



BEREC

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Our date

Your date

Our ref:

Your ref:

28.11.2019

10.10.2019

BoR (19) 180

Public Consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation

About MBL

The Norwegian Media Businesses' Association (MBL) is the media employer organization and lobbyist in Norway. The organization counts approx. 320 member businesses, consisting of newspapers, TV companies, media groups, magazines, multimedia companies, press agencies, radio stations, printers and distributors etc. MBL is a member of the Confederation of Norwegian Enterprise (NHO), Norway's largest organization for employers and the leading business lobbyist.

Summary of key points

- We are strong supporters of an open, neutral and transparent public Internet. It is a necessary condition for free, professionally edited media to thrive for the benefit of an open and democratic society.
- The practise of zero-rating challenges and undermines the very nature of net neutrality and needs to be curtailed.
- It is impossible to delineate satisfactorily the scope of a zero-rated service. The nature of digital innovation is that traditionally clear barriers between what used to be separate markets and products and services have broken down.
- Adverse effects on media pluralism by zero-rating should be given serious consideration.
- We invite BEREC to strengthen its Guidelines with this in mind, and we ask that these concerns are reflected in the revised assessment methodology.

About net neutrality and the Open Internet Regulation

The MBL and our members – private and professionally edited media houses publishing a wide range of content on print, television and digital devices – are strong supporters of an open, neutral and transparent public Internet. It is a necessary condition for free, professionally edited media to thrive for the benefit of an open and democratic society.

The open Internet allows the public to reach professionally edited media by subscribing to access services. It is imperative that Internet access offerings across Europe continue to offer citizens access to a broad and diverse range of content, without unnecessary constraints or access services acting as content gatekeepers, in a non-discriminatory manner. The open Internet is vital for digital diversity, media and content pluralism and innovation.

Norwegian Media Businesses' Association

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We therefore welcome the opportunity to take part in the Public Consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation (“the Guidelines”).

About zero-rating

Recital 1 states the following: «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.»

We would argue that the practice of zero-rating challenges the very nature of net neutrality and in essence violates these principles:

- Traffic is not treated equally and non-discriminatory.
- The practice gives increased market power to already dominant players and discriminates against both smaller and new players.
- End-user choices are reduced, firstly by zero-rating promoting some players at the expense of others, and secondly because other players are not a real choice for many users due to having to pay.
- Ultimately, the practice undermines the whole purpose of the regulation, because it undermines the principle of equal treatment and gives a disproportionate amount of influence to telecom operators and already dominant content players.

Zero rating: the case of Norway

Zero-rating of music streaming applications over mobile broadband are currently being offered in Norway. The Norwegian market for mobile telecommunications is dominated by two players. According to data from the Norwegian Communications Authority (Nkom)¹, an autonomous agency of the Ministry of Local Government and Modernisation, the dominant player Telenor² had market shares of 52,6 % and 68,1 % in the private market and business market respectively for the first half of 2019. The next player is Telia³, which had market shares of 36,8 % and 25,8 % respectively.⁴ For all practical purposes this is a duopoly, with the two dominant players having 89,4 % and 93,9 % of the private market and business market respectively.

This lack of real competition has the effect of giving Norway much higher prices for mobile broadband and far less use of mobile data traffic than our neighbours Sweden, Denmark, Iceland and Finland, see below.⁵

¹ <https://eng.nkom.no/>

² www.telenor.no

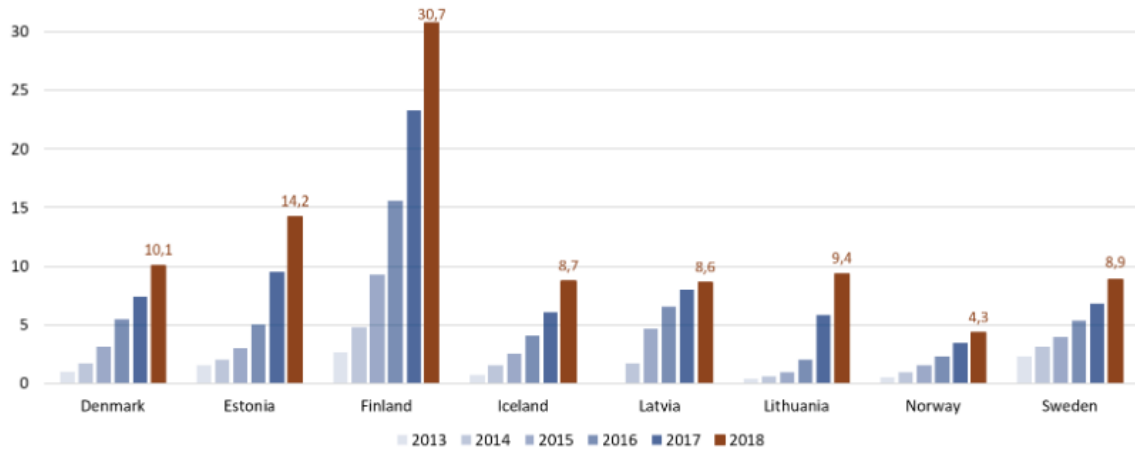
³ www.telia.no

⁴ https://ekomstatistikken.nkom.no/#/article/ekom1h2019#mobil_marked

⁵ <https://statistik.pts.se/en/nordic-baltic-telecom-market/graphs/1-mobile-services/15-data-volume/>

Data transferred over mobile networks per capita in a month (Gbytes)

Includes both uploaded and downloaded traffic. Data roaming abroad is not included. Calculated by the binary system (1 GB = 1024³ B)



Source: "Telecommunication Markets in the Nordic and Baltic Countries", September 2019

This makes zero-rating a more serious threat in Norway than in countries where cost of data traffic is significantly lower and where in many cases the amount of data traffic included in practice is unlimited.

We would argue that zero-rated music streaming diverts users away from other content, by the very fact that it is being offered 'free' in terms of data usage.

There is evidence to suggest that consumption is being distorted when cost is zero. Research suggests that there will be an increase in a good's intrinsic value when the price is reduced to zero⁶. Free goods have extra pulling power, as a reduction in price from \$1 to zero is more powerful than a reduction from \$2 to \$1. This is particularly true for hedonic products—things that give us pleasure or enjoyment⁷. A core psychological explanation for the zero price effect has been the so called 'affect heuristic', whereby options that have no downside (no cost) trigger a more positive affective response⁸.

According to this research it makes sense for telecom operators and large content providers to provide zero-rated content, in that it increases their audience at the expense of competitors not able or willing to offer zero-rated content of their own. As such it increases their market power at the expense of other players, and makes it more difficult for smaller and new, innovative content providers to succeed.

⁶ Shampanier, K., Mazar, N., & Ariely D. (2007). Zero as a special price: The true value of free products. *Marketing Science*, 26, 742-757.

⁷ Hossain, M. T., & Saini, R. (2015). Free indulgences: Enhanced zero-price effect for hedonic options. *International Journal of Research in Marketing*, 32(4), 457-460.

⁸ The affect heuristic represents a reliance on good or bad feelings experienced in relation to a stimulus. Affect-based evaluations are quick, automatic, and rooted in experiential thought that is activated prior to reflective judgments.

Increased scope of zero-rating in Norway

Zero-rating in Norway has been extended from the below 29 years old group ('young people') to include subscription models available to the general public, irrespective of age. This further contributes to strengthening duopoly tendencies in the mobile broadband market, by helping the two dominant telecom operators and large content players get greater control over music content consumption across the entire age spectrum.

Delineating a zero-rated service

In practice, it is impossible to delineate satisfactorily the scope of a zero-rated service. For instance, music streaming services like Spotify competes in a market where a radio music show could be an alternative to listening to songs on Spotify for many users. We would argue that a narrow definition of what constitutes a 'market' or 'identical service' is potentially harmful to the overall aim of the Open Internet Regulation. The nature of digital innovation is that traditionally clear barriers between what used to be separate markets and products and services have broken down. Market dynamics have become much more fluid. User choices are influenced by a number of factors. In consequence, a zero-rated service will distort competition in ways not yet fully understood or described.

Strict practises are needed

Net neutrality is important to ensure that media content is not blocked or prioritized in traffic to users. It is important that e.g. Internet providers' own media content is not given priority over other media content, or that content providers who are willing to pay are given priority. This would lead to a distortion of competition, making democratically important news media content harder to access and would have a negative impact on the news media's position as an important news and content provider.

Practices such as zero-rating require active monitoring by NRAs to assess the harm to end-users' rights, innovation and media pluralism. We strongly support BEREC's contribution to making NRA backstop powers to tackle problematic practices as robust as possible.

Allowing zero rating is contrary to the spirit of net neutrality. Strict practice of exceptions will benefit net neutrality, because it will help maintain the necessary and general principle behind the rules. We would argue that potential harmful effects on media pluralism are underestimated and not sufficiently reflected in the 'Step-by-step assessment for zero-rated offers'.

A consequence of zero-rating is that some services are favoured over others and thus creating a market imbalance and a violation of the principle of equal treatment. An imbalance that telecom operators could use to their advantage by making exclusive agreements with some operators on purely commercial terms. We could end up with a situation where international commercial players are considered free of charge online, whereas national media content will be perceived as costly because it is not included in the scheme.

Zero-rating causes an operator to be a gatekeeper between the content provider and the user. This will in effect create less freedom of choice for the user over time. This could be the first step to a situation where content providers will have to pay to be zero-rated.

In our view zero-rating has become a loophole, by which telecommunication companies are able to offer services to their mobile subscribers, services that by their very nature violates the

principle of equal and non-discriminatory treatment of traffic. This practice is growing and has the potential to undermine the Internet as a level playing field and an engine of consumer driven innovation.

This practice benefits only large, multinational companies, and is a threat to both newcomers and national companies. It does not, in the long run, benefit consumers. Consumers will de facto be more dependent on the zero-rated services and face less choice when newcomers and smaller players don't succeed. In the extreme scenario Internet via mobile phones could become a walled garden, something we see elsewhere in the world in emerging economies.

Zero-rating programmes that are supposedly less likely to restrict end-user choice or undermine innovation on the Internet: §§ 42, 42a – 42e and 48

The proposals offer new guidance to provide best practice on open zero-rating programmes that supposedly are less likely to restrict end-user choice or undermine innovation on the Internet.

The proposed new 42a states: «Taking as an example a zero-rating offer where a specific music streaming application is zero rated, an end-user would not be prevented from using other music streaming applications that are not zero rated. However, the zero price applied to the data traffic of the zero-rated music streaming application (and the fact that the data traffic of the zero-rated music streaming application does not count towards any data cap in place on the IAS) creates an economic incentive to use that music streaming application instead of competing ones. The effects of such a practice applied to one or more specific applications are more likely to “undermine the essence of the end-users’ rights” or lead to circumstances where “end-users’ choice is materially reduced in practice” (Recital 7) than when it is applied to an open category of applications.»

In addition to the often heard arguments that a) zero-rating programmes are often not transparent, b) that it is unclear for CAPs if they are eligible to join a programme, and c) it is unclear how long it will take to go through the application procedure, we would argue that there are three related issues that are even more problematic. Firstly, it is almost impossible to make clear cut definitions of a category of content online, such as a music streaming service. Music is an element of many content formats, there are radio stations that play music more or less continuously, there are podcasts that consist mainly of music, and so on. The very concept of an open category is therefore problematic.

Secondly, every content provider must compete for users' time. Therefore, an incentive to spend time on some content detracts from the amount of time available to other content. A strong incentive, such as zero-rating, acts as a very powerful influencer of users' choice of content – as we have argued above.

Thirdly, and connected to the other two, possible adverse effects on media pluralism should be given serious consideration.

We would argue that these three additional issues should be given considerable weight in the 'Step-by-step assessment'.

Step-by-step assessment for zero-rated offers: Annex

The step-by-step assessment is intended to give NRAs a clear tool for assessing zero-rated and other similar offers. The step-by-step assessment shall provide more structure to the analysis

especially under para 46 of the Guidelines and provide assistance to NRAs when assessing specific cases. The ultimate question, «are the end-users' rights limited?» must be considered by the NRA in a broad context. We believe that there is a case for NRAs to be more proactive by placing more weight on the broader question of how zero-rated offers in the long run could adversely affect media pluralism.

The burden of proof should lie with the ISP that wants to offer a zero-rated service, and the task of the NRAs should be to ensure that the general goal of the Regulation is being met: equal and non-discriminatory treatment of traffic in the provision of Internet access services. The importance of giving services and traffic on the Internet equal and non-discriminatory treatment and protect end-users and simultaneously to guarantee the continued functioning of the Internet ecosystem as an engine of innovation must weigh heavily in an assessment.

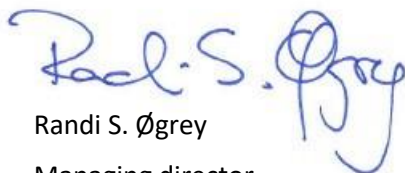
We have argued that there are a number of problems with allowing zero-rating. We have made special reference to three that have not been given enough consideration:

- The very concept of an open category is problematic.
- An incentive to use some content detracts from the amount of time available to other content. A strong incentive, such as zero-rating, acts as a very powerful influencer.
- Adverse effects on media pluralism should be given serious consideration.

We invite BEREC to strengthen its Guidelines with this in mind, and we ask that these concerns are reflected in the revised assessment methodology.

Kindest regards

NORWEGIAN MEDIA BUSINESSES' ASSOCIATION

A handwritten signature in blue ink, appearing to read "Randi S. Øgrey". The signature is stylized and cursive.

Randi S. Øgrey

Managing director