



## 2021-2022 Annual Report on Net Neutrality

On April 30, 2016, the Open Internet Regulation<sup>1</sup> came into effect, also known as the net neutrality regulation (hereafter: the Regulation). In Europe, internet access providers must treat similar categories of internet traffic equally. That means they are not allowed to block or restrict traffic, for example. Providers are allowed to take measures aimed at managing internet traffic, but such measures cannot make any distinction based on content or applications.

ACM is responsible for monitoring and enforcing compliance with the Regulation in the Netherlands<sup>2</sup>, and, each year, ACM publishes a report<sup>3</sup> regarding its enforcement of this Regulation, and its findings. This is the sixth annual report on net neutrality, and covers the period from May 1, 2021 through April 30, 2022. Finally, ACM looks ahead at next year's key priorities.

### 1 Looking back

Over the past twelve months, ACM focused on net neutrality in various areas, both in the Netherlands and abroad. In the sections below, ACM's activities with regard to net neutrality will be explained.

#### 1.1 Update to BEREC Open Internet Guidelines

BEREC has updated the Guidelines on the implementation of the Open Internet Regulation<sup>4</sup> (hereafter: the Guidelines) following three similar rulings of the EU Court of Justice (hereafter: the Court) in 2021.<sup>5</sup> On 15 June 2022, the definitive Guidelines were published, following a public consultation thereof in an earlier stage.

In three similar rulings of 2 September 2021, the Court ruled that, under the Regulation, zero-rating is not allowed. With zero-rating, customers are able to enjoy unlimited consumption of certain categories of content or applications such as music or video applications, with no costs or data caps. Vodafone and Telekom Deutschland offered plans with a zero-rating option, but, according to the Court, that is at odds with the principle of net neutrality. According to the Court, the zero-rating option differentiates between categories of data traffic on the basis of commercial considerations. Such a commercial approach, the Court argues, is at odds with the general duty of internet access providers to treat all data traffic in an equal and non-discriminatory manner.

BEREC has updated the Guidelines, bringing them in line with the Court's interpretation of the Regulation, where the Regulation does not offer any room for zero-rating services that, in any way

<sup>1</sup> Regulation (EU) 2015/2120 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R2120>

<sup>2</sup> <https://www.acm.nl/nl/onderwerpen/telecommunicatie/de-telecommarkt/netneutraliteit-internetaanbieders> (in Dutch)

<sup>3</sup> Previous annual reports can be found on <https://www.acm.nl/en/publications/2020-2021-annual-report-net-neutrality>, <https://www.acm.nl/en/publications/2019-2020-annual-report-net-neutrality> and <https://www.acm.nl/en/publications/2018-2019-annual-report-net-neutrality>.

<sup>4</sup> BoR (22) 81, 9 June 2022:

[https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/regulatory\\_best\\_practices/guidelines/10280-berec-guidelines-on-the-implementation-of-the-open-internet-regulation](https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/10280-berec-guidelines-on-the-implementation-of-the-open-internet-regulation) .

<sup>5</sup> CJEU, 2 September 2021, C-854/19, C-5/20 and C-34/20.

whatsoever, differentiates between categories of data traffic depending on their contents. The aim of the BEREC Guidelines is to offer the national regulators guidance for their enforcement of the Regulation. ACM has also given its input during the drafting phase of the updated Guidelines.

## 1.2 Policy Rule regarding Enforcement of the Decision on Terminal Equipment

The Open Internet Regulation<sup>6</sup> and the Decision on terminal equipment<sup>7</sup> stipulates that end-users have a free choice of terminal equipment and therefore also the right to choose their own modems. In July 2021, ACM published the final version of the ACM Policy Rule regarding Enforcement of the Decision on Terminal Equipment<sup>8</sup>, in which ACM clarifies how internet access providers should make this possible. For example, ACM provides certainty to telecom operators and consumers about what part of the network is owned by the telecom operator, and over what part consumers have control. In addition, ACM indicates what information the network owners must publish so that the appropriate terminal equipment can be introduced on the market, and that consumers are actually able to use them.

The policy rule came into effect on 28 January 2022, and ACM has since taken enforcement action against internet access providers that restrict the consumers' free choice of terminal equipment.<sup>9</sup>

## 1.3 Covenant on the Blocking of Websites

In November 2021, Dutch internet providers and copyright holders, united in the Dutch Copyright Foundation (in Dutch: Federatie Auteursrechtbelangen) and Dutch anti-piracy foundation Stichting Brein, reached an agreement on the blocking of websites with content that, according to court rulings, infringes copyright laws or related rights.<sup>10</sup> With this covenant, Dutch internet providers are prepared to block collectively any websites that enable illegal downloading. This will only happen after a court ruling in proceedings initiated by Stichting BREIN against a single provider. Until now, Stichting BREIN usually launched multiple proceedings against individual providers in order to seek an injunction from the courts to block websites that offer illegal content. The rules regarding the procedure for obtaining such injunctions have been laid down in the covenant. Similar agreements are in place in numerous other European countries.

ACM was consulted as part of the drafting process of the covenant. According to ACM, blocking infringing websites on the basis of an injunction is allowed under the Regulation. That is why ACM will not take any proactive enforcement action in cases that evidently fall under the scope of the covenant. When receiving complaints or requests for enforcement regarding such blocking injunctions, ACM will first contact the providers that are involved in the covenant.

## 1.4 Sanctions against Russian media channels

In connection with Russia's invasion of Ukraine, the Council of the European Union has imposed sanctions against Russian media channels, among other entities.<sup>11</sup> Following BEREC's communications,

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<sup>6</sup> Article 3, paragraph 1 of the Regulation.

<sup>7</sup> Decision of 12 December 2016 containing rules regarding terminal equipment in connection with the implementation of Directive 2008/63/EC (Decision on terminal equipment).

<sup>8</sup> Reference ACM/UIT/558439: <https://www.acm.nl/en/publications/consumers-and-businesses-are-allowed-choose-their-own-modems>

<sup>9</sup> Case number ACM/22/177158: <https://www.acm.nl/en/publications/acm-daily-penalty-payments-if-cable-operator-ziggo-violates-rules-free-modem-choice-july>

<sup>10</sup> Covenant on the Blocking of Websites (in Dutch: Convenant Blokkeren Websites): [https://www.tweedekamer.nl/kamerstukken/brieven\\_regering/detail?id=2021Z19516&did=2021D41852](https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2021Z19516&did=2021D41852)

<sup>11</sup> Regulation (EU) 2022/350 of the Council of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, and Ministerial Regulation of the Minister of

ACM has informed Dutch internet access providers about the fact that the Regulation is not an obstacle in the implementation of the European sanctions.<sup>12</sup> The Regulation allows internet access service providers to take traffic measures to block specific content, applications or services in order to comply with Union legislative acts.<sup>13</sup>

## 1.5 Measurement tool of internet speeds

In the 2020-2021 Annual Report on Net Neutrality, ACM announced that it had decided not to implement the measurement tool that was, in part, developed for BEREC. ACM was considering alternative solutions. Last year, ACM sat down with various stakeholders, and, on the basis of those consultations and for other reasons, decided not to develop its own measurement tool. Over the past few years, ACM has received hardly any reports from consumers about internet speeds, and consumers know how to find the existing measurement tools that are freely available. This means that the goal has thus already been achieved what ACM had intended when announcing the development of its own measurement tool.

ACM continues to enforce compliance with the transparency obligations laid down in the Regulation, including those about internet speeds.

## 1.6 Reports

Over the past 12 months, ACM has received 60 reports regarding net neutrality filed by end-users. These reports concerned various topics that touch upon net neutrality such as internet speeds and the freedom to choose one's own modem. ACM does not only receive reports from end-users about possible violations of the Regulation, but also receives questions from internet access providers about the application of the Regulation. Below is a brief summary of three reports that ACM received last year:

### *Internet Control Message Protocol traffic*

ACM received reports from consumers that Internet Control Message Protocol traffic (ICMP traffic) was possibly incompletely transmitted by a provider of an internet access service. As a result thereof, for end-users, the outputs of the traceroute/tracert application were incomplete, and therefore, not completely useful. However, end-users may depend on a complete ICMP traffic for various applications, including the measurement of the quality of the connections, and the solving of connection problems. Discussions between ACM and the provider of the internet access service in question revealed that there was a technical error in the equipment, as a result of which end-users could not see the usual ICMP traffic. The provider of the internet access services has looked for a solution to this problem.

### *Voice over WiFi*

VoWiFi stands for Voice over WiFi, and complements calling over 3G/4G, also known as VoLTE (Voice over LTE). With mobile calling over WiFi, consumers are able to make calls when there is no mobile coverage (3G/4G). Poor mobile coverage occurs, for example, in well-insulated homes or office buildings. In part because of the policy rule regarding calls to Dutch emergency number 112 (in Dutch: Beleidsregel mobiele aankiesbaarheid 112), which guarantees that emergency number 112 can always be reached (in Dutch: 'aankiesbaar') using all technologies that providers of mobile telephony use for normal phone conversations, VoWiFi is becoming more and more important.<sup>14</sup> Over the past year, ACM has been notified by end-users that it is not always possible to use VoWiFi. ACM is looking into these

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Foreign Affairs of 3 March 2022, no. Min-BuZa.2022.11520-15, on amending the sanctions regulation regarding the territorial integrity of Ukraine 2014.

<sup>12</sup> [https://berec.europa.eu/eng/news\\_and\\_publications/whats\\_new/9321-berec-open-internet-regulation-is-not-an-obstacle-in-implementing-eu-sanctions-to-block-rt-and-sputnik](https://berec.europa.eu/eng/news_and_publications/whats_new/9321-berec-open-internet-regulation-is-not-an-obstacle-in-implementing-eu-sanctions-to-block-rt-and-sputnik) and <https://www.acm.nl/en/publications/open-internet-regulation-not-obstacle-blocking-rt-and-sputnik-because-eu-sanctions>.

<sup>13</sup> Article 3, paragraph 3, under a of the Regulation.

<sup>14</sup> <https://www.acm.nl/sites/default/files/documents/2020-07/beleidsregel-mobiele-aankiesbaarheid-112.pdf> (in Dutch)

reports, and expects to finalize its assessment of whether there is a net neutrality problem in this case in the course of 2022.

### *Fighting malware*

ACM has received questions from an internet access provider about whether the traffic-management measures that the provider wishes to take against the large-scale distribution of malware are allowed. Article 3, paragraph 3, under b of the Regulation allows measures that preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end-users. Internet access providers thus can take traffic management measures for as long as necessary, but will have to inform ACM about them.

## **2 Key priorities for June 2022 – May 2023**

For the next twelve months, ACM will work to make sure (both at the national level and the international through BEREC) that end-users have access to an open internet.

### **2.1 Phasing out zero-rating services**

On the basis of the updated BEREC Guidelines, zero-rating services that are not application-agnostic can no longer be allowed. In the Netherlands, the only zero-rating service on the market has since September 2021 not been offered anymore to new customers or renewals. ACM is in discussions with the provider of the zero-rating service about phasing out the service for existing customers.

### **2.2 BEREC**

In the second half of 2022, ACM will be involved in various BEREC projects that are connected to net neutrality. For example, the consultation and the subsequent publication of the BEREC study into the internet ecosystem are on the agenda. In this study, BEREC looked into the internet economy, for example by assessing the degree of openness of not just the internet access services, but also other related elements of the internet ecosystem.

In addition, BEREC will study the market for IP interconnection against the backdrop of net neutrality, looking into the market for peering and transit, and into the relative competitive positions of internet access providers, CAPs, and end-users. As part of this study, ACM will also address the recent proposal of European internet access providers to have CAPs pay more for internet traffic between CAP and the end-user.

The European Commission conducts an evaluation of the Regulation every four years<sup>15</sup>, using input from various sources, including from BEREC. ACM will contribute to that BEREC opinion.

### **2.3 Dialog with market participants**

Innovative services or certain situations can raise questions among internet providers about the interpretation of the Regulation and Guidelines<sup>16</sup>. One key element of ACM's activities with regard to net neutrality therefore is entering into a dialog with market participants about the application of the Open Internet Regulation to their services. ACM will continue to do so next year. Furthermore, ACM later this

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<sup>15</sup> Article 9 of the Regulation.

<sup>16</sup> [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/regulatory\\_best\\_practices/guidelines/9277-berec-guidelines-on-the-implementation-of-the-open-internet-regulation](https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/9277-berec-guidelines-on-the-implementation-of-the-open-internet-regulation)

year will likely launch preliminary discussions with providers about developments in the telecom sector and the role of net neutrality.

**Do you have any indications?**

Over the next twelve months, ACM will continue to assess any new reports regarding compliance with net neutrality rules. Everybody has the opportunity to submit any reports regarding net neutrality to ACM, either by phone, social media or in writing. ACM will take action where needed. [Submitting your tip-off or indication to ACM | ACM.nl](#)