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BEREC Guidelines on Net Neutrality: Position of the German Media Authorities

The German Media Authorities have participated in the development process for the Guidelines on net neutrality by emphasizing the need to take media pluralism into account as regards net neutrality in their position paper published in February 2016. The issue of net neutrality relates not only to telecommunications but also to pluralism. The Media Authorities are committed to securing pluralism and to strengthening the rights of end-users.

The Media Authorities welcome the objective of comprehensively safeguarding the availability and general quality of the open internet which has already been clearly defined in Regulation (EU) 2015/2120. The Guidelines on Net Neutrality emphasise these aspects even more strongly in nos. 20 – 27 and nos. 46 – 53; however, they remain unspecific in some points.

1 Aspects of pluralism not sufficiently taken into account

The Media Authorities regret that the present draft only insufficiently takes into account considerations concerning the relevance of pluralism. The Guidelines are after all based on the cross-sectional provisions concerning culture embedded in Article 167 (4) of the Treaty on the Functioning of the European Union, as well as on Article 11 (2) of the Charter of Fundamental Rights of the European Union; they require the Union to respect the freedom of the media and media pluralism.

The Media Authorities advocate a holistic approach for safeguarding net neutrality which encompasses all actors considering the risks imposed for the neutral transmission of content with a bearing on the formation of opinion over the internet which can set standards for the transport of audiovisual or audio offers (including, in particular, CDN providers, DRM providers, receiver manufacturers, platform providers).

The Media Authorities would like to point out that even in the context of issues relating to net neutrality, the rules of the market must not be the only criterion for ensuring the protection of the pluralism of opinion as required both by the German Constitution and EU law. Applying combined costing for devising tariffs at the level of the relevant actors concerning the safeguarding of net neutrality must not result in barriers impeding access to the market for new providers of content offers with

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a relevance for the formation of opinion, or for providers of regional or local content with a relevance for the formation of opinion.

The Guidelines will form the key standard for the implementation of Regulation (EU) 2015/2120 (hereafter referred to as "the Regulation"). For their practical application, it is therefore of little avail to replace terms contained in the Regulation which are subject to interpretation by other terms subject to interpretation in the Guidelines, or to pass interpretation to the national regulatory authorities. This could result in a EU-wide "patchwork" of differing interpretations.

2 Interpretation of the term end-user in no. 4 and following nos.

In their position on the Regulation published on 26 February 2016, the Media Authorities in Section 3¹ called for agreements between ISPs and content providers to also be subject to regulation. They therefore welcome the wide interpretation of the term end-user developed by BEREC and the inclusion of content providers (as far as these demand services of an ISP). The prohibition in Article 3 (2) of the Regulation under which agreements between ISPs and end-users shall not limit open internet access now also relates to agreements taken out between ISPs and content providers; this is to be welcomed.

3 Zero-Rating

The Media Authorities further welcome that the free exercise of rights by end-users of the internet shall not be limited by commercial agreements (Article 3 (2) of the Regulation). This specifically relates to the selection of media offers in terms of safeguarding a free public process of the formation of opinion. Equal access to the internet for all offers with a relevance for the formation of opinion – and hence to end-users – must be safeguarded.

Agreements between ISPs and content providers under which a price of zero is applied to data traffic volumes for individual offers are therefore illegal in the opinion of the Media Authorities. Large data traffic volumes which tend to be typical of audiovisual offers and audio offers result in end-users for economic reasons primarily opting for the offer which is not taken into account when costing the booked data volume of the end-user. The free choice for end-users described above which should be free in theory, would thus be restricted. Such practices would therefore have to be prohibited in accordance with no. 30 of the Guidelines. If an ISP devises an entire video or audio category as a zero-rating offer, access should be granted to all content providers at equal terms – zero-rating must be devised using an "agnosticism approach" as regards applications and services.

¹ The Position can be downloaded (in German only)
via [www.die-medienanstalten.de/
fileadmin/Download/Positionen/Gemeinsame_Positionen/
Stellungnahme_Netzneutralität_Medienanstalten_26022016.pdf](http://www.die-medienanstalten.de/fileadmin/Download/Positionen/Gemeinsame_Positionen/Stellungnahme_Netzneutralität_Medienanstalten_26022016.pdf)

For further concretisation it would also appear useful and necessary to include individual zero-rating models in the Guidelines rather than leaving all models (other than the one mentioned in no. 38) to the individual assessment of the regulatory authorities.

The Media Authorities welcome the affirmation given in the explanatory paper "About BEREC's Net Neutrality Guidelines" at the end of the section on zero-rating (page 4) according to which the assessment of the effects of zero-rating and other business practices must also take into account any effects on the freedom of expression and media pluralism. In this respect the Media Authorities consider this a basis for cooperating with the Federal Network Agency which holds responsibility for telecommunications regulation in Germany.

4 Specialised services

The exceptional character of the specialised services should generally be made more prominent in the Guidelines. In the opinion of the Media Authorities, this is essential as Article 3 (5) of the Regulation expressly stipulates that providers shall be free to offer services other than internet access services although this restricts the principle of open internet access. To pre-empt disputes on interpretation, the Guidelines should emphasise the rule-exception principle contained in no. 95 and following nos. and provide for a strict interpretation of the conditions under which a specialised service may be offered.

The Media Authorities uphold their position that there should not be an "audiovisual media" specialised service as this is considered to present a risk for pluralism of offers and opinion.

Concerning logically separated networks which transmit linear broadcasting via the IP network, e.g. the *Entertain* product currently on offer by Deutsche Telekom, we consider it doubtful whether such an offer should be classified as a specialised service at all. It should be noted, however, that such networks which can be compared to the traditional broadcast distribution structures are broadcasting platforms which in Germany are subject to the provisions of the Interstate Broadcasting Treaty as concerns the terms of access and distribution.

The Guidelines rightly do not refer to audiovisual on-demand services such as Netflix or Amazon Video (in no. 109, the term „linear broadcasting“ is used). In our opinion there is currently no technical need for a specialised service classification for these services either. Quality requirements for these providers are sufficiently warranted by traffic management measures of the ISP or individual measures of the provider such as CDN.

For the economic terms regulating access for audiovisual offers the requirement of equal opportunity should apply. Business models of ISPs providing for tariffs to be charged to content providers can in principle

result in a restriction of equal opportunity as they make distribution dependent on the economic clout of a content provider.

5 Traffic management

Concerning traffic management, the Guidelines should be adapted to emphasise more strongly that traffic management is admissible exclusively for technical or legal reasons, not, however, for commercial considerations.

In this context we would like to refer to the limited detailing offered in the Guidelines which has already been referred to above. In the section on traffic management (Article 3 (3) of the Regulation, no. 54 and following nos. of the Guidelines) at least the criterion "data category" which is key for the admissibility of such measures should be stipulated in a uniform fashion; at least, however, it should be explained in which way "data categories" are to be created and limited.

6 Competent regulatory authority in Germany

Taking into consideration the implementation of the results of the report of the German *Bund-Länder-Kommission*² on convergence of the media and the requirement for cooperation laid down in Article 123, Section 2, 1st sentence of the Telecommunications Act, the Media Authorities look forward to their intensive cooperation with the Federal Network Agency as regards the implementation of the Guidelines; this relates in particular to instances concerning their implementation touching upon the positive order of broadcasting as embedded in the German Constitution.

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² The *Bund-Länder-Kommission* is a joint committee comprising both the German Federation and the German States which is established on a case-by-case basis to handle matters of overlapping legislative competences.