To: **BEREC**
Body of European Regulators
For Electronic Communications
Riga - Latvia
E-mail: NN-Consultation@berec.europa.eu

Rome, July 14 2016

Subject: Public consultation on BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules [BoR (16) 94]

Fastweb, one of the leading fixed broadband operators and the second MVNO in Italy, welcomes the opportunity to comment on BEREC's Guidelines on the Implementation by National Regulators of European Net Neutrality Rules.

Fastweb appreciates the hard work done by BEREC in providing NRAs with appropriate guidelines for the implementation of Net Neutrality principles laid down in the EU Regulation 2015/2120, in order to guarantee its consistent application and thereby regulatory certainty for stakeholders.

In Fastweb's opinion, these Guidelines are well-designed as they represent a proper *trade-off* setting for the following reasons:

a. although maintaining a "*principle-based*" approach, they provide, at the same time, NRAs with comprehensive explanation of controversial issues (i.e. zero-rating);

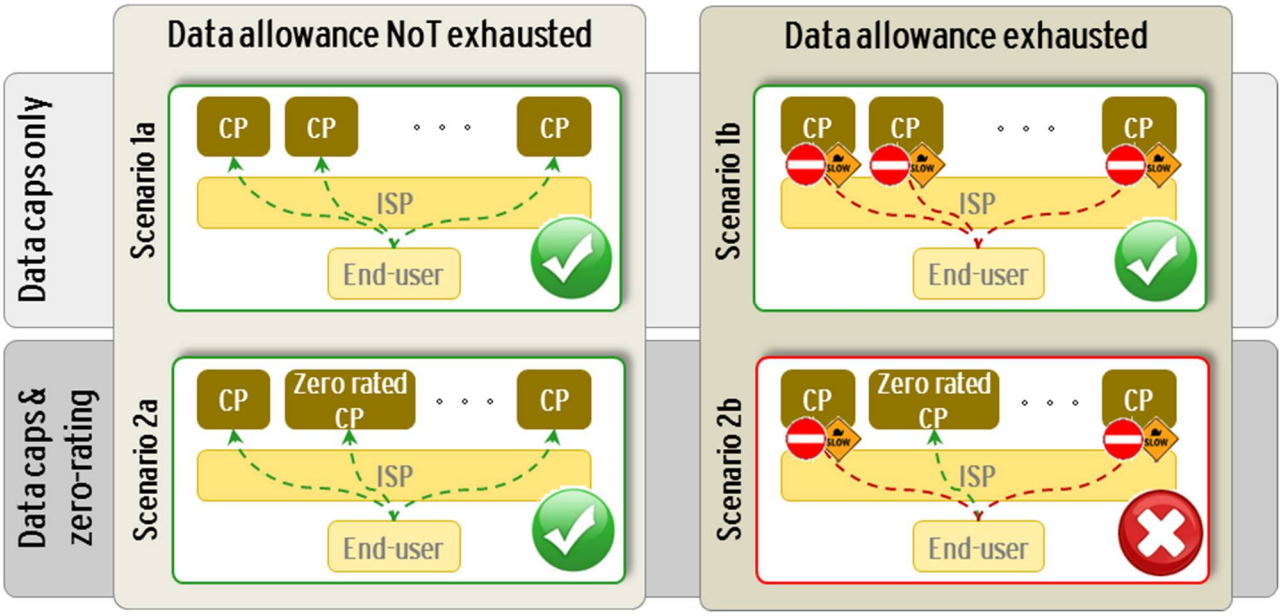
b. while blocking harmful competition behaviors, they leave the door open to different kind of authorized traffic management measures.

Zero-rating discriminates between different contents and/or applications

Regarding the controversial issue of zero-rating, Fastweb commends BEREC for its interpretation of the EU Regulation 2015/2120. In fact, BEREC's approach is fully aligned

with the spirit of the Regulation which does not explicitly prohibit zero-rating practices – just because it is not possible to settle a unique definition and implementation of zero-rating, considering all the different types of zero-rating services - but only when these practices discriminate between different contents/applications, as clearly stated in paragraph 38 of the Guidelines which considers that: "*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) would infringe Article 3(3) first (and third) subparagraph".*

The figure below shows how the above-mentioned zero-rating offers discriminate between different contents/applications.



While "data caps only" (scenarios 1a and 1b) are not considered a net neutrality issue provided that all traffic is handled equally, in scenario 2b "data caps and zero-rating offer" there is a differentiation between different types of traffic: once the end-user has consumed its data allowance, he continues to have access to exempted traffic (i.e. zero-rated content) while the other traffic is throttled or blocked.

This kind of zero-rating offers cannot be considered a "*reasonable traffic management measure*", as the zero-rated offers are only based on commercial considerations and not on objectively technical quality of services requirements. As a matter of fact, the aim of this kind of offers is not to provide - as the reasonable traffic management measure would,

in accordance with art. 3(3) and Recital 9 of the EU Regulation 2015/2120 - the optimization of the overall transmission quality and of end-user's experience but to prioritize services and/or applications offered by well-established content and application providers.

Zero-rating limits the exercise of end-users right to access information/contents

In addition, we would like to emphasize a second issue regarding the compliance with the Net Neutrality Regulation. In fact, zero-rating offers are limiting the exercise of end-users right to access information/contents or use applications and services - as provided in art. 3(1) of the Regulation - as they incentivize end-users to limit their choice to a specific service/application, thus raising further barriers to the emergence of new competitive services that are not included in the zero-rated "*bouquet*" and thereby hindering innovation.

BEREC insists on this point by stating in paragraph 39 of the Guidelines that "*The ISP could either apply or offer zero-rating to an entire category of applications (e.g. all video or all music streaming applications) or only to certain applications thereof (e.g. its own services, one specific social media application, the most popular video or music applications). In the latter case, an end-user is not prevented from using other music applications.* ***However, the zero-price applied to the data traffic of the zero-rated music application (and the fact that the data traffic of the zero-rated music application does not count towards any data cap in place on the IAS) creates an economic incentive to use that music application instead of competing ones****. The effects of such a practice applied to a specific application are more likely to "****undermine the essence of the end-users' rights****" or lead to circumstances where "****end-users' choice is materially reduced in practice*** *(Recital 7) than when it is applied to an entire category of applications".*

Zero-rating harms competition, particularly for MVNOs

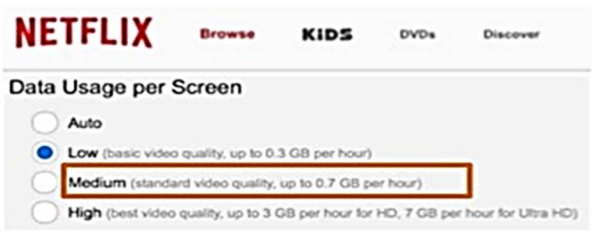
Zero-rating offers have a significant (and negative) impact on competition in mobile and fixed markets.

Regarding the mobile markets, it should be emphasized that zero-rating offers would increase the existing unbalance between mobile network operators (hereinafter "MNOs") and mobile virtual network operators (hereinafter "MVNOs") as MVNOs are **unable to economically replicate** these offers, considering the way wholesale deals for MVNOs are structured due to the lack of *ex-ante* regulation on the mobile access network.

Indeed, MVNOs pay to the host MNOs all the data traffic generated by their own customers, making it impossible to "exempt" specific applications/contents from the traffic threshold. The only possibility for MVNOs to offer zero-rated services would be to obtain upfront flat network capacity from an MNO, but, so far, this sort of wholesale deal in the EU were only made possible as a result of a merger 4-to-3 (i.e. in Ireland and in Germany).

The figure below shows a practical example of the outcome in terms of data consumption and wholesale charges related to zero-rated offers.

➢ Streaming video (e.g. Netflix)



Netflix – Medium quality (700 MB per hour) (Hypothetical unit price of €0,001/Mb)		
Streaming (hour per month)	Traffic (GB per month)	Extra Wholesale Charge
10	7	7€/month
15	10,5	10,5€/month
20	14	14€/month

➢ Streaming audio (e.g. Spotify)

Spotify – Medium quality (160Kbps) (Hypothetical unit price of €0,001/Mb)		
Streaming (hour per month)	Traffico (GB per month)	Extra Wholesale Charge
30	2,2	2,2€/month
60	4,4	4,4€/month
90	6,5	6,5€/month

At a hypothetical wholesale charge of 0,1 €cent per MB, an average use of popular CAPs would entail an extra wholesale charge increase in the range of 7 to 14 € per month, in case of medium quality Netflix streaming, and 2,2 to 6,5 € per month, in case of medium quality Spotify streaming.

With current retail bundle prices (for example Fastweb offers "Mobile Fuel" including 300min, 300SMS, 2GB for 10 € per month) it is clearly impossible for MVNOs to sustain the mentioned extra wholesale charges and, hence, to compete with MNOs.

Moreover, zero-rating practices have the effect of better rewarding high retail market shares insofar they allow MNOs to monetize them when entering into agreements with content and application providers "CAPs". In other words, the bigger the retail market share, the stronger the bargaining position of the MNO *vis-à-vis* CAPs.

Smaller players, on the contrary, do not have any leverage to push CAPs to enter into zero-rating agreements. As a result, all the zero-rating offers are mainly implemented by MNOs which have more scale and negotiation power than MVNOs, so giving to the first a further competitive advantage with respect to the latter.

This situation is particularly evident in the Italian mobile market, as shown in figure below, where all the MNOs have at least a zero-rating offer, whereas no MVNO has a zero-rated plan.

MNO	Zero-rating offer	Content Provider
TIM	TIM YOUNG&MUSIC (Digital & Full Digital)	TIM Music
Wind	ALL INCLUSIVE MUSIC	Napster
3	ALL IN MUSIC	App All-in music
VODAFONE	Social Summer	Facebook, Instagram, Twitter, etc.
MVNO	**Zero-rating offer**	**Content Provider**
Poste Mobile		
Fastweb		
Others		

Source: MNOs and MVNOs web sites (July 2016)

Likely competition harm also in wireline markets

Although zero-rating offers are mainly used by mobile operators combined with data caps plans, these offers are also beginning to spread on fixed networks. Taking a prospective

view of media convergence and technological evolution towards Ultra High Definition, the competitive shortcomings of commercial practices coupling zero-rating with data-caps become apparent as 4K and 8K Ultra-HDTV will require respectively about 4 and 8 times as much data traffic consumption compared to the current HDTV.

Taking this evolution into consideration, zero-rated IP-TV services coupled with data-caps will in most cases be preferred to other available OTT-IPTV services. Users will naturally try to avoid the risk of exceeding their data caps by choosing to watch the zero-rated offers of their access providers.

In the US, most of the cable operators (Comcast, Century Links) and fixed access operators (Verizon, AT&T) are switching from unlimited internet plans to "usage-based" data sharing plans. Some of these operators have already combined these data plans with zero-rated offers (i.e. mostly TV content offered by ISP).

A similar trend is taking hold in Europe too. For instance, in 2013, Deutsche Telekom announced a plan that would have cap the volume of fixed internet connections but exempted its own IPTV (zero-rated) video service[1].

In Fastweb's view, flexible Net Neutrality rules (i.e. the allowance of zero-rating practices), would incentive ISPs to leverage their market power by demanding fees from «edge» content providers and imposing metered data costs on subscribers to push them towards zero-rated offerings.

As a consequence, the allowance of zero-rating practices would constitute a further incentive to consolidation and reduction of competition in order to gain more scale and negotiating power vs. CAPs/OTTs.

Conclusion

In the light of all above, taking into account the negative effects that zero-rated offers have on: a) innovation; b) end-user's rights to access and choose contents/services and, c) competition, **we urge BEREC to maintain the current well-balanced approach on zero-**

[1] Digital Fuel Monitor 2014, "*The real threat to the open internet is zero-rated content*", Antonios Drossos, pag.4;

rating, taking also into account the evidence that in countries (e.g. Netherlands[2]) where zero-rating offers have been banned, mobile operators were commercially incentivized in pushing down the price of internet access (or conversely push the monthly volume caps higher) in order to encourage the usage of contents, services and applications. At this regards, some NRAs believe that a ban on zero rating could force MNOs to raise the caps. According to Harvard's Prof. Crawford "*MNOs would be trying to offer as much capacity to users as possible. The net effect for consumers is positive where zero rating is absent*"[3].

[2] Digital Fuel Monitor 2014, "*The real threat to the open internet is zero-rated content*", Antonios Drossos, pag. 5
"In the Netherlands, where zero-rating is banned, KPN just doubled (free of charge) the mobile internet volume caps to encourage a carefree usage of its online videos. KPN's action is the first empirical evidence of the pro-competitive benefits of real net neutrality rules that ban zero-rating and all other forms of price discrimination";

[3] IT Media Consulting, "*Discrimination and Neutrality on the Internet: the Zero Rating Case*", pag.14.