

August 24, 2016

Body of European Regulators for Electronic Communications (BEREC)

Zigfrida Annas Meierovica bulvāris No. 14, 2nd floor

LV-1050 Rīga

Republic of Latvia

Re: Open Letter to BEREC on Net Neutrality Guidelines

We write to express our concerns and thoughts in response to the consultation on your draft net neutrality guidelines.<sup>1</sup> We believe ensuring a flourishing, open Internet where innovation, commerce, and expression thrive requires nuanced policy approaches rather than categorical bans on certain types of behavior, as have been proposed by some of the most vocal participants in this proceeding.<sup>2</sup>

Net neutrality, and surrounding issues like zero rating and specialized services, are not black and white: both sides of the debate have legitimate points, and the best solution from a consumer and innovation perspective involves tradeoffs and compromise. Guidelines should not allow firms to use connectivity or content business models in anticompetitive or otherwise harmful ways. But specialized services and zero rating, even paid or applications-specific arrangements, can benefit consumers and competition. No evidence suggests these practices have harmed consumers. Rather than ban these innovations, better to follow a permissive, case-by-case approach informed by economic analysis, allowing for experimentation with beneficial forms of pricing or traffic differentiation.<sup>3</sup>

The European Union and the United States have different market structures for electronic communications, and different structures may yield different optimal policies. But even the Federal Communication Commission (FCC), in its very prescriptive Open Internet Order, maintained a flexible approach to zero rating and permissive use of specialized services.<sup>4</sup> It is difficult to imagine what justification BEREC might use to create even stricter rules than the FCC, as has been urged by several advocates in this consultation.<sup>5</sup>

---

<sup>1</sup> BEREC, “Guidelines on the Implementation by National Regulators of European Net Neutrality Rules,” BoR (16) 94 (June 2016).

<sup>2</sup> See, for example, Sir Tim Berners-Lee, Professor Lawrence Lessig, and Professor Barbara van Schewick, “Four Days to Save the Open Internet in Europe: An Open Letter” (July 14, 2016) <http://webfoundation.org/2016/07/four-days-to-save-the-open-internet-in-europe-an-open-letter/> (“Save the Internet Open Letter”).

<sup>3</sup> See Doug Brake, “Mobile Zero Rating: The Economics and Innovation Behind Free Data,” (Information Technology and Innovation Foundation, May 2016), <https://itif.org/publications/2016/05/23/mobile-zero-rating-economics-and-innovation-behind-free-data>.

<sup>4</sup> Federal Communications Commission, “In the matter of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order,” GN Docket No. 14-28 (February 2015), at 68 (*stating that* “new [sponsored] service offerings, depending on how they are structured, could benefit consumers and competition. Accordingly, we will look at and assess such practices...based on the facts of each individual case”).

<sup>5</sup> Save the Internet Open Letter, *supra* note 2.

BEREC's guidelines should keep an eye toward the future: next-generation networks, especially wireless networks, are anticipated to connect a dizzying array of sensors and machines with a wide variety of performance demands on the network. These applications are likely to have different needs from the network with regard to factors such as speed, latency, jitter, or duty cycle. Policies should encourage investment in new tools and functionalities of next-generation technologies that can unlock value of different applications through an adaptable network.

In Regulation 2015/2120, the European Union established a consistent EU-wide approach to net neutrality, rightly recognizing the need for flexibility in this area.<sup>6</sup> The regulation's allowances for specialized services and zero rating are not "loopholes" to be filled, but recognition of the need for optimistic oversight. We are grateful for the opportunity to contribute to this proceeding and urge you to maintain a permissive case-by-case approach to zero rating and allow flexible use of specialized services.

Sincerely,

**Individuals** (affiliation for identification only)

**Robert D. Atkinson**

President and Founder, Information Technology and Innovation Foundation

**Johannes M. Bauer**

Professor and Chair, Department of Media and Information, Michigan State University

**Dan Berninger**

Founder, VCXC

**Doug Brake**

Telecom Policy Analyst, Information Technology and Innovation Foundation

**Silvia Elaluf-Calderwood**

Associated Research Fellow, Oxford Brookes University, UK

**Larry Downes**

Senior Industry and Innovation Fellow and Project Director, Evolution of Regulation and Innovation Project, Georgetown University

---

<sup>6</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open Internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union OJ L 310, at 9, art. 3(5), (*stating that* "[p]roviders of electronic communications to the public... shall be free to offer services other than [I]nternet access services which are optimised for specific content, applications or services...").

**Rob Frieden**

Professor and Pioneers Chair in Telecommunications and Law, Penn State University

**Martin Geddes**

Independent Consultant and Telecoms Expert, Martin Geddes Consulting Ltd.

**Ellen P. Goodman**

Co-Director, Rutgers Institute for Information Policy and Law and Professor, Rutgers University Law School

**Justin (Gus) Hurwitz**

Assistant Professor of Law, University of Nebraska College of Law

**Kim Keenan**

President and CEO, Multicultural Media, Telecom and Internet Council

**Roslyn Layton**

Ph.D. Fellow, Center for Communication, Media and Information Technologies, Aalborg University

**Geoffrey A. Manne**

Executive Director, International Center for Law & Economics

**Berin Szoka**

President, TechFreedom

**Nicol Turner-Lee**

Vice President and Chief Research and Policy Officer, Multicultural Media, Telecom and Internet Council

**Christopher S. Yoo**

John H. Chestnut Professor of Law, Communication, and Computer & Information Science and Founding Director of the Center for Technology, Innovation and Competition, University of Pennsylvania

**Institutional Signers**

Information Technology and Innovation Foundation

International Center for Law and Economics

Multicultural Media, Telecom and Internet Council

TechFreedom