



Contribution of Orange Group
to BEREC Public Consultation
“On the implementation by National Regulators of European Net
Neutrality rules”

June 30, 2016

Consultation reference: BoR (16) 94



Executive Summary

Several provisions of the BEREC draft guidelines under consultation go beyond or even contradict the text of the European Regulation « Telecom Single Market » (2015/2120), when the text is considered in light of the legislative co-decision process.

1) Comments on the process and BEREC mandate

The European Regulation (2015/2120) requests BEREC to adopt guidelines in order to ensure its consistent enforcement by National Regulation Authorities (NRAs). Those guidelines are important for operators as they will have an influence on their capacity and the way they design and manage networks and provide innovative services to customers and businesses.

Two aspects raise concerns. First there have been very few exchanges with the industry in their preparation. This concern is all the more serious considering the very short timescale between the publication of the consultation and the adoption of the text planned for August 2016. Second, the draft Guidelines go beyond the Regulation in several respects and in terms of what is necessary to implement it (for instance on services other than IAS) or risk hampering innovation with an overly static interpretation of how networks function (for instance on business offers). When finalising the text, BEREC should ensure it sticks to the mandate and the provisions of the Regulation, also taking into consideration that, in the light of recent case law (decision N°390023 of Conseil d'Etat in France), these guidelines could be challenged in Court in some Member States: strict compliance with the letter and the substance of the Regulation is therefore imperative to prevent legal uncertainty and fragmentation of the single market.

2) Comments on the substance

Commercial practices

The BEREC draft guidelines make a special case of zero-rated offers (§37-45), which are not qualified by the Regulation itself which only refers to commercial offers, calling for an ex-post and case-by-case assessment. By doing so, the draft guidelines go beyond the Regulation and they also create confusion; they do not distinguish between “sponsored data” offers and the practice of “zero rating “ offers, although these two practices are different. Indeed, « sponsored data » is merely an internet version of « 0800 » services used for decades to the great satisfaction of telephone customers for which the price of traffic is paid by the content or application provider instead of being paid by the end-user, with no impact on traffic management. In parcel delivery services too, transport may be paid either by the sender or by the receiver and these options have never led to political controversy or legal challenge. If the final BEREC guidelines were to retain such details, they should then identify and support “sponsored data » offers to be distinguished from « zero-rated » practices.

Technical management of internet access traffic

The Regulation (Recital (7) and Article 3.2.) supports notably speed differentiation between different internet access services. Such speed segmentation would enable operators to prioritise the traffic between internet access services, in particular between residential and business access. This would allow businesses to meet the requirement of ensuring mission-critical performance or emergency services. It also supports efficient network architectures combining fixed and mobile infrastructures to enhance the



provision of IAS. Such a prioritization is fully compliant with the two requirements for an open internet: non-discrimination between traffic from the customer perspective, access for all content and application providers to all end-users of internet access. This should be supported by BEREC Guidelines.

The draft guidelines (§111) introduce a rigid dichotomy between two types of VPNs: « VPN applications » over IAS with no possibility of guaranteed quality of service and « VPN network services » over specialised services allowing a guaranteed quality of service. Such a dichotomy is questionable with the emergence of « Software Defined Networks/ Network Function Virtualisation » technologies by which networks are becoming “applications” running on shared infrastructures. These technologies, key for 5G, have the ability to associate the guarantee of quality provided by dedicated networks with the flexibility of applications available on the internet to match the requirements of future digital services. The BEREC guidelines should therefore be modified on this point so as not to hamper those technological evolutions which would contribute to the European Union’s global competitiveness by allowing European businesses to benefit from state-of-the-art access, as will be possible in other regions of the world. The American FCC Order on Open Internet indeed only includes consumers and not businesses. Preventing European firms from having access to digital services of equivalent quality to the quality available to their American or Asiatic competitors would put Europe’s global competitiveness at high risk. Identification of “business” or “emergency” as IAS traffic categories with specific requirements could provide a pragmatic solution in this respect.

The draft guidelines also prohibit ISP’s from providing end-users with opt-in services to block unwanted content, such as ad-block services or parental controls, although such facilities actually increase end-users’ choice and are delivered by other providers of the internet value-chain. Such an interpretation would be incomprehensible and would go against the objective of reducing the regulatory asymmetry between players providing equivalent services. Why would European authorities guarantee a monopoly on ad-block or parental control services to device providers by prohibiting the provision of equivalent competitive services by ISPs?

Services other than IAS (SoIAS)

The lawmakers made the choice of not positively defining services other than IAS and did not give a mandate to NRAs to do so. In this respect the final text adopted in 2005 after the co-decision process clearly depart from the first version initially voted by the European Parliament in 2004 which included a definition of so-called “specialised services”. The reason why lawmakers refrained from defining those services in the Regulation is that the technical characteristics of future innovative SoIAS are by definition unpredictable. Therefore, mandating future SoIAS to comply with predefined technical characteristics would hinder innovation and inefficiently distort future technical choices. Nevertheless, the draft guidelines (§106) wrongly attempt to elaborate criteria (logically distinct capacity, strict admission control) which results in a positive definition of those services. Moreover, the “specialised services” terminology introduced in the guidelines as well as the wording of the criteria defining those “specialised services” (“logically separated”, “extensive use of traffic management”, “strict admission control”) are directly copied from the first reading version of the Regulation, which was explicitly revised in this respect after the co-decision process. Hence **by adopting this wording and these criteria, BEREC would directly contradict the co-decision process which has resulted in the final text.** The draft guidelines must imperatively be modified on this point.



On the impact of SolAS on the quality of the internet access services, the guidelines must account for the fact that, absent SolAS, the need they serve would not disappear but would still need to be satisfied, even with reduced quality, through internet access. Therefore, absent SolAS, the need they serve would likely need to occupy more internet access service resources, and provide less satisfaction to end users than if the needs were met through SolAS with optimized technical solutions. Analysing the impact of SolAS on internet access quality must be done net of this effect (§117 & next).

Transparency provisions

Provisions on speed, or processes which are highly technical and detailed by BEREC compared to the Regulation, should not be imposed without further consulting with experts of the industry to assess their impacts, costs and practicability. In any event, the guidelines should provide a reasonable timeframe - 6 months- for the implementation of those new measures.



Concerns on BEREC draft guidelines on the implementation of European Open Internet Rules

Orange's major concerns relating to the forthcoming BEREC guidelines on the implementation of European Open Internet rules cover the following topics:

- BEREC process for the forthcoming adoption of Open Internet Guidelines
- Scope
- Commercial practices
- Traffic management
- Specialised services
- Transparency

The paragraphs of the BEREC draft guidelines to which Orange concerns refer are mentioned as "§ X". For instance, a paragraph beginning with the mention "§ 18" implies that the concerns expressed in that paragraph refer to paragraph 18 of BEREC draft guidelines.

BEREC process

1. The process followed by BEREC in adopting its draft guidelines and to consult stakeholders is highly questionable. No significant transparent interaction with stakeholders and in particular with the industry, has taken place during the elaboration of the draft guidelines. Although there was a workshop organised with industry associations, it was done at the very beginning of the process, in November 2015, with no debate on BEREC's possible interpretations, and subsequent requests for additional exchanges were refused. BEREC has, on the other hand, received the views of an unbalanced panel of experts, during a closed door workshop in February 2016. In addition, the process of consultation of stakeholders, lasting six weeks from 6 June to 18 July before an adoption of the text planned in August, appears to have been merely a formality. Such an unsatisfactory process for the adoption of a text which may be challenged in courts¹ in different Member States may prove to be ill-advised for legal security of all stakeholders and the harmonisation of the interpretation of Open Internet rules in Europe.

2. BEREC's timeline for the adoption of guidelines was not synchronised with the deadlines provided by the Regulation. The Regulation came into force on 30 April 2016, however, the guidelines are to be published only in August 2016. This has created uncertainty in the traditional network management practices and increased uncertainty for consumers who have had insufficient knowledge about the ways their traffic is handled. Thus the process lacks regulatory predictability and increases the costs for the operators.

3. Such an unsatisfactory process for the adoption of a text which is of great relevance for market players, and which may be challenged in courts² in some Member States, is regrettable in terms of legal security of all stakeholders.

Scope

4. The European Regulation 2015/2120 of 25 November 2015 lays down measures concerning "open internet access" as expressed in its title. Article 1 states that the subject matter and scope of the Regulation is "... to safeguard equal and non-discriminatory treatment of traffic in the provision of internet

² See in particular the recent decision N°390023 of Conseil d'Etat in France, which allows the challenge in court of texts such as communications, guidelines or recommendations when they may affect the practice of administrative authorities, are supposed to be known by stakeholders and have economic effects.



access services ...” Therefore, the text for which BEREC must adopt guidelines in order to ensure a harmonised implementation in Europe should refer to “open internet access” not to “net neutrality”, an expression which is not mentioned in the Regulation.

5. § 5, 6 - The Regulation concerns end users’ rights on the retail market. Interconnection issues, including between CAP and ISPs, should be addressed through relevant regulatory provisions concerning interconnection. There is no justification for BEREC to lay down recommendations on those aspects in the present guidelines; they should therefore be deleted. In that sense, BEREC is right when considering in §47 that IP interconnection practices are outside the scope of the Regulation.

6. § 18 - The terminal equipment must not be the only cause of limitation of reachable end points to provide a specific service or a limited number of services not marketed as access to the internet. The right to provide a specific service or a limited number of services over an IAS should be available without discrimination to all undertakings in the digital value chain, not only to providers of terminal equipment.

7. § 18 - A service which sends all traffic encrypted from an OS or a browser of a device to a specific proxy over an IAS can be considered as controlling all Internet usages of the device user and as such must be considered as an IAS in the context of these guidelines.

8. § 23 - “End users have the right to use the terminal equipment of its choice”. BEREC Guidelines should point out that terminal equipment must however comply with the interfaces of public networks which network operators have then the obligation to publish under EU law (Radio Equipment Directive 2014/53/UE).

Definitions

BEREC guidelines should stick to the definitions given, or not, by the Regulation:

9. **The Regulation defines IAS, and by default the other services but without other considerations; BEREC should therefore avoid using the term “specialised services” or using criteria that were disregarded by the co-legislators; see below on “Service other than IAS”.**

10. § 17, 35 and 52 – **The Regulation does not define the concept of “sub internet”** while BEREC prohibits this type of offer, which raises questions regarding the possibility of launching in the future innovative offers such as eHealth or eGovernment, simcards; also those paragraphs risk creating a discriminatory situation where limited access for “device-based” offers would be permitted but not “access-based”; those paragraphs should be deleted.

Commercial practices

11. § 25 – Tethering; BEREC draft guidelines consider that the practice of **restricting tethering is likely to constitute a restriction in breach of the Regulation but this is not explicit from the Regulation** and a more proportionate approach should be taken, as such a prohibition risks jeopardising innovation for IAS providers, with risks for unlimited data bucket offers.

12. § 38 & § 45 - **Zero rated offers are considered negatively by BEREC in its guidelines; while the Regulation does not mention, let alone, prohibit per se such type of offers,** the draft Guidelines adopt a

negative stance against them and goes even further by considering some of them illegal. The draft Guidelines omit to highlight that such offers can also benefit the end users; for instance such services can be used to provide customers with an opportunity to trial new services (e.g.: video or music streaming) or to enjoy necessary ancillary services such as consumer service or speed test, without having to worry about data consumption costs. Operators should remain able to explore innovative business models under a case by case ex post monitoring by the NRA as foreseen by the Regulation; those § should be deleted.

It is also difficult to understand why, on the one hand BEREC dislikes zero rating offers but on the other hand it also dislikes higher prices. The market is based on segmented offers, and providers must be free to provide a variety of services with differentiated prices in respect of the value of the offers.

Indeed recent empirical research³ has dismissed the presumption that zero-rate plans would reduce the actual variety of applications or content used by end-users. Only offers concerning dominant CAPs could, in certain circumstances, be considered as potentially raising a concern if they actually limit choice for end-users, in particular if those CAPs require conditions from ISPs that limit in practice the possibility for smaller CAPs to sponsor their own contents. Therefore BEREC guidelines should explicitly state that these agreements are in principle and in general authorized, except in very specific cases, if they are for the specific benefit of dominant on-line platforms and have the ability to actually materially restrict end-user choices. In any event, assessment by national regulators should remain ex-post. As mentioned in the Regulation, the assessment could be also done ex post by another competent authority instead, such as a Competition Authority. In that respect no clear explanation is given in the guidelines.

13. § 39 - BEREC draft guidelines also oppose the possibility to zero rate one application; again this does not seem in line with the Regulation.

14. As a conclusion, if a given NRA considers there might be an issue with a commercial offer, it should check whether the conditions mentioned in Rec. 7 are met, namely does the commercial offer materially reduce the choice of the end users in practice, taking into account the market position of the IAS and CAP providers and does it undermine the essence of the end users' rights? BEREC guidelines should only refer to those criteria without concluding a priori that certain commercial offers should be prohibited.

Open commercial practices such as sponsored data offers should be acknowledged as benefiting end users and not raising any specific issue

15. § 39, 41, 42 - Openness should be a key point for NRAs in assessing a commercial practice concerning IAS. If all CAPs have the same rights and ability to conclude commercial agreements with ISPs, then the practice should be considered as compliant with the Regulation. This is for instance the case of "sponsored data" offers, which are proposed to all CAPs and through which IAS traffic is paid by the CAP rather than by end-users. Sponsored data should be authorized in any of its commercial forms, including when the CAP pays for the traffic consumed by the client.

³ "Zero Rating: Do Hard Rules Protect or Harm Consumers and Competition? Evidence from Chile, Netherlands and Slovenia" Roslyn Layton, Aalborg University, Center for Communication, Media and Information Studies, Silvia Monica Elaluf-Calderwood London School of Economics & Political Science (LSE) - Department of Management ; Oxford Brookes University, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587542

Such offers are similar to “0800” services for telephone, or to “transport paid” postal services which no one has ever criticised for being non-neutral. They are also supported by economic theory (see for instance “Internet Regulation, Two-Sided Pricing, and Sponsored Data” by Bruno Jullien and Wilfried Sand Zantman, TSE, January 2016).

Such offers should be supported without reservation by BEREC guidelines.

16. § 43 - In the analysis of the effect of commercial practice, BEREC should specifically identify the case of “sponsored data”. Because it confuses “sponsored data” with other practices, the BEREC draft guidelines appear to consider that such practices may be either neutral or negative for end-users’ choice but tend to overlook all the cases when sponsored data will have a positive impact on end-users’ choice because of the following effects:

a. “Sponsored data” practices may incentivise end-users to try new innovative services instead of sticking to the same dominant mainstream platforms and CAPs; they are therefore innovation-friendly. Such pricing schemes can enhance innovation and competition and increase users’ choice..

b. A large proportion of end-users find it difficult to relate their on-line usage with their consumption of Mbytes, because consumptions diverge widely between application categories and between providers of a given application category, and also because a given consumption may be increased by pop up videos imposed by display advertising. This lack of end-users’ control over data consumption means that they limit their use of online services to below what would be socially optimal. Sponsored data transfers the payment of data volumes to the party which is technically able to control the relation between usage and data consumption in the network, allowing a more efficient adjustment of consumption. End-users become free to use the service without being afraid of unpredictable levels of data consumption.

c. Sponsored data may help to reduce end-users’ contribution to network costs, as part of the cost would be supported by CAPs, therefore allowing ISPs to propose lower IAS prices, and increasing choice and penetration of IAS in the population.

17. § 43 - More generally Orange has the following comments on the criteria mentioned by BEREC: Second and third bullet point: commercial practices supporting the use of non-dominant CAPs are likely to have a positive effect on innovation and on users’ choice, because it helps to contest the dominant position of major CAPs.

Fourth bullet point: there is one key element missing in the analysis, the non-discriminatory character of the commercial practices considered. This is the case of “sponsored data” offers, which are proposed to all CAPs. Such offers should be supported without reservation by the BEREC guidelines.

Moreover, there are some specific carrier and customer care applications which deserve zero rating. These applications cannot be blocked (or slowed down) even if the data cap is reached.

18. §45 - This § is difficult to understand: on the one hand BEREC dislikes zero rating, but on the other hand it dislikes higher prices... the market is based on segmented offers, the providers must be free to provide a variety of services linked to differentiated prices in relation to their value.



IAS traffic management

IAS traffic management should remain compatible with IAS quality segmentation

19. § 48 - The principle set out in the Regulation is that all traffic in relation to a given IAS should be treated equally, that IAS providers should not discriminate between CAPs and should not interfere in the relation between CAPs and end-users. But it does not mean that all individual IAS should be identical.

20. § 60 - On the contrary, the Regulation explicitly supports the ability for ISP to segment IAS, in particular in terms of speeds and volumes. This segmentation may involve differentiation in quality terms between individual accesses. The need for segmentation is particularly relevant in order to provide business grade access. Therefore, NRAs should include in their analysis of non-discrimination the freedom for ISPs to segment on the basis of quality between IAS offers provided to different end-users and answering different needs. This freedom is clearly expressed in the Regulation itself:

- The Regulation does not impose specific rules concerning management of traffic concerning two different end-users' accesses. **Any rigid rule on how network resources should be allocated between different end-users using IAS services of different quality or speed would go beyond the provisions of the Regulation** and lead to an inefficient and arbitrary outcome.
- Applications and services should not be confused with end-users. Whereas the Regulation prohibits commercial discrimination of traffic management between applications and services within an IAS, it explicitly supports segmentation of IAS offers proposed to end-users, and therefore commercial segmentation between end-users.

Quality segmentation between business access and residential access is a typical case for which the freedom provided by the Regulation should apply. BEREC guidelines should explicitly support the notion that traffic associated with a business market may be considered as a specific traffic category with specific quality requirements

21. § 64 - Prioritisation between traffic concerning different IAS can support efficient network architectures for the provision of high quality IAS. For instance, mobile infrastructure could contribute to efficient fixed Internet Access Service provision, if a rigid and inappropriate interpretation of the European Regulation does not inadvertently prohibit it. Notably, if the Regulation is interpreted as prohibiting prioritisation between types of traffic of different IAS services, then an efficient contribution of mobile infrastructure to fixed IAS service would become impossible.

For example, this can be shown with the use of hybrid fixed/mobile access to improve fixed access speed. Internet access provided at a fixed location may take advantage of idle capacities available on mobile access in addition to their fixed access capacity, in order to increase access speed, when this capacity is not being used by customers for mobile access. However, when mobile customers need to access the internet, they should get priority on mobile access resources over fixed access customers which only use mobile access resources as a complement. However, if giving priority over fixed customers to mobile customers on mobile resources is considered as non-compliant with the Regulation, then the risk is that mobile access consumers would experience congestion, because traffic generated by fixed access would be too high and the whole opportunity to efficiently improve access speed would have to be abandoned because of a disproportionate interpretation of the Regulation.

22. § 64 - Prioritisation between traffic of different IAS can also be justified to serve specific needs, for instance those of emergency services such as police, fire services, or hospitals. Such users do not necessarily use leased lines or VPNs on dedicated resources and may, need urgent access to information only available on the open Internet. If prioritisation between different types of traffic of different IAS is considered as prohibited, then access to vital information risks being denied to emergency services.

BEREC guidelines should not prevent the emergence of SDN/NFV solutions for business VPNs

23. § 113 - Today, the notion of “VPN” may be divided between “VPN application” (over IAS) and “VPN network service” (over a specialised service) but this division is not future proof as it ignores the upcoming trend towards SDN and NFV to address business needs. Under SDN and NFV architectures existing dedicated private network resources will be replaced by software defined routers available in the Cloud and reachable on-line. By definition under SDN, “VPN network service” and “VPN application” will merge.

It is of critical importance for the future of the European economy that business grade access to software and virtualised networks located within the internet can be guaranteed when implementing the Regulation. It is all the more important not to deprive European businesses of this possibility while their US competitors will be able to take full advantage of this evolution without any Net Neutrality concern, as the FCC Open Internet order only concerns residential users.

This section should thus be entirely reviewed to allow technology evolutions and to be future proof. The BEREC guidelines should not determine the way in which innovative business offers should be delivered in the future.

Freedom to compete on reasonable traffic management should be the rule

24. § 54 - the Regulation provides that ISPs are free to technically optimise the IAS service they provide to their customers, on a competitive basis, as long as they use reasonable traffic management as defined by the Regulation itself. Excessive regulatory interference in this domain would negatively impact the efficient management of IAS traffic, impede competition between providers and ultimately harm end-users. **The Regulation clearly acknowledges the need and right for operators to manage their networks. BEREC guidelines should delete wording such as “prima facie appears to infringe this principles”.**

NRAs should consider the outcomes of traffic management, rather than monitoring the technical options chosen by each ISP to achieve these outcomes. Administrative interference should be avoided in order to keep operational traffic management efficient for the benefit of end-users and the choice of technical options should remain in the hands of the network operators.

25. § 70 & § 89 - The draft Guidelines clarify that traffic management measures can be applied on an on-going basis. This is indeed in line with technical realities as traffic management is about how networks are configured and is not something which is switched on and off. It is therefore not helpful when the 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.” It is worth noting in particular that latency needs cannot be addressed simply by adding more capacity. Rather, as explained in recital 9 of the Regulation, traffic management is about the efficient use of network resources and it will continue to remain relevant as more and more devices become connected, delivering a much wider and more diverse set of applications and services that have significantly more heterogeneous technical requirements.

ISPs are not liable for all congestion cases

26. § 5, 86, 87 - when assessing congestion cases, NRA should take into account the fact that not all congestion situations are controlled by ISPs. ISP liability should be excluded when CAPs (cf. §5) refuse to correctly dimension their access to the internet or their interconnection. Quality of service depends not only on ISPs but also on the other parties to which ISPs are interconnected: CAPs that operate their own networks or have agreements with transit providers, and transit providers which can influence the routing



of the internet traffic. The choices or policies of these third parties can limit end-users' rights to benefit from the right level of quality of service for IAS.

27. §81 - To allow traffic management only when a security attack is detected is already too late. The point 81 weakens the ability of operators to fight against piracy or security problems.

ISPs should remain able to block illegal content and propose content filters to end-users

28. § 78 - NRAs should support ISPs blocking content recognised as illegal under Union law, on a voluntary, self-regulatory basis, for the specific case of child sexual abuse content, with reference to Directive 2011/92/EU of 13 December 2011 combating child sexual abuse.

29. § 78 - NRAs should also support the ability of ISPs to filter spam, if users want to avoid such unsolicited communications, as well as to allow parents to set up parental filters that block pornography or gratuitous violence, with the prior request or consent of end-users and the possibility to withdraw the consent, and thus such filters, at any time.

30. § 36 - More generally, if an IAS provider provides an option to the end-users by which end-users may choose for whatever reason to ban types of application or specific content, e.g. child protection measures and ad-blocking, it should not be considered as an impairment of freedom of choice of end users. On the contrary, it is an enhancement of end-users' choices and freedom, including when end-users voluntarily ask for the blocking of advertising content. BEREC should in such cases not prevent end-users from making personal choices.

Provisions related to encrypted traffic should take into account the limited knowledge of ISPs about the nature of this traffic

31. § 57 - ISPs may have little knowledge of the specific requirements of encrypted traffic, depending on whether the encryption chosen by the CAP only covers the payload, extends to metadata or also includes the header. It may limit the ability of the ISP to use traffic management according to the characteristics of the corresponding traffic. BEREC should therefore delete/amend the last bullet point of 57.

“Services other than IAS”

Necessity criterion

To conform to the Regulation terminology we use “Services other than IAS” (SolIAS) instead of Specialised Services.

32. § 98 - **The key principle of the Regulation as written in Article 3(5) is that providers “shall be free to offer services other than internet access services” under specific conditions.** This acknowledgment of ISPs' freedom to provide SolIAS should be the starting point of BEREC's analysis. Therefore any assessment of those types of services can only be done ex post by NRAs that have to prove that the specific conditions for freely providing services would not be met.

33. § 102, 103 & next - **Any suggestion of a procedure for ex-ante authorisation of SolIAS provision would be in full contradiction to the freedom of service innovation guaranteed to ISPs by the Regulation,**



as well as with the EC statement made on July, 8th clearly stating there is no authorisation procedure put in place in the Regulation: “*The Commission explained that in its view neither Article 4 nor Recital 11 of the agreed text of the draft Regulation introduces a special authorisation regime*”.

34. § 104 & 108 - BEREC final guidelines should explicitly mention that this assessment is “ex post”. The proposed wording reverses the burden of proof. **ISPs are permitted by the Regulation to provide services beside IAS. It is not up to the ISP to demonstrate that the criteria are met. It would on the contrary be up to the NRA to prove that the criteria are not met.** Consequently the last sentence of 104 should be deleted.

§ 106 - **Provisions** (such as “strict admission control”, “logically separated from the IAS”) **which have been explicitly rejected from the Regulation during the legislative debates cannot be reintroduced in the BEREC guidelines.** During the legislative debate, the co-legislators explicitly decided not to define or characterise the so called “specialised services” so as to avoid obsolete definitions or definitions which would not be future proof. **The draft guidelines must imperatively be modified on this point.**

35. § 54 -The assessment of the required QoS level for a given service shall remain the sole responsibility of the ISPs and not be subject to arbitrary administrative control. Otherwise, it would harm the consumers, who would be deprived of the benefit of competition between providers of quality services.

Impact of SolAS on IAS availability and general quality

36. § 114 - The analysis of the impact of SolAS on IAS availability and general quality must take into account an essential fact: should any given specialised service disappear, the usage served by this SolAS would continue, even at a degraded quality, and would occupy IAS resources, inefficiently because of lack of optimisation. Therefore, the assessment of the capacity allocated to SolAS should be made net of the IAS capacity saved by having SolAS provided outside IAS.

§ 119,122 - To formalise this idea, BEREC guidelines should use the right counterfactual to compare the situation with or without SolAS. Absent SolAS, the corresponding usage would not disappear, but would have to be carried on IAS resources, in a less optimised way with less quality, less consumer satisfaction, and more network capacity requirement due to absence of optimisation. Therefore, in general, the existence of SolAS saves network capacity for the benefit of applications and contents provided on IAS. Considering the appropriate counterfactual scenario, it should be clear that most generally the existence of SolAS improves the general quality of applications and content provided over IAS.

37. As regards SolAS, BEREC guidelines cannot either impose contradictory requirements for SolAS which would be structurally impossible to meet, in contradiction with the freedom to provide granted by the Regulation. In particular, it would be logically inconsistent to require that SolAS provide better quality that would not be possible over IAS, and at the same time to prohibit priority access to network resources for SolAS. There is a good reason why the Regulation does not impose non-discrimination between IAS traffic and SolAS: it is precisely to allow such services to offer quality or guarantees which cannot be guaranteed on IAS. **Any provision in BEREC guidelines which would prohibit priority access to network resources for SolAD (of course subject to the non-impairment of the availability and general quality of IAS) would betray the text and the spirit of the Regulation** and would have tremendously damaging effects on EU citizens and businesses.



38. Recital 17 - It should also be noted that the Regulation does not prevent providers from offering only SoIAS (e.g. pure telephony providers or pure business access providers): the wording “in addition to any internet access services provided” in recital (17) and Art 3.5. of the Regulation must be interpreted as: “if there is any internet access service provided”.

Transparency

39. § 185 - To give ISPs a realistic and proportionate timescale to comply with the terms of BEREC guidelines, these guidelines should be applicable no earlier than 6 months after their publication.

40. § 124,.. 157 - Numerous points are already covered by domestic or EU consumer protection laws (on contracts, on protection against misleading advertising, on out-of-court resolution of consumer complaints). BEREC guidelines should not encourage the addition of redundant and inconsistent rules on top of existing ones. Moreover, these guidelines are meant to support a harmonised implementation of the European Regulation on Open Internet.

41. § 152 – estimated maximum download and upload speeds cannot be defined for indoor coverage as indoor cannot be qualified.

42. § 126 – The information requirement should be clear and simple for end-users. A requirement leading to the provision of a large quantity of irrelevant technical information overloading and confusing customers should be avoided. BEREC guidelines should avoid being excessively precise and detailed.

43. § 136 - BEREC guidelines should not forget that the benefit of a competitive market for end-users is not only a low price for a standardised product, but also choice and variety. In this respect parameters by which customers may receive transparent information should also be able to reflect the variety of offers resulting from a competitive market.

44. § 127 - In practice, the contractual terms cannot be tailored individually.

45. § 140- 148 The maximum speed performance of fixed IAS fluctuates too. Therefore, individual contracts for fixed access can only refer to a range of speeds per operator and type of offer covering the dispersion of individual situations in the field.

46. § 149- 152 - Information on “speeds” in a mobile context should be limited to “theoretical maximum speed”. The TSM obligation to indicate the “estimated maximum” speed for mobile IAS, reflects the fact that mobile performance depends on a broad variety of factors (e.g. congestion, weather) influencing the max available speed under optimal conditions. For mobile, the theoretical maximum speed should be the only key parameter.

47. § 137, 155, 158 - Maximum and advertised speeds are available under optimal conditionals, not available most of the time. Accordingly, a discrepancy between these parameters and the actual performance will be the norm rather than the exception and should not lead to individual remedies. Otherwise, ISPs would have to indicate maximum and advertised speeds close to the minimum. If too detailed figures are demanded, associated with high contractual liability, i.e. if any significant deviation from the maximum and advertised parameter per tariff, indicated in the individual contract, leads to remedies for the individual end-user, ISP would have to choose the safest legal option and propose irrelevant but easily achievable values, depriving consumers of meaningful information. In such a situation, ISPs would have less incentive to differentiate by investing in quality and end-users would have less



transparency on the actual speed they can expect under good or optimal conditions. Therefore a reasonable definition of the terms “significant deviation” as well as of “continuously” and “frequently” is key to ensuring legal certainty for both businesses and consumers, and to support fair incentives to invest in quality.

48. § 158 - BEREC should provide guidance to NRAs on how to define certification criteria for robust monitoring systems. These criteria should be equally valid, irrespective of whether an NRA builds its own monitoring system or certifies a third parties’ monitoring system. The certification procedure for third party measurement systems should be lean, non-bureaucratic and non-discriminatory. Also, ISPs should have the option to provide certified measurement systems, given that they are often the first point of contact in regard to access-related matters.

49. § 158 - Only a robust monitoring system delivers measurements that provide transparency over an ISP’s actual performance. Robustness is first of all based on excluding factors that interfere with the IAS’ performance. This refers to factors beyond the ISP’s backbone as well as factors deriving from the end-user’s infrastructure. Accordingly, a robust monitoring system needs to measure only the performance between a server within an ISP’s backbone and the internet access point.

50. § 158 - Some parameters require technical expertise from ISPs. BEREC guidelines should not impose highly technical options or procedures without consulting the relevant ISP experts.