



**Comments of Microsoft Corporation on
Draft BEREC Guidelines on the Implementation
by National Regulators
Of European Net Neutrality Rules**

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Microsoft commends BEREC for its draft Guidelines published June 2016. In addition to the protections set forth in Regulation (EU) 2015/2120 (“Regulation”), the draft Guidelines set forth critical protections necessary for an open Internet, which is the engine of the digital marketplace. By connecting users from Paris to Buenos Aires, Berlin to Melbourne, Lisbon to Tokyo, Delhi to Seattle, and nearly all places in between, the Internet creates and facilitates a thriving global marketplace that offers new and exciting opportunities for entrepreneurs across the globe. It is thus critical to the future of EU’s digital marketplace that European entrepreneurs, consumers and businesses have ample opportunity to both create and reap the benefits of the global Internet, and thereby grow the EU economy in the digital age. Microsoft commends BEREC for the thoughtfulness and thoroughness of the Guidelines it has proposed for implementation of EU net neutrality rules by National Regulatory Authorities. The draft Guidelines clarify and bolster the protections established in the Regulation and continue the efforts of the Commission, Council and Parliament to promote investment and innovation in Europe’s digital economy. Microsoft supports the Guidelines as drafted, and recommends that BEREC proceed to adopt them as final Guidelines.

The Guidelines are another critical step in promoting continued investment and innovation. In the digital age, and especially when it comes to information and content delivered over the Internet, unhindered access to online platforms and services is a prerequisite. Return on investment on data networks depends on the availability of (and demand for) compelling Internet content and applications. Only by fostering an environment for the development and proliferation of compelling Internet content, applications, and services will the demand for superfast broadband evolve, including demand for 5G networks. Going forward, Internet services and content will continue to help support the business case for network investment in the EU by promoting wider Internet use across all of the EU, demand for higher quality access, and revenue growth. Internet ‘content’ was estimated to be worth 155 billion euros for telecom operators in Europe in 2010, confirming the link between telecom revenues and the availability of a wide array of Internet content, services and applications; the estimated consumer surplus for enhanced broadband access linked to consumption of Internet content and services in Europe is £100 billion.¹ Simply put, promotion of Internet content and services is promotion of broadband networks in particular and the digital economy in general. The Guidelines reflect this need to promote digital investment and innovation in the EU.

Microsoft has a long-standing and strong interest in a global open Internet protected by principles of net neutrality. This interest derives from and reflects the breadth of Microsoft’s “cloud first” business worldview. It is clear that the Commission, Council, Parliament, and BEREC also believe in connecting EU citizens to the global Internet so they can enjoy the benefits that such connectivity provides, and the EU digital marketplace and economy can flourish. The Guidelines reflect this belief and commitment.

¹ Plum Consulting: *Open Internet – Platform for Growth*, October 2011;
http://blogs.skype.com/en/Plum_October2011_The_open_internet_-_a_platform_for_growth.pdf

Indeed, a commitment to a global open Internet – through net neutrality protections – is the single most important policy step the EU can take to encourage and promote innovation and investment in the development of cloud services and online content throughout the EU. Numerous online startups -- such as reddit, Kickstarter, meetup, Etsy, and Tumblr, as well as Y Combinator, the preeminent Silicon Valley venture capital firm for online startups -- told the U.S. FCC that a truly open Internet, protected by net neutrality rules, is critical to maintaining the environment of “permissionless” innovation that is the lifeblood of app developers and other online startups. As Y Combinator put it, “the reason so much innovation and wealth creation has happened in tech over the last decade is that any American with her laptop and Internet connection could build a startup and compete with incumbents (and even beat them) without a team of lawyers and without a large budget to pay for priority from ISPs.”² In the absence of net neutrality rules, “startups would struggle to compete against those who were able to afford paying for a fast lane—or an exclusive fast lane.”³ Similarly, Tumblr told the FCC that failure to adopt strong neutrality rules would “harm innovation and, ultimately, millions of content creators, curators, and consumers in the Tumblr network and other competing networks.”⁴ The same holds true for the EU and its potential for developing a vibrant online marketplace for content and services. Without the permissionless innovation enabled by net neutrality, startups will experience barriers to entry and increased startup costs. And, these “increased costs increase risk for both investors and entrepreneurs, and will decrease investment and the creation of new businesses.”⁵ If it truly wishes to create a policy framework in which online innovation flourishes and investment is available to developers of EU digital goods and services, it is critical that BEREC establish Guidelines that bolster the Regulation. The draft Guidelines accomplish that.

The draft Guidelines reflect an abiding commitment to an open Internet. The Internet will only be truly open – and thus fully available to Europe’s entrepreneurs for the development of new and innovative apps and services – if Internet Service Providers (“ISPs”) are not permitted to engage in discriminatory behavior that gives preferential treatment to some traffic over others. Preferential arrangements are incompatible with the fundamental principles of an open Internet and would have the effect of pressuring content providers, application developers, and service providers to enter into contractual arrangements with broadband access providers in order to effectively reach consumers.

Allowing such arrangements would be particularly detrimental to the evolution of a strong EU cloud services and content marketplace. If developers in the EU are beholden to pay for or otherwise enter into an arrangement with an ISP to get their services or content in the marketplace, their ability to innovate and create new Internet-based products and services will be compromised, and they may choose to use their talents elsewhere or limit their content or services for use in overseas markets. Preferential arrangements would also harm content and service development by distorting subscribers’ choices of which apps, services and content to access. ISPs would leverage their gatekeeper role as the only path through which providers of Internet-delivered services can reach their customers, potentially distorting the app marketplace towards their own interests instead of customer benefits. The draft Guidelines reflect and address these concerns, particularly in the language addressing Article 3(5) of the Regulation.

Preferential transmission arrangements also could chill deployment of faster, more reliable broadband access services to EU consumers over time. Instead of offering their subscribers

² See <http://apps.fcc.gov/ecfs/document/view?id=7521383177>

³ *Id.*

⁴ See <http://apps.fcc.gov/ecfs/document/view?id=7521114565>

⁵ *Id.*

broadband access packages with faster, more reliable service and increased data allowances, preferential transmission arrangements would incentivize broadband access providers to add new capacity and network improvements only to meet contractual commitments contained in existing or anticipated preferential transmission arrangements and to enter into more of these potentially lucrative deals. There may be other arrangements that, like preferential transmission arrangements, improperly enable a broadband access provider to dissuade Indian consumers from accessing certain online services, or encourage them to access others. For all of these reasons, Microsoft supports clear Guidelines prohibiting all preferential treatment of Internet traffic, such as “fast lanes” and other traffic prioritization arrangements, except in the very rare cases in which such preferential treatment may be technically and objectively *necessary* for the provision of service, or as the Guidelines say, that a required specific level of quality for a particular service “cannot be assured” with Internet access services. (See, e.g., ¶ 104.)

Microsoft recognizes the legitimate need of operators to effectively manage their networks. The preferential transmission arrangements discussed above are separate from, and serve completely different purposes than, the broadband access provider’s reasonable network management practices implemented to ensure network security and integrity, by addressing traffic that is harmful to the network or unwanted by end users and reducing or mitigating network congestions. These network management practices are based on standard industry protocols and on technical or operational decisions intended to maintain a robust, safe, and secure Internet experience for all users. Congestion management, for example, is a useful tool to ensuring the provision of high-quality broadband Internet access to end-users. However, traffic management tools that are necessary to avoid and resolve congestion can be used too broadly, in unnecessary circumstances, or for other inappropriate purposes. Therefore, while Microsoft does not endorse regulatory actions that would prohibit the ability of broadband providers to fairly use network management tools to overcome genuine technical challenges and maintain a high quality, secure Internet service for their customers, we also believe that such freedom to manage the network should not allow network operators to engage in discrimination or practices that are anti-competitive or harmful to end-users. Moreover, given the potential for network management practices to have unnecessarily broad – and harmful – impact on Internet services, applications and content, such practices should only be deployed to more efficiently manage traffic on the network in demonstrated, punctual cases of acute congestion, and not as a systematic and proactive approach in lieu of provisioning additional broadband capacity. Microsoft believes the draft Regulation adequately balances the needs of ISPs to manage their networks with the protections necessary to protect against discriminatory treatment of traffic.

Finally, Microsoft supports the language in the Guidelines addressing the Regulation’s protection of end user rights as set forth in Article 3(2) of the Regulation. The core principle underlying net neutrality is that all end users on the Internet should be able to decide for themselves which services and content to use and how to use it. ISPs should not be able to unduly favor their own content, applications or services, or the content, applications and services of third parties. ISPs should not be able to choose what content, applications or services users can access and distribute, or pick who succeeds or fails in the markets for Internet content, services and applications. Microsoft believes the draft Guidelines, along with the Regulation, advance these fundamental principles, and by doing so, are a critical step in advancing investment and innovation across the entirety of the EU’s digital marketplace.