Open floor to

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EU IS BACKSLIDING ON NET NEUTRALITY TO THE ERA OF DONALD TRUMP

In 2021 the Court of Justice of the European Union (CJEU) decided in three cases from Germany[1] that zero-rating is illegal under the EU Net Neutrality Regulation[2]. These judgements are remarkable in several ways: First, they were unexpected and immediately prompted a reform of the BEREC Guidelines on Net Neutrality. Secondly, they are in line with the longstanding assessment of civil society that application-specific differentiated pricing practices (which include, but are not limited to, application-specific zero rating) are a harmful practice which is prohibited by the obligation to "treat all traffic equally" in Europe's Net Neutrality Regulation[3].

Since 2015 civil society has communicated this reading of the Regulation to BEREC in several consultation responses (2016 and 2019), oral hearings (2015 et 2019) and open letters (2016). Sadly, to no avail. The referenced exchanges are proof of the fact that the six-year-long inaction of telecom regulators cannot be attributed to negligence, but willful inaction to enforce their legal mandate. Given that zero-rating practices are a wide-spread phenomenon to be seen in all but two EEA countries, it would have been up to any of the 30 regulators in EEA countries to bring a case challenging it, but eventually it was up to the CJEU to answer a question no regulator dared to ask.

Two lessons should be learned from this: First, the weight within BEREC attached to consumer protection and civil society actors is out of balance compared to the weight attached to industry actors. Secondly, enforcement based on the updated Guidelines has to be swift, thorough and appropriate to the harm, the CJEU has affirmed in its judgements. Any delays in enforcement at this point would raise questions of regulatory capture and on the rule of law.

2022 could have been a moment to pause and realign the regulatory debate about the Internet in Europe. Sadly, that didn't happen and instead we went straight back to a debate we had 10 years ago. On 2nd May 2022 Commissioners Vestager and Breton announced to scrap core net neutrality protections by introducing a Sending Party Pays principle. This old idea of a two-sided market comes from the termination fees of the telephony era and has been rejected for the Internet numerous times; most prominently during the 2012 ITU meeting when the telecom industry tried to have it adopted as a global model for the Internet. Back then it faced criticism from NGOs, academics, Internet luminaries and even Commissioner Neelie Kroes. The only ones supporting this idea were authoritarian states that saw it as a way to take control of the Internet. A two-sided market ignores the paying Internet subscribers that demand the traffic sent to the network of their operator. This model also neglects the additional cost of market entry for startups, particularly in a segmented access market such as Europe. The irony is that the telecom industry until recently incentivized traffic from big content providers by excluding it from users' data cap and now it wants extra money for that exact data volume.

There is only one historical precedent for what Commissioners Vestager and Breton are currently proposing for the Internet in Europe: it's the complete abolishment of net neutrality protections under the administration of Donald Trump. Maybe that's where we'll end up.

1. CJEU, 2 September 2021, Vodafone and Telekom Deutschland (cases C-854/19, C-5/20 and C-34/20).
2. Regulation (EU) 2015/2120 of the European Parliament and of the council of 25 November 2015 laying down measures concerning open Internet access. Click here.
3. Article 3(3) paragraph 1 of Open Internet Regulation 2015/2120.