

**RESPONSE of ISPA Austria on**

**Consultation paper on the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines**

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

### 3. On which subjects would you expect the Guidelines to be more explicit or elaborated? How should the text of the Guidelines be adapted on these points, in your view. Please explain.

Some Internet access service providers closed Port 25 for reasons of network integrity for customers using dynamic IP-addresses. The different national regulatory authorities (NRA) have different approach concerning port blocking practices. For example, the German (BNetzA) considers port blocking as compatible with Article 3(3) sub-para. 3 lit. b of the EU Regulation 2015/2120, while the Lithuanian regulatory authority (RRT) concluded that blocking port 25 permanently infringes on end-user's right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice as stated in Article 3(1) of the EU Regulation 2015/2120.

In ISPA's opinion the current Guidelines give no sufficient guidance on this subject which leads to inconsistent treatment of the EU Regulation 2015/2120 by the different NRAs. Therefore, in ISPA's opinion a more coherent guidance of BEREC regarding the implementation of port blocking would bring legal certainty for the access providers. For instance, the provision of a list with criteria in the Guidelines for the case by case assessment if a port blocking measure is compliant with the principles of the net neutrality regulation would significantly contribute to a more transparent and consistent enforcement of the regulation by the NRAs.

### 5. Did the application of the Regulation, or the implementation of the Regulation by the Guidelines, prevent you from launching certain products or services?

In Austria an Internet access service provider launched a free stream product for video streaming where content and application providers, who joined the cooperation, were zero rated. The access provider has also contractually reserved the right to reduce the data traffic for the corresponding products when needed to max. 1.7 Mbit/s ("traffic shaping"). The Austrian national regulatory authority (RTR) prohibited this product, because this "traffic shaping" constitutes in the eyes of the national regulatory authority an unjustified and discriminatory traffic management measure and therefore infringes Art 3 (3) of the EU Regulation 2015/2120.

### 6. Do you have any additional comments on the application of the Regulation and Guidelines?

The Regulation aims to ensure that European end-users have the right to choose between various types of services and equipment, without any discrimination. In ISPA's opinion this objective presumes the freedom to define freely the scope of the services that the end-user would like use as well. The different NRAs in the member states interpret the scope of the end-user's right to choose differently broad for instance when it comes to port blocking practices or parental control services. In ISPA's opinion these aspects of the BEREC Net

Neutrality Guidelines require more consistent and elaborate approach when being implied by the national regulatory authority.

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

### 13. Is there a need for improvement of the Guidelines concerning traffic management measures going beyond reasonable traffic management measures (ref. in particular paras 76-93)? If yes, how could this text be improved? Please provide concrete suggestions.

Yes, when it concerns the implementation of web-blocking measures based on alleged copyright infringements, and only then the current guidelines should be amended in a way that would allow the national regulatory authorities to make an *ex ante* assessment of the implementation of traffic management measures which go beyond reasonable traffic management measures.

The current interpretation of the Regulation (EU) 2015/2120 by the BEREC Guidelines (Paragraph 21) explicitly precludes the NRAs to make an *ex ante* authorization of traffic management measures. This interpretation by the BEREC Guidelines creates significant legal uncertainty for the Internet access service providers when it concerns the implementation of web-blocking measures on the grounds of claimed copyright infringements.

In Austria the access providers are under constant and significant pressure by rightsholders to block access to potentially copyright infringing websites. Currently, the Regulation (EU) 2015/2120 permits the implementation of web-blocking measures under the provisions in Art 3 (3) lit a and sets as a requirement among others the decision of a court or a public authority. However, it is safe to assume that a mere notification, which are not bound by any quality or formal criteria which would constitute a minimum threshold of the application of rule of law as it might be expected in a democratic society, by a rightsholder, as it is provided in § 81 (1a) Austrian copyright act, would not suffice as a legal basis in the sense of Art. 3 (3) lit a. As a consequence, this means that by implementing the web-blocking measure solely based on such a request, the access provider risks violating Art. 3 (3). This puts the Austrian Internet access service providers in the tremendously unsatisfactory position to either comply with a blocking request by rightsholders and risk to get fined by the NRA, or to not block access, receive a blocking injunction and account for substantial legal fees.

Following several new access-blocking requests by rightsholders, concerning allegedly copyright infringing websites, a group of Austrian Access-ISPs, with the support of ISPA Austria, has now raised in a proactive matter their concerns in front of the Austrian National Regulatory Authority (RTR) as to whether their actions could be seen as possible Net Neutrality violation. In their notification they refer to the Austrian NRA the question whether a mere blocking request by a rightsholder presents a sufficient legal basis according to Art 3 of Regulation (EU) 2015/2120 or if blocking access to a website without a court order could be a breach of net neutrality. In the report to the NRA the ISPs further explicate, that private companies should not be forced into the role of a judge where they must assess the legality of a website in order to decide whether a blocking request is justified or not.

ISPA Austria strongly rejects such a privatization of law enforcement on the internet, as it shall be the sole task of a state authority as for example the NRA or courts. ISPs are not in the position to assess if the web-blocking measure is proportionate or if the requested blocking measure applies indeed to a copyright infringing website, in order to justify the implementation of the web-blocking measure on the first place. Those assessments solely oblige the state authorities and should be made before the ISP violates the Art. 3 (3) the Regulation (EU) 2015/2120 by wrongfully implementing traffic management measures.

Furthermore, ISPA Austria would like to underline that especially for small and medium Internet access service providers it is very challenging to assess whether a traffic management measure is proportionate or if a certain website contains copyright infringing content. As most of them do not have an inhouse legal team, they are not equipped to deal with such complex legal issues therefore it should be possible for the NRA to make an *ex ante* assessment on this subject before the actual legal violation has already occurred.

**15. Do any terms used in article 3(3) concerning traffic management need further explanation in the Guidelines? If yes, please specify.**

The Regulation currently allows the implementation of traffic management measures which go beyond reasonable traffic management based on national legislation which complies with European Union law. In ISPA's opinion clarification is needed on how the phrase "*national legislation that complies with Union law, to which the provider of internet access services is subject*" is to be understood, in particular how concrete such a provision must be. This is essential for NRA to have legal certainty when deciding whether the implementation of a web blocking measure based on a simple blocking request by a rightsholder is justified.

Furthermore, this exception in Art. 3 (3) of the Regulation effectively created diverging legal situations in the member states when it comes for instance to net based parental control products. In some member states those products, due to explicit national legislative measures, have been deemed legal whereas in others they are discussed to be in conflict with the net neutrality principles. For instance, the UK has addressed this issue by national legislation, in the rest of Europe the subject remains controversial as there is still a lack of representative decisions. In order to foster transparency and legal certainty ISPA asks BEREC to apply a more consistent approach on this subject in the Guidelines. Therefore, ISPA would suggest that BEREC elaborates further in the Guidelines on the relevant legal basis in Union law, on which national legislation regarding traffic management measures can build upon.

## **G. New technologies (horizontal)**

**21. Do you think the Regulation and the Guidelines provide sufficient flexibility to adopt new technologies which are likely to be used in 5G? Please explain, preferably with examples.**

In ISPA's opinion the Guidelines should strengthen the adoption of new technologies by promoting transparency, innovation and competition in the European digital economy.