18 July 2016

Position Paper

Cable Europe contributions to the draft BEREC Guidelines on the implementation of the Net Neutrality provisions

The Regulation 2015/2020 and the Digital Single Market (DSM)

The Digital Single Market (DSM) is one of the greatest ambitions of the European Union and the Regulation 2015/2020 is an important tool to enable that ambition.
The Regulation 2015/2020 mandates BEREC to produce a set of guidelines on the implementation of the Net Neutrality provisions, which are now under consultation.

The draft guidelines should therefore support the ambition of a fully connected Digital Single Market. The draft guidelines should also have a forward looking approach because this is the only way to provide incentives to every single stakeholder.

However, the draft guidelines are taking a precautionary approach that considers every commercial and technical practice inherently against the open internet provisions. We believe this not the right approach.

Electronic communication networks are evolving at an amazing speed. This evolution requires flexibility and a forward looking regulatory framework to achieve the level of connectivity that is expected.

Cable Europe welcomes the opportunity given by BEREC to present its comments and contributions to ensure the guidelines are fully compliant with the regulation.

The connected Digital Single Market

The European industry aims at being a front runner and to achieve that goal the undergoing global technology developments require freedom to innovate, not a permission to innovate. New technical specifications such as 5G, SDN-NFV (Software Defined Networks – Network Functions Virtualisation) and IoT (Internet of Things) are under development and require conceptual frameworks that are not limited by regulation. As the leadership role of European industry is constantly being challenged by industries in other regions, these guidelines don't represent the right enabler. They create uncertainty and slow down technology developments.

Cable Europe

BEREC has 2 options when drafting the guidelines: **(1)** use a restrictive and precautionary interpretation of the Regulation 2015/2020 or **(2)** take into account what was the spirit of the legislators.

If the actual restrictive interpretation tone is maintained it will definitely cause more harm than good.

First of all, from **the legal point of view** the legislators acknowledged that a fast pacing technology evolution is not compatible with over prescriptive rules. So, the spirit of the regulation is a flexible model that enables innovation based on transparency rules, not the contrary, where any innovation should be deemed negative and impacting net neutrality.

Secondly, taking into account **the technical perspective**, all new technologies that are under development require conceptual flexibility. They will be severely impaired by rules that challenge and try to domesticate the way the internet and the laws of physics work.

Thirdly, and perhaps the most important aspect, **the business perspective**. New business models will not succeed under a very stringent framework that treats innovators differently according to their classification. If the innovator is an ISP (big or small) the guidelines take, *ab initio,* a negative stance. Whereas, if the innovator is a CAP, the guidelines take the opposite view.

These three flaws will throttle innovation, hold the European industry back from an ambitious Digital Single Market and ultimately, create business uncertainty and delay investment.

The draft guidelines critical nuances

The Scope

The regulation does not cover IP interconnection agreements. However, the § 6 of the guidelines interprets the legal text in such a way that IP interconnection can fall under the scope of the regulation.

Draft BEREC guidelines	**Suggested improvement**
6. NRAs may take into account the interconnection policies and practices of ISPs in so far as they have the effect of limiting the exercise end-user rights under Article 3(1). For example, this may be	~~6. NRAs may take into account the interconnection policies and practices of ISPs in so far as they have the effect of limiting the exercise end-user rights under Article 3(1). For example, this may be~~

relevant in some cases, such as if the interconnection is implemented in a way which seeks to circumvent the Regulation.	~~relevant in some cases, such as if the interconnection is implemented in a way which seeks to circumvent the Regulation.~~

Sub-internet services § 17

The draft BEREC guidelines introduce a new concept called "sub-internet services" that was discussed but intentionally not included in the Regulation 2015/2020 by the legislator. By including this new concept in the draft guidelines BEREC widens the scope of the regulation. This creates uncertainty. Cable Europe suggests to delete § 17 and the references to "sub-internet services" in §§ 35 and 52.

Draft BEREC guidelines	**Suggested improvement**
17. BEREC understands a sub-internet service to be a service which restricts access to services or applications (e.g. banning the use of VoIP or video streaming) or enables access to only a pre-defined part of the internet (e.g. access only to particular websites). NRAs should take into account the fact that an ISP could easily circumvent the Regulation by providing such sub-internet offers. These services should therefore be considered to be in the scope of the Regulation and the fact that they provide a limited access to the internet should constitute an infringement of Articles 3(1), 3(2) and 3(3) of the Regulation. BEREC refers to these service offers as 'sub-internet services', as further discussed in paragraphs 35 and 52.	~~17. BEREC understands a sub-internet service to be a service which restricts access to services or applications (e.g. banning the use of VoIP or video streaming) or enables access to only a pre-defined part of the internet (e.g. access only to particular websites). NRAs should take into account the fact that an ISP could easily circumvent the Regulation by providing such sub-internet offers. These services should therefore be considered to be in the scope of the Regulation and the fact that they provide a limited access to the internet should constitute an infringement of Articles 3(1), 3(2) and 3(3) of the Regulation. BEREC refers to these service offers as 'sub-internet services', as further discussed in paragraphs 35 and 52.~~
35. If an ISP contractually (as opposed to technically) banned the use of specific content, or one or more applications/services or categories	~~35. If an ISP contractually (as opposed to technically) banned the use of specific content, or one or more applications/services or categories~~

thereof (for example, banning the use of VoIP) this would limit the exercise of the end-user rights set out in Article 3(1). This would be considered to be an offer of a sub-internet service (see paragraph 17).	~~thereof (for example, banning the use of VoIP) this would limit the exercise of the end-user rights set out in Article 3(1). This would be considered to be an offer of a sub-internet service (see paragraph 17).~~
52. In case of agreements or practices involving technical discrimination, this would constitute unequal treatment which would not be compatible with Article 3(3). This holds in particular for the following examples: • A practice where an ISP blocks, slows down, restricts, interferes with, degrades or discriminates access to specific content, one or more applications (or categories thereof), except when justified by reference to the exceptions of Article 3(3) third subparagraph. • IAS offers where access to the internet is restricted to a limited set of applications or endpoints by the end-user's ISP (sub-internet service offers) infringe upon Article 3(3) first subparagraph, as such offers entail blocking of applications and / or discrimination, restriction or interference related to the origin or destination of the information. • A zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated application(s), as it would infringe Article 3(3) first (and third) subparagraph.	52. In case of agreements or practices involving technical discrimination, this would constitute unequal treatment which would not be compatible with Article 3(3). This holds in particular for the following examples: • A practice where an ISP blocks, slows down, restricts, interferes with, degrades or discriminates access to specific content, one or more applications (or categories thereof), except when justified by reference to the exceptions of Article 3(3) third subparagraph. • ~~IAS offers where access to the internet is restricted to a limited set of applications or endpoints by the end-user's ISP (sub-internet service offers) infringe upon Article 3(3) first subparagraph, as such offers entail blocking of applications and / or discrimination, restriction or interference related to the origin or destination of the information.~~ • A zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated application(s), as it would infringe Article 3(3) first (and third) subparagraph.

Safeguarding of open internet access

Commercial practices (Zero rating)

Zero rating or differential pricing is not prohibited *per se* by the Regulation. However, once again, **the draft guidelines, consider any such practice as inherently violating the Regulation 2015/2020**. Ex. § 45 "*Commercial practices which apply a higher price to the data associated with a specific application or class of applications are likely to limit the exercise of end-users' rights because of the potentially strong disincentive created to the use of the application(s) affected, and consequent restriction of choice. Also, the possibility that higher prices may be applied to an application or category of application may discourage the development of new applications.*"

The draft guidelines missed an important opportunity to clarify which are the commercial practices that are in line with the regulation. After reading §§ 28 – 45 no single example of compliance is provided. This fact demonstrates that the guidelines overruled the regulation and exclude possibilities for differentiated pricing.

Draft BEREC guidelines	**Suggested improvement**
	Include new paragraph that shows examples of commercial practices that are in line with the regulation

Traffic Management

Traffic management has always been a key element to maintain the quality and efficient use of the network resources. However, BEREC seems to assume that investment is always the right solution in terms of management of traffic. In practice, investment must be economically justified and existing and new methods of traffic management should be encouraged to deliver high quality services and ensure the most efficient use of the network. The Regulation 2015/2020 recognised the necessity of traffic management and defined the conditions that distinguish between reasonable and non-reasonable traffic management measures.
Traffic management measures are reasonable whenever the measures are transparent, non-discriminatory and proportionate and are not based on commercial considerations. However, the draft guidelines in § 58 extend and exceed the spirit of the European legislators.

As mentioned before, under the pretext of an artificial balance, the draft guidelines opt to **prejudge any traffic management activity as inherently violating the Regulation 2015/2020.**

One of the provisions set in § 58 defines that "*The traffic management measure has to be necessary to achieve the aim.*". This requirement contradicts the regulation which acknowledges the importance of reasonable traffic management and its necessity as a building block of the internet. In another provision in § 58, the draft guidelines prescribe that NRAs should evaluate if "*There is not a less interfering and equally effective alternative way of achieving this aim (e.g. equal treatment without categories of traffic) with the available network resources.*". The Regulation 2015/2020 didn't classify traffic management as a last resource, the only condition that is required is that it is reasonable and follow the transparency, non-discriminatory and proportionate requirements.

Draft BEREC guidelines	**Suggested improvement**
58. When considering whether a traffic management measure is proportionate, NRAs should consider the following: • There has to be a legitimate aim for this measure, as specified in the first sentence of Recital 9, namely contributing to an efficient use of network resources and to an optimisation of overall transmission quality. • The traffic management measure has to be suitable to achieve the aim (with a requirement of evidence to show it will have that effect and that it is not manifestly inappropriate). • The traffic management measure has to be necessary to achieve the aim. • There is not a less interfering and equally effective alternative way of achieving this aim (e.g. equal treatment without categories of traffic) with the available network resources. • The traffic management measure has to be appropriate, e.g. to balance the competing requirements of different traffic categories or competing interests of different groups.	58. When considering whether a traffic management measure is proportionate, NRAs should consider the following: • There has to be a legitimate aim for this measure, as specified in the first sentence of Recital 9, namely contributing to an efficient use of network resources and to an optimisation of overall transmission quality. • The traffic management measure has to be suitable to achieve the aim (with a requirement of evidence to show it will have that effect and that it is not manifestly inappropriate). ~~• The traffic management measure has to be necessary to achieve the aim.~~ ~~• There is not a less interfering and equally effective alternative way of achieving this aim (e.g. equal treatment without categories of traffic) with the available network resources.~~ • The traffic management measure has to be appropriate, e.g. to balance the competing requirements of different traffic categories or competing interests of different groups.

The draft Guidelines carry on with the precautionary approach and exceed the text of the Regulation 2015/2020 in § 70. Although the draft Guidelines clarify that traffic management measures can be applied on an on-going basis, following the technical realities that sustain the network, the draft Guidelines further state that "*However, where traffic management measures are permanent or recurring, their necessity might be questionable and NRAs should, in such scenarios, consider whether the traffic management measures can still be qualified as reasonable within the meaning of Article 3(3) second subparagraph*.". This paragraph is misleading and questions the importance of permanently managing the network with the best possible efficiency.

BEREC Guidelines	Suggested amendment
70. This does not prevent, per se, a trigger function to be implemented and in place (but with the traffic management measure not yet effective) on an ongoing basis inasmuch as the traffic management measure only becomes effective in times of necessity. Necessity can materialise several times, or even regularly, over a given period of time. However, where traffic management measures are permanent or recurring, their necessity might be questionable and NRAs should, in such scenarios, consider whether the traffic management measures can still be qualified as reasonable within the meaning of Article 3(3) second subparagraph.	70. This does not prevent, per se, a trigger function to be implemented and in place (but with the traffic management measure not yet effective) on an ongoing basis inasmuch as the traffic management measure only becomes effective in times of necessity. Necessity can materialise several times, or even regularly, over a given period of time. ~~However, where traffic management measures are permanent or recurring, their necessity might be questionable and NRAs should, in such scenarios, consider whether the traffic management measures can still be qualified as reasonable within the meaning of Article 3(3) second subparagraph.~~

Specialised services

If one looks at new technologies like 5G, which is being designed to deliver a new generation of industrial automation and hyper connectivity, any restrictive interpretation of the regulations could stifle this innovation before it even develops. The draft Guidelines go on to require NRAs to verify whether, and to what extent, optimised delivery is objectively necessary to ensure one or more specific and key features of the applications, and to enable a corresponding quality assurance to be given to end-users. However, the draft Guidelines propose that NRAs decide what level of quality is necessary rather than the end-user deciding what level of quality is needed for his or her purposes.

As previously mentioned, innovation should not require prior authorisation from Regulators, quite the contrary, it should be permissionless.

The § 95. of the draft Guidelines also states that "*Beyond the delivery of a relatively high quality application through the IAS, there can be demand for a category of electronic communication services that need to be carried at a specific level of quality that cannot be assured by the standard best effort delivery*." This is another example where the spirit of the European legislators is ignored and distorted. The recital 16. of the Regulation 2015/2020 states very clearly that "*There is demand on the part of providers of content, applications and services to be able to provide electronic communication services other than internet access services, for which specific levels of quality, that are not assured by internet access services, are necessary.*"

Finally, there is some concern regarding the understanding "that specialised services are offered through connection that is logically separated from the IAS to assure these levels of quality" (§ 106.). This requirement was extensively discussed during before the adoption of the Regulation and in the end not included in the text. There are different ways in which specialised services can be delivered and the legislator consciously decided to not pre-empt any of them. The reference to logically separated networks goes beyond the scope of the Regulation and should, therefore, be removed.

Conclusion

BEREC was mandated to draft guidelines that will assist NRAs to coherently interpret the open internet provisions of the Regulation 2015/2020.
This regulation is a key enabler of innovation and the European legislators understood that a fast moving sector like the technologies of Electronic Communications has to be flexible and forward looking. The draft Guidelines provide further details to the regulation provisions but include an inherent prejudice that totally ignores the spirit of the legislators.

Cable Europe is therefore proposing some new drafting which will improve the guidelines and align them with the provisions of the regulation. Rather than adopting a restrictive mind-set, the text should put the emphasis on transparency and monitoring of the market .

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About Cable Europe

Cable Europe is the trade association that connects leading broadband cable TV operators and their national trade associations throughout the European Union. The regulatory and public policy activities of Cable Europe aim to promote and defend the industry's policies and business interests at European and international level. The European cable industry provides high speed broadband internet, TV services, and telephony into the home of 64.5 million customers the European Union.

This paper represents the views of the full members of Cable Europe, and not necessarily those of our associate members, partners or affiliates.

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