



Answer to BEREC's consultation about its Net Neutrality Guidelines

Fédération FDN

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1 Introduction

This document responds to the consultation issued by BEREC to evaluate the application of the Regulation (EU) 2015/2120 and its Net Neutrality Guidelines, which text can be found here:

http://berec.europa.eu/eng/news_consultations/ongoing_public_consultations/4818-public-consultation-for-the-evaluation-of-the-application-of-regulation-eu-20152120-and-the-berec-net-neutrality-guidelines.

All the document will be published on the Federation's website, and is not subject to secrecy.

1.1 About the Federation

The "Fédération des fournisseurs d'accès à Internet associatifs" (Federation of the non-profit Internet access providers), also known as "Fédération FDN¹", gathers almost 30 non-profit Internet access providers, mostly in France, under its banner.

Each of these Internet access providers (IAP) is managed by its subscribers and is value-centered: access is provided by non-profit associations, that care first for the fundamental rights of their members and subscribers. Each member IAP is also declared as an operator to the relevant NRA. Our operators are established in France, including overseas, except for one that is established in Belgium.

The Federation itself is user-powered, all the actions being handled by volunteers, including the response to this consultation. Our organisations are old (in comparison to the history of the Internet), so our volunteers have a good knowledge of the telecom market in France and Europe, as they have been working on these topics for many years. In France, despite the fact that the volunteers of Fédération FDN have a lack of time

¹In reference to FDN, "French Data Network", a non-profit Internet access provider founded in 1992, which is the oldest Internet access provider still operating in France, and is the origin of our Federation.

and funding to attend all events in Europe and to develop their advocacy activities, their positions on matters like Net neutrality are considered well-argued and have an influence on policy-making.

1.2 General remarks

We have to keep in mind that the EECC is still in the trilogue negotiations. What we know about the text so far is not reassuring (we have concerns about article 71 in particular, and also 5G, to name but a few of them). As such, we doubt that this text will have enough safeguards to make the BEREC guidelines useful.

For instance, at this stage of the trilogue, there are discussions to withdraw the NRAs competence on 5G from them. As 5G is one of the topic used by the industry to weaken Net neutrality, it is seriously worrying.

Another remark: BEREC, and with it the relevant NRAs will not bring further the topic of Net neutrality if they wait for complaints to be filled. How many citizens, even if they note their ISP infringes Net neutrality, will have the reflex to fill a complaint to their NRA? Do they have the assurance that it will be taken into account? We believe citizen would be better protected if the regulators have their back and take proactive actions.

2 A. General experience with the application of the Regulation and BEREC NN Guidelines

The Guidelines and the European Regulation helped ARCEP take a position on the devices topic². This is a good thing because the questions that have been raised are quite interesting. Moreover, this proves that NRAs are able to see a bit further than networks *per se*.

But as it increases the knowledge produced by the NRA, it also dilutes the attention of a regulator which has limited means both in terms of money and staff: for instance, the fiber networks are still in need of attention and regulation.

On the pan-european scale, we acknowledge a lack of harmonization of the regulation between the relevant NRAs. This is especially the case on the zero rating topic. This does *not* go in the direction of a Digital Single Market. Indeed, how can the market be unified if an offer is considered as acceptable in Portugal and Belgium, but not in France?

We already raised the vagueness of the Regulation and BEREC guidelines on this topic and the BEREC has until now only coordinated the NRAs. We now urge the BEREC to dig deeper and prohibit all form of discrimination and price differentiation and to monitor more closely offers that infringe Net neutrality in some Countries.

²This work is in French and can be found here: https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018.pdf.

If not, it will take a long time before the issue is brought before the European Court of Justice. Meanwhile, in some countries, users face zero rating offers that infringe Net neutrality.

The implementation of the Guidelines shows that the text is not clear enough about zero rating and that it remains a grey zone. The result is as expected that there are different interpretations according to each NRA. As we said earlier, it is a real obstacle to Digital Single Market. The BEREC should conduct a study on the impact on competition and on consumers. The public debate is cornered by the operators as there is no data on the impact of zero rating offers on the market.

Also, some commercial practices that are not zero rating, such as bundling press offers with the access to the Internet (one in France is known as "SFR-presse", we already raised concerns about this in our previous response to the BEREC³), appear dangerous to us, as they have a clear impact on the media diversity: the newspapers that will be most read will be the ones included in the bundles. Maybe this will need some clarity as the operators are clearly exploiting a grey area.

Questions 4 and 5 are biased. It assumes the regulator's work has interfered with the good development of companies. In fact this is the assumption most of the operators have: the regulator is enforcing too many rules, we cannot work, we will die.

This is a false dichotomy. We believe it is possible to have both strong rules protecting the users' rights and flourishing businesses. Bargaining fundamental rights should not be a possibility for false economic reasons. If some ISPs had to discontinue products or services, it means that they were offering services or products that were infringing rights such as right to access information.

Question 5 is similar in spirit to the previous. It simply deals with possibly future products and services where question 4 dealt with possibly past ones. As such our answer to this question is the same as our answer to question 4.

We encourage BEREC and the relevant national regulators to use the coercitive powers the Regulation gives them. If the operators see a stick, they will behave. This, even if the stick is not used to punish them. We already warned in the previous consultation that the new Guidelines were quite timid regarding the incentive given to NRAs to punish bad behaviours. As the Regulation is now two years old, there has been enough time for the operators to work according to these guidelines. Now it is time to consider sanctions.

We know that the situation is not the same in all the Member States. For example, Netherlands have a strong law, prior to the 2015 Regulation, which is not the case elsewhere. All the NRAs don't work with the same tools and the same background, which sometimes makes the Regulation difficult to apply in an harmonized way. But we do think regulators must do their work: they may impose the fact they count in the game by acting. If they keep acting like they are afraid to fight, nothing will happen.

This is all the more important that the EECC is at the moment planning to strip down some topics and some incentive from the NRAs. It must not be done, elsewhere

³We refer to this text at the end of the present response.

the BEREC will not be useful in assisting the end-users. It will just sit and watch.

3 C. Commercial practices such as zero-rating (articles 3(1) and 3(2))

The current assessment of zero-rating is not protecting the end-user's right at all. As we stated in our previous response to BEREC, we agree with the approach developed in paragraph 32, but consider, and in this we disagree with the European regulator, that any form of zero rating should be banned.

Indeed, surprisingly, BEREC and other NRAs considered that this criteria allowed each NRA to state whether it will regulate or not such offers, in every case.

This leaves us with a grey area which makes the regulation not harmonized at all, as already remarked here, this goes at the opposite of a unified market strategy.

In our previous answer to BEREC⁴ we noted that the paragraph 47 was unclear to us, and it appears to still be:

« The interconnection, or more specifically the poor quality of the interconnection, can damage QoS. If the ISP provides a good interconnection to his own service, but very poor interconnection with his competitors; or if he refuses to setup the same quality of interconnection with two competing services, it creates a technical difference in quality between the two applications/services. It should be the role of the NRA to control whether those interconnections are fair or unfair. Unfair interconnection rules can be a way to discriminate contents or applications, even under article 3(3). Since all of this is obvious, the meaning of paragraph 47 is unclear. It may be considered as stating that an interconnection between two operators (ISPs or others) should not be regarded as an end-user IAS, which is also obvious. »

The grey area strategy is not a good one. As stated previously, it produces a lack of harmonization between Member States and leaves the citizens with infringements to their rights quite a long time before a complaint is filled and the case studied.

4 D. Traffic management (article 3(3))

This part of the Guidelines did not change a lot since the last consultation. In consequence, our vision on this section has remained similar.

We refer to our remarks in our previous response to the BEREC. In particular, we draw the regulator's attention on this note:

⁴Referenced at the end of this document.

« The point is not where the filtering is performed, but where and by whom it is controlled. So we do insist strongly on “under the control of the end-user”. During recent discussions at ARCEP in preparation of this draft of the guidelines, it was one of the points getting a clear and loud agreement from all stakeholders (large operators, small ones, civil society, etc) that having things under the control of the end-user should be the priority, so as to promote greater control of the end-users on their online life.»

We would like to point BEREC to our press releases on the current LPM "Loi de Programmation Militaire" in France since this project will have a strong impact on Net neutrality and secrecy of correspondence which the government feigns to ignore (even when talking about DPI and e-mail attachments). Both FFDN⁵ and LQDN⁶ have issued statements.

5 E. Specialised services (article 3(5))

We would like to insist on the fact that what is already in place in the Guidelines and the Regulation regarding specialized services is enough to allow the development, for instance, of self-driving or connected cars⁷.

The Regulation and the Guidelines already allow this type of use of the network.

6 F. Transparency (article 4)

6.1 Question 20

We will not repeat here what we stated in preamble. Apart of that, two options can be considered to help citizens more.

One option is to give more information to users so they can choose, while being sufficiently informed. The French NRA does this a bit, with its maps showing the coverage for fixed or mobile access. It helps end users compare the different operators and make their choice on criteria that are not only commercial ones (but more focused on quality of service).

The work started by BEREC on how to measure infringements to Net neutrality, based on the work done by RTR (with RTR-Netztest) proceeds from the same idea. If it is difficult to measure such things without attempting to the end-users' privacy, we

⁵<https://www.ffdn.org/fr/communiqu/2018-04-20/la-federation-fdn-appelle-au-rejet-de-l'article-19-de-la-lpm>

⁶https://www.laquadrature.net/fr/Detection_cyberattaques_nouvelle_loi_surveillance.

⁷Let alone the fact that this sort of vehicle are, obviously, designed to cope with network losses and jitter: without this, such vehicles would be very dangerous. What if the network is lost on the highway, in a tunnel or during a storm?

do think it can empower a bit users and help them raise concerns towards the relevant NRA.⁸.

Another track is to help end-users raise concerns about their ISP or service provider. ARCEP does this with a platform called "J'alerte l'ARCEP" which makes it easier to indicate if a problem is encountered. This idea is not new as La Quadrature du Net has made the same kind of tool, called Respect My Net, to help citizens point out the infringements to Net Neutrality they witness.

We think the two approaches combined are good: the more the public has the keys to analyse if there is a problem, the more it will be willing to raise a concern about it. Helping at the two ends makes it a sort of virtuous circle.

Maybe this idea can be spread at the European level.

7 G. New technologies (horizontal)

7.1 Question 21

Question 21 needs to be torn down to be understood. It assumes that the new technologies *need* flexibility to be adopted –whatever "flexibility" stands for. This is not obvious to us. We believe new technologies can be developed with respect for the great principles of the Internet.

Market actors who assert that they need additional flexibility for 5G ought to carry the burden of the proof. Allowing them not to do so makes criticizing their assertions impossible. It also transforms the deployment of 5G into a trojan horse which is used to request abusive and currently-forbidden commercial practices.

As of today we are not aware of any technological reason that would make 5G require more flexibility. The only reasons we are aware of are commercial ones. As such, we believe that allowing derogations on the basis that 5G requires them would be an unjustified and disproportionate attack on freedoms.

If some actors begin proving that they indeed require changes in order to bring 5G to markets, we will be pleased to discuss their assertions.

Even if it were found that 5G deployments have incompatibilities with some the existing laws, this cannot be a reason to reduce citizen protections, not the least because 5G came after them and should have been designed in a compliant way. Lowering our standards because a norm has been created in an incompatible way is something EU citizens would not understand, and indeed it would not make sense.

⁸Our opinion on this specific topic can be found here: <https://www.ffdn.org/en/etude/2017-04-10/answer-berec-stakeholder-meeting-brussels-about-net-neutrality>.

7.2 Question 22

We understand "network slicing" as the creation of several virtual networks with different technical behaviours on top of a single physical setup. As such, it cannot infringe on existing regulations by itself but it can ease doing so.

For instance, if an operator wants to implement a network with a given deficiency, it is already possible to deploy separate antennas and backbone which implement that deficiency, albeit costly. Network slicing merely permits deploying the same deficiency without having to roll out additional hardware. The issue is therefore not a technical one but a commercial one. We believe that this technology can be very beneficial to wireless communication networks (see our answer to question 4 of French DGE's public consultation on 5G⁹) but it is equally possible to use it inadequately. It is likely that operators will be tempted to create tiered networks, possibly switching subscribers automatically between them based on opaque metrics and policies. Since the Guidelines deal with networks regardless of their nature (physical or virtual) and account for limitations of the networks, they should be clarified in order to stress that moving subscribers between classes of virtual networks cannot be used to circumvent regulations.

An additional note on this topic is that network slicing can also become a great source of confusion to subscribers. We foresee that some operators will claim they cover 100% of a given territory, provide the highest speeds, the lowest latencies, and the best energy-efficiency even though all these are not true simultaneously but merely separately on a specific network slice. Such practices would deeply confuse users: the same operator network and the same technology could result in wildly varying user experiences.

We understand "edge computing" as doing computations close to the edge of the networks in order to be as close as possible to devices. For mobile networks, this means putting them in the base stations, i.e. near the radio antennas. Edge computing is to be regarded as a realization of a specialised service. Indeed, it is about providing an improved quality of service for some applications for which the operator is receiving subsidies. It therefore falls in the same category as specialised services.

8 H. Other comments

Most of our additional comments were made in preamble.

We make in this text a lot of references to previous ones, being press releases or previous responses to BEREC. Here is the list of these texts for further reading:

- Our response to BEREC on the draft of the Guidelines: <https://www.ffdn.org/en/etude/2016-07-18/fdn-federation-contributes-berec-consultation-net-neutrality>
- Our notes about the meeting we had with BEREC in April 2017: <https://www.>

⁹<https://www.laquadrature.net/fr/consultation-5G>.

ffdn.org/en/etude/2017-04-10/answer-berec-stakeholder-meeting-brussels-about-net-neutrality

- Our common response to a consultation about 5G with La Quadrature du Net:
<https://www.laquadrature.net/fr/consultation-5G>
- These two press release of La Quadrature make a good picture of the evolution of the Net Neutrality topic in Europe, even if they are a bit old now:
 - <https://www.laquadrature.net/en/50-shades-of-grey-for-net-neutrality>
(May 2016)
 - <https://www.laquadrature.net/en/net-neutrality-one-year-after-dark-picture>
(June 2017)