitive distortion and would therefore be detrimental for the European telecommunications market. Today, the majority of fibre networks is being deployed by alternative network operators. In Germany, for example, three quarters of FTTH/B deployment are carried out by alternative network operators[8]. The largest part of fibre deployment from BREKO member companies is being carried out trough economically viable investments, only a small amount comes from public funding[9]. These numbers show that the role of alternative operators in deploying fibre networks must not be underestimated. If large OTT platforms were only involved in the investment costs of a few of the biggest European network operators, the largest part of the market would be left out. This would give a clear competitive advantage to a limited number of network operators and clear disadvantages to all other players on the market. Consequently, due to decreased costs on the side of the largest network operators, price disparities would follow. If only large network operators were included, this would also undermine fair peering arrangements between larger and smaller operators or in other words, between incumbents and competitors. Hence, the incentive for large network operators to force smaller operators into "paid peering" would be increased.

Along with this development, we also see the risk of growing regional disparities, which need to be avoided. Not only in rural areas, there is often only one fibre network / one deployment project by alternative network operators like city carriers. An uneven investment in projects by large network operators would likely lead to a disadvantageous concentration of deployment in a few areas and would direct scarce resources like civil engineering capacities away from the areas where they are most needed. Therefore, if only large network operators were included in the involvement of OTT

[7] para. 49, page 17
[8] BREKO Market Study 21, page 12, https://www.brekoverband.de/site/assets/files/13870/breko_broadband_study_21.pdf, last checked 30.03.2022
[9] BREKO Market Study 21, page 20, https://www.brekoverband.de/site/assets/files/13870/breko_broadband_study_21.pdf, last checked 30.03.2022

platforms, this would most likely not result in a wider availability of (fibre) networks, as the proposals by large European network operators suggest. Particularly in Germany, many areas only receive future-proof fibre networks thanks to the strong commitment of small or medium-sized alternative network operators. Unequal involvement in investments risks distorting the market, affecting business cases and ultimately decreasing the comprehensive deployment of fibre networks.

While the two ECJ rulings were based on mobile tariffs, issues like the equal treatment of internet traffic are also crucial for fixed broadband connections. New technologies, especially fibre with its possibility to transfer high data volumes in short times, make the updated draft guidelines and their future-oriented guidance on net neutrality indispensable.
With rapidly increasing data volumes[10] and new technologies like Virtual Reality evolving, fibre is the only future-proof technology. A study by BREKO demonstrates that real fibre networks are by far the most sustainable access network technology, surpassing both FTTC networks and cable networks.[11]
The strong role of fibre networks means that in case an involvement of OTT platforms in network deployment is envisaged, and in case all the aforementioned conditions are met, it should only include fibre technology. While other fixed network technologies like copper or cable/DOCSIS show clear disadvantages against real FTTH/B networks, mobile technologies, mainly 5G, are only deployed by a handful of operators, currently mostly in metropolitan areas. Fibre deployment, on the other hand, is being carried out by hundreds of alternative network operators all over Europe.

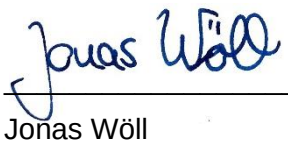
In conclusion, BREKO welcomes the new BEREC draft guidelines on the Implementation of the Open Internet Regulation and the reinforcement of net neutrality originating from the ECJ rulings and appreciates the opportunity to contribute to the public consultation. In our view, there is a strong connection between net neutrality and the call of European network operators to involve OTT platforms in network investments. Without regulation, we see the risk of exclusive deals between platforms and big network operators that might jeopardise net neutrality and exclude alternative network operators. Any involvement of external platforms in the costs of network deployment must be subject to clear and transparent rules that involve all relevant players.

[10] BREKO Market Study 21, page 4, https://www.brekoverband.de/site/assets/files/13870/breko_broadband_study_21.pdf, last checked 30.03.2022
[11] BREKO Sustainability Study, https://www.brekoverband.de/site/assets/files/3672/2020-sustainability-assessment-fttc-ftth.pdf, last checked 30.03.2022

Lastly, BREKO wants to take account of the recent BEREC statements on the EU's sanctions to block RT and Sputnik News. We support the clarification that the current sanctions fall under the exceptions of Article 3(3) of the OIR and that therefore the blocking of these specific websites is compatible with net neutrality rules. BREKO and its member companies support all measures aimed at supporting Ukraine and are willing to play their part in overcoming the crisis. The current developments demonstrate that the conditions for OIR constantly change and highlight the necessity to continually review and adapt the existing regulatory framework on the implementation of net neutrality rules.

Should you have any further questions, please do not hesitate to contact us at any time.

Yours sincerely,



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