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POSITION PAPER ON
BEREC Guidelines on Net Neutrality and Transparency:
Best practices and recommended approaches

TO : Body of European Regulators for Electronic Communications (BEREC)

FROM : Katarzyna Lasota Heller, Group Legal Compliance Officer - EU Regulatory Affairs, Naspers MIH Group

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SUBJECT : Position Guidelines on the document "*Guidelines on Net Neutrality and Transparency: Best practices and recommended approaches*"

I. INTRODUCTION

The Naspers Myriad International Holding ("MIH") would like to take the opportunity to share with BEREC its view on net neutrality and transparency¹ in response to the document "*Guidelines on Net Neutrality and Transparency: Best practices and recommended approaches*", issued by BEREC in October 2011 (the "Guidelines").

MIH operates several renowned internet platforms (focusing on e-commerce, communities, content, e-payments and communication), pay-television and related technologies. The group's most significant operations take place in developing and emerging markets (such as Central and Eastern Europe, China, India and Brazil), where leading market positions are

¹ berec.europa.eu/whatsnew/index_en.htm



taken. In the EU market, MIH is best known for its internet auction platforms with almost 40 million registered users².

For providing these services, MIH heavily relies on the services of Internet Service Providers (ISPs).³ MIH does not act as an ISP itself in Europe.

Given this bond of dependency between MIH and the ISPs, MIH qualifies as an important stakeholder with respect to the subject matter as dealt with in the Guidelines.

II. COMMENTS ON THE CONTENT OF THE GUIDELINES

With BEREC, we are of the opinion that transparency towards users is of key importance in order to realise net neutrality⁴. This being said, although transparency measures are necessary, they are not sufficient.

Further, we can agree with the characteristics transparency requirements should meet: accessibility, understandability, meaningfulness, comparability and accuracy, this before, during and after the contracting phase.

However, please note that we have the following additional remarks:

(a) Price Information

Together with BEREC, we note that Article 20(1) b) of the Universal Services Directive sets forth a non-exhaustive list of information requirements (as further specified by Article 21(3) c) of the same Directive) in order to achieve transparency. We are also of the opinion that it is not recommended to foresee in an exhaustive list, this in order to safeguard the flexibility to adapt transparency requirements in changing markets. Further, we approve BEREC's intention to provide more detailed information requirements as set forth in the Guidelines (see page 25 and further).

However, in our view, essential price information which an end user needs to take an informed economic decision, is missing.

As can be deduced from the study undertaken by the London School of Economics for the UK NRA, Ofcom (see page 38 of the Guidelines), end users will most likely be influenced by

² MIH Group operates several internet platforms (focusing on e-commerce, communities, content, e-payments and communication), pay-television and related technologies. The Group's most significant operations take place in developing and emerging markets (such as Central and Eastern Europe, China, India and Brazil), where leading market positions are taken. In the EU market, the MIH Group is best known for its internet platforms or other activities typical for online intermediaries with almost 40 million registered users. In Poland, the most known platforms are Allegro.pl, otomoto.pl, otoDom.pl, otoPraca.pl, otoWakacje.pl, Platnosci.pl, tablica.pl, Oferia.pl, Ceneo.pl, CoKupic.pl, iStore.pl and Bankier.pl, GaduGadu.pl. In Czech Republic the platforms are as follows: aukro.cz, otomoto.cz, payu.cz, bezrealitky.cz, hotel.cz, spa.cz, turistik.cz, hory.cz, i-developer.cz, livingcity.cz. There are also platforms in Slovakia (Aukro.sk, Tetaberta.sk), Hungary (vatera.hu, teszvesz.hu, vaterauto.hu, otomoto.hu, arukereso.hu), Romania (tizo.ro, trendzone.ro, mercador.ro, autovit.ro, compari.ro, payment platform Gecad), in Portugal (precos.com.pt), Bulgaria (aukro.bg, , hitarpetar.bg,) in Greece (ricardo.gr), and in Norway (QXL.no). There is also business called Trendsales ApS accessible in Denmark, Sweden, Norway and Finland.

³ We use the term "ISP" in accordance with the terminology used by BEREC in the Guidelines.

⁴ See also Neelie Kroes, *Net Neutrality in Europe*, Paris, 13 April 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/153>, stating that "Transparency is non-negotiable".



price information as a guide to take a transactional decision, rather than by other relevant information.

Hence, although national consumer law or eCommerce legislation may already set forth specific price information requirements⁵, it should be noted that in this economic area particularly, variations in pricing schemes become more and more frequent. Such pricing schemes are triggered both by vertical and horizontal integration of the services offered by the service providers.

With respect to price information, we make the following recommendations:

- As we have frequently established in practice, various [underlying economic causes](#) may exist for increasing prices of certain services offered to the end user (e.g. increase of price of service packets which are frequently used to make use of certain online content, this in order to make the concerned content less attractive to the user);
- Hence, in our opinion, the end user must be informed of [all relevant price information](#), i.e. both a complete pricing information (e.g. information on all costs) and all economic factors that have influenced the decision to establish the prices as they are applied;
- This could for example be the case by clearly indicating for [which service content](#) service packets are usually used so as to allow the end user to establish that the service packet is relatively expensive;
- Such a *modus operandi* can also appear useful to identify cases of [unfair competition and to promote further integration of the internal market](#);
- A possible solution in this context might be also to establish [mandatory minimum price information](#) requirements, in order to establish harmonisation to a certain extent. Minimum requirements could then also tackle certain relevant issues, such as the types of services that are offered, the different types of end users and usages (which is also mentioned by BEREC in its Guidelines), etc.

(b) Involvement of Third Parties

Although we fully agree with the requirement of indirect actions to promote net neutrality, we assume that the third parties providing such indirect actions (including the NRAs) will base these actions also on the input received from other relevant stakeholders in this area (such as end users, content providers, etc.).

Therefore, we welcome BEREC's overview of relevant stakeholders on page 52 of the Guidelines.

In our opinion, both at a European level and at the national level (NARs) the input of all these stakeholders should be taken into consideration before adopting (binding) measures/guidelines.

(c) Principle of proportionality

⁵ See for example Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.



NRAs have the obligation, when making provisions in this respect, to do so in a proportionate way (see page 18 of the Guidelines).

Although we understand and fully approve the requirement of compliance with a general principle of proportionality, in our opinion this principle should be further detailed and concretised by BEREC and/or the NRAs.

Information towards consumers, in order to allow such consumers to take an informed decision, should in our view not be limited based on the economic interests of the ISPs. A reference to the rather vague notion of "proportionality" may give rise to interpretation problems and divergences between the European Member States.

As a result, we think that it might prove beneficial for market integration, effective competition and consumer welfare to issue some guidelines on this issue also.

(d) Relevant stakeholders

As we will indicate below, in our view the European legislation primarily focuses on the protection of the end users interests. However, the interests of other stakeholders, such as content providers, should equally be safeguarded and dealt with in this legislation.

III. NETWORK NEUTRALITY

MIH welcomes and approves the initiatives on the European level to further harmonise the telecom sector and to establish several fundamental "playing rules", including on net neutrality, which every telecom operator should comply with.

However, in order to further protect the interests of European citizens and to promote innovation and a full accomplishment of an internal market, we have several additional recommendations based on our experience in practice.

The European Commission communicated that:

*"The Commission will publish, by the end of the year, the evidence that will come to light from **BEREC's investigations**, including any instance of blocking or throttling certain types of traffic.*

*On the basis of the evidence and the implementation of the telecom framework provisions, the Commission will decide, as a matter of priority, on the issue of **additional guidance on net neutrality**."⁶*

MIH would like to take this opportunity to share with BEREC its findings on net neutrality from a practical point of view.

(a) End user versus other stakeholders

As can clearly be deduced from the provisions of the Telecom Package (see e.g. Chapter IV of the USD Directive: "**End-user interests and right**") and also from the Guidelines, the provisions as discussed in this document are primarily intended to safeguard the interests of end users of the services.

⁶ European Commission COM (2011) 222, "*The open internet and net neutrality in Europe*", http://ec.europa.eu/information_society/policy/ecomm/doc/library/communications_reports/netneutrality/comm-19042011.pdf, 9.



Although MIH fully agrees with the European legislator's intention to safeguard and support the interests and rights of end users, MIH is of the opinion that the interests of other stakeholders, such as content providers, must be looked after and specifically dealt with as well.

Referring to the section below, we can already state that content providers are often confronted with situations where a lack of payment of additional fees (without legal, economic or technological basis) will result in blockages, degradation, etc.

These practices have material adverse impacts on several European ground rules (non-discrimination, freedom of speech, internal market, competition, etc.).

(b) Network Neutrality in Practice

Content providers not being adequately protected, might lead to unlawful situations which could be disadvantageous for end users as well.

As an important player on the market, we have, for example, come across the following practices:

- We have established on several occasions that capacity-consuming service content offered through the infrastructure of telecom operators, may be subject to payment of additional fees to the telecom operator⁷.
- Equally, an access provider may hinder access to certain services (e.g. VoIP) in order to protect their economic interests (e.g. fixed or mobile telephony). It was recently confirmed by the European Commission that such behaviour runs against the fundamentally open character of the internet⁸.

The aforementioned consequences of the absence of a fundamental rule of network neutrality, clearly indicates the adverse impacts such absence may have:

- Invalid restrictions on the [fundamental right of freedom of speech](#) as set forth in several international treaties to which the European Member States and the European Union is bound (e.g. article 10 of the European Convention on Human Rights and the Charter of Fundamental Rights of the EU); as an example, the interference in the use of social networks could be mentioned;
- Unlawful restriction of [fair competition](#), by making content less attractive in comparison with the content offered by a foreign content provider;

⁷ This issue also tackled by European policy makers, see Neelie Kroes, *Net Neutrality in Europe*, Paris, 13 April 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/153>: "In fact, some are interpreting the non-discrimination principle as essentially preventing telecom operators from seeking commercial payments or agreements with content providers which deliver their highly capacity-consuming services through broadband networks and require a certain level of service for their transmission to be effective. That prospect raises a number of delicate and complex issues. These issues must be very carefully assessed before the EU gives any possible regulatory response."

⁸ European Commission COM (2011) 222, "The open internet and net neutrality in Europe", http://ec.europa.eu/information_society/policy/ecomm/doc/library/communications_reports/netneutrality/comm-19042011.pdf, 3.



- Impede innovation and the increase of prosperity for end users⁹.

(c) Absence of Network Neutrality

Before the introduction of the Telecom Packages¹⁰, competition law arguments were invoked to oppose to actions infringing network neutrality¹¹. However, application of competition law principles to this matter entail several legal obstacles (e.g. dominant position, the relevant market, etc.).

At present, the European legislative framework after the introduction of the Telecom Packages, neither explicitly sets forth the principle of net neutrality. As already indicated in the overview given by BEREC on page 10 and further of the Guidelines (to which we refer), several legal instruments are available in favour of preserving network neutrality, however:

- no explicit provision on network neutrality is set forth and traffic management is not prohibited hence allowed in principle (when compliant with European and national legislation); and
- the legal framework supporting net neutrality consists of fragmented rules only (e.g. article 8(4)(g) Framework Directive, article 20(1)(b) of the Universal Services Directive, etc.).

As a result, under the current legislation, network neutrality has not been stipulated as a basic rule for the provision of telecom services.

Hence, the adverse impacts as mentioned above are realistic threats under the current legal framework.

(d) Conclusion

In our opinion, the debate should be reopened as to whether an express prohibition on infringements on network neutrality should be included in the legal framework.

We think that such prohibition should definitely be included in the event the Telecom Package is under review by the European legislator.

As indicated above, we have established in practice which adverse effects may be generated in absence of such a general prohibition.

Should additional net neutrality legislation be adopted, we share the opinion of Neelie Kroes that such legislation should comply with some basic principles¹²:

- Freedom of expression is fundamental

⁹ See, for example, L. LESSIG and R.W. MCCHESENEY, *Id*; T. BERNERS-LEE, *Net Neutrality: This is serious*, <http://dig.csail.mit.edu/breadcrumbs/node/144>; D. WEITZNER, *The Neutral Internet: An Information Architecture for Open Societies*, <http://dig.csail.mit.edu/2006/06/neutralnet.html>

¹⁰ We refer to the revision of the Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC, Framework Directive 2002/21/EC, Universal Services Directive 2002/22/EC and the Directive 97/66/EC on the processing of personal data in the telecommunications sector.

¹¹ See e.g. P. VALCKE, L. HOU, D. STEVENS and E. KOSTA, "Network neutrality: Legal answers from an EU perspective", *RDTI* 2008, volume 32, 329-330.

¹² See Neelie Kroes, *Net Neutrality in Europe*, Paris, 13 April 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/153>.



- Transparency is non-negotiable
- Investment in efficient and open networks
- Fair competition
- Support for innovation

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