



**Public consultation on the draft *BEREC Guidelines*
on implementation of net neutrality rules
(BoR (16) 94)**

Contribution KPN

KPN
PO Box 30 000
2500 GA The Hague
The Netherlands
Contact person: Paul Knol (paul.knol@kpn.com)

Reference: GCO/16/U/41

15 July 2016

1. Introduction and summary

1. KPN welcomes the opportunity to react on BEREC's public consultation on the draft Guidelines on the implementation of the EU net neutrality rules. As a member of both GSMA and ETNO we have been able to read the draft submission of both organisations and we support the views expressed therein. In our submission we will focus on the issues we consider to be most important, based on our experience with net neutrality legislation, that in the Netherlands entered into force on January 1, 2013.
2. KPN is aware of the sensitive nature of the subject of 'net neutrality'. BEREC needs to strike a balance between the strict interpretation of the Regulation on open internet access as promoted by many and the need for the telecommunication/ISP sector to have sufficient flexibility and certainty to invest in future technologies and services to cope with the strong increases in demand for diversified capacity and quality of networks for internet access. The internet is by nature an international, if not worldwide, phenomenon and technological and market developments are increasingly worldwide. Therefore, one of the most important tasks for BEREC is to ensure a fully harmonised interpretation of the Regulation within the EU/EER. Political pressure to provide national solutions, support national choices and leave room to differing views between NRA's would tempt to leave room for national interpretations. KPN strongly believes that only a clear, fully harmonised and balanced interpretation of the Regulation will safeguard simultaneously a free and open internet, competition and investment in innovative infrastructures and services.
3. The draft Guidelines can be improved to achieve this balance.
4. On various issues the draft Guidelines are too much a more detailed version of the Regulation and still fall short on giving guidance on possibilities to introduce new diversified services. We understand the complexity to formulate guidelines on networks and services not yet defined and standardised. However, market developments simply demand clarity upfront about the conditions that market parties have to fulfil when implementing new technologies and services.
5. The internet, the networks building the internet and adjacent markets are rapidly developing. They need to cope with the strong increase of demand for bandwidth and quality from existing and new services. Standardisation of new technologies to support this strong increase (such as 5G and SDN/NFV) is not done at a national or European level, but a global one. Some important network equipment suppliers are based in the US or Asia. In order to be able to include requirements imposed by EU regulation it is necessary that these rules are clear prior to the process of standardisation and not afterwards. If regulators would only be able to conclude in retrospect that solutions in standards are not in line with regulatory principles, these standards and services using them will potentially not materialise. If no upfront clarity can be obtained, a potential consequence could be that EU enterprises and citizens would miss out on the newest developments or benefit only later on, after complex and costly adaptations. Developments of services, such as connected cars, eHealth applications etc., similarly require upfront clarity. ISP's and equipment manufacturers are not likely to invest in technologies and services for which they are not able to ascertain compliance with EU rules. It must be prevented that the EU would suffer delay and the gap with US and Asian developments would grow.

6. Since BEREC understandably cannot be clear on issues that are not even clear yet to operators and manufacturers, it is most important that BEREC introduces possibilities to informally consult on qualifications for concrete new technologies and services. There should be a possibility in relation to standardisation and service development to discuss aspects that would relate to the rules of the Regulation in such a way that guidance can be received upfront, with sufficient certainty that chosen solutions cannot be qualified differently later on. And this upfront certainty needs to hold for all Member States. Even if it would be challenging to create such a mechanism given the national rules for enforcement of the Regulation, it is an important role for BEREC to define and implement such procedures and practices.¹
7. The most important issues to be addressed hereafter can be summarised as follows:
 - a. the Guidelines and future regular updates should provide sufficient clarity to ensure that market parties are able to evaluate innovation options. Processes for (informal) consultation need to be introduced;
 - b. the Guidelines should include reasonable timeframes to comply to the interpretations included therein and future amendments thereof;
 - c. since the Regulation implies full harmonisation of the application of the rules also concepts that so far have not been harmonised – such as defining ‘public’ internet access – requires a harmonised approach;
 - d. it should be clarified that certain customers support services that ISP’s offer to support the use the internet access services should be allowed. Consistency between these Guidelines and BEREC’s Guidelines on the Roaming Regulation should be improved;
 - e. the increasing demand for prioritisation of certain services or certain types of (governmental and business) customers should, in the public interest, not be restricted to services that comply to the strict criteria of services other than internet access services);
 - f. the increasing threat of the internet being used for malicious and unsolicited content require the use of firewalls by ISP’s and the ability for ISP’s to offer certain network based filtering options upon request of – and under control of – customers;
 - g. the need for clarity and certainty of qualifications of services are not compatible with the presumption that such qualifications may change over time, depending on technological developments. Investments based on earlier qualifications cannot be undone;
 - h. the prescriptive description of the transparency requirements of Article 4 of the Regulation leaves insufficient room for ISP’s to reach the results intended by the Regulation in an appropriate and proportional manner.
8. Below, we will detail these comments and provide concrete examples and proposals.

¹ In the Netherlands, after the Dutch net neutrality rules entered into force by January 1, 2013, the Dutch NRA ACM has been open to informal consultations on questions in relation to the application thereof. A similar practice is required under the new EU rules. Since the Regulation provides for full harmonisation, consistency in conclusions should be ascertained, for which we presume BEREC will play an important role.

II. General aspects

9. The Regulation entered into force only after a long and often confusing debate, resulting in a text that is still showing the compromise character of the preceding discussions. It is however not possible for ISP's to compromise on the implementation of network planning and network management: traffic is either blocked or not, is either prioritised or not, services are either differentiated or not, etc. The task for BEREC, imposed in Article 5 of the Regulation, should be to clarify the interpretation of the rules to actual network practices in order to give clarity to the market as much as possible, without creating inflexibility to future technological and market developments. In this respect the Guidelines – even if this is only a first version – remain too general to give the required clarity.
10. The Guidelines will only enter into force four months after the formal entry into force of the provisions of the Regulation. ISP's have not been able to live up to the interpretations that will be included in the Guidelines and prepare for compliance to these interpretations. Even the draft now under consultation leaves open many uncertainties. BEREC should include rules for NRA's to allow ISP's reasonable timeframes to comply to the interpretations. The intention of the Regulation is to ensure an open and future proof internet and the Guidelines should primarily aim for that goal - and not impose strict enforcement measures on practices implemented (long) before the rules have entered into force. Realistic timing to adapt current practices should be included.

III. Definitions (Article 2)

11. Par. 8-10 and 122 rightly concludes that non-public internet access is not covered under the regulation. Currently however, there is no consistent EU definition of what services are considered public or non-public. It should be ascertained that an EU wide interpretation of this concept is implemented in relation to e.g. WiFi hotspots, of which the qualification public/non-public is often uncertain. Where e.g. internet access in cafés is mentioned as non-public service, it would be helpful to mention if so called 'internet cafes' (where access to internet is the primary business goal) also benefit from this conclusion and – if not – what would be the relevant factors to distinguish. WiFi hotspots are increasingly offered also by supermarkets and other stores (e.g. Ikea) and it should be ascertained that such services are qualified equally in different member states in light of the full harmonisation perspective of the Regulation.

IV. 'Commercial practices' and customer support services

12. The Guidelines rightly dedicates a lot of attention to the question what 'commercial practices' would (not) be allowed under the Regulation, but fails to be clear about an important service tool that (mobile) operators are often providing to their customers. In all commercial offers that include a predefined allowance for internet access data – such as is common practice with mobile data bundles – or when data is offered per increment ('pay-as-you-go') it is extremely important

² Reference to Paragraph numbers without further specification refers to the numbering of the paragraphs of the draft consulted BEREC Guidelines. Reference to Articles and (sub) paragraphs thereof refers to the Regulation on open internet access.

for customers to be informed on their actual use. Many operators have started to provide 'MyOperator' apps³, or similar tools to inform customers on their actual consumption of their services. By means of such services, customers can safely use their mobile services, without the risks of bill shocks or the risk of suddenly reaching the agreed data-allowances. Often these services also allow customer to buy additional 'bundles' of voice or data when their allowances are completed.

13. Such services by no means restrict the possibilities of customers to use the content or services of their choice, but simply allow them to manage their access service in an easy and understandable way. However, if such services would have to be blocked or slowed down if (after full consumption of the allowance) – as is implied by Par. 38 – their effective use would be unnecessarily taken away.
14. Quite rightly the EU Roaming Regulation includes the obligation for operators to apply similar services 'free of charge' for use outside the home territory. The BEREC Roaming Guidelines (BoR (16) 34) conclude (e.g. par. 25 and 31) that such information should be provided for free, e.g. by means of a free-of-charge landing page. Effectively that means an obligation for zero-rated information provision. We assume that the Roaming Regulation, by imposing such an obligation, cannot be overruled by an interpretation of the open internet access provisions that would be read differently by BEREC. Therefore it would be helpful if BEREC would include a reference to their Roaming Guidelines on this point to avoid unnecessary confusion.
15. But more importantly, KPN would strongly plea for a similar interpretation for national use of similar customer information services. No market effects are resulting from this, other than that customers can easily assess their usage and – if offered – have an easy tool to buy additional allowances.
16. It could be argued that such service would need to be implemented as a service-other-than-an-internet-access-service ('SoIAS'), but it seems overly complex, unnecessary and disproportionate to allow such services only if specific quality of service parameters would be implemented. The customer service does not require such QoS parameters, but only needs to be exempted from the conclusion of Par. 38 of the draft-Guidelines in order to work effectively.
17. By simply concluding in the Guidelines that the 'free of charge' use as mandated by the Roaming Regulation may also be applied nationally for such customer support services, BEREC would interpret the Regulation in an effective and balanced manner.

V. Traffic management IAS

18. Increasingly the business market requires specific service classes for specific needs. This raises the most questions in mobile networks where access networks are shared amongst different users. The interests of businesses and governmental organisations are not contrary to net neutrality and do not create undue advantages in our view, especially where arguments for public safety are in discussion. Public organisations (e.g. police, ambulances) may have special mobile networks for their specific tasks in some countries, but they may also be equipped with general mo-

³ These apps are also used to provide customers 'free' information based on self-regulation.

mobile devices running over public networks, working with specific applications. Other businesses (related to airports, railways, hospitals, security, etc.) may also use mobile applications for internal communications. This supports the most effective use of spectrum, since only in some very specific situations priority for traffic may be needed.

19. For some of these services it could be argued that they qualify as 'SoIAS', but it might not be the most appropriate solution to define a large number of 'SoIAS' for such users and use. Nevertheless it is obvious that in many situations (most extreme the recent bomb attacks on airports and others) there is a need to prioritise certain traffic, dependent on the user rather than on technical characteristics of the traffic.
20. It should not be considered as an undue differentiation to create some classes of prioritisation for such IAS – especially relevant on mobile networks – since it avoids the need for either artificially introducing SoIAS or even creating specific networks, which endangers effective spectrum use.⁴ We do not read such a restrictive conclusion in the Regulation, but it would be necessary for BEREC to describe the criteria it is proposing to be applied by NRA's to judge on the possibilities to such service differentiation, not based on technical differences, but of usage for certain types of customers willing to pay for applying the necessary service classes. Such services are already offered in the market and should pass the test under the Regulation for necessary prioritisation.⁵ And certainly there is great demand for these types of services. This is evidenced by discussions in the Netherlands between MNO's and verticals (including Schiphol, Rotterdam Harbour and hospitals), initiated by the Ministry. Such service differentiation would involve tariff differentiation and traffic prioritisation in cases of congestion in the network. It is however uncertain if it would pass the restrictive approach of the draft Guidelines (see e.g. Par. 65). It is necessary for BEREC to reconsider this approach to safeguard legitimate public interests.
21. An undue rigid interpretation of the 'non-discriminatory traffic management' obligations of the Regulation could furthermore negatively impact application of future technology developments (such as 5G) in the standardisation, which will enable more possibilities for service differentiation. We understand that it is not possible for BEREC to assess upfront the consequences of this standardisation, but – again – we see the need for open discussions and consultation once concrete issues need to be qualified. It must be prevented that the EU would suffer delay and the gap with US and Asian developments would grow, or additional costs would be incurred. A too restrictive interpretation, or a lack of possibilities to get clarity prior to decisions on investment, could be detrimental for EU citizens and businesses and could even risk the EU to miss out on certain services.
22. In the very competitive European IAS markets operators need to balance an optimum service quality with a low cost level to be able to offer the best services at a good price level. It is always

⁴ In the Netherlands this debate has already been initiated by some businesses in spectrum policy discussions, presuming that mobile network operators are not willing and/or allowed to differentiate priority classes. If the Regulation would indeed lead to such a conclusion it would be against public interest.

⁵ See e.g. zie <https://kigowatch.com/nl/gps-kids-tracker>, where the child protection service is described: 'UNIEK NOODPROTOCOL - Wanneer het data netwerk overbelast is, zoals op een drukke dag in de Efteling, dan werkt de KiGO gewoon. We krijgen namelijk voorrang op het mobiele netwerk. Samen met Vodafone hebben we een uniek noodprotocol ontwikkeld.'

necessary for operators to plan their network roll-out and upgrades well in advance and therefore always predictions on market (traffic) developments are used. The Guidelines tend to restrict network management and congestion management to situations of actual (impending) congestion and imply that 'simply investing in more capacity' should be the option for 'normal' situations. Of course we recognise the need for constant investment, which we believe the telecommunications sector is providing, even more than other sectors in the internet value chain. But it should be noted that the ex post justification for certain measures should not be based primarily on the actual ('ex post') traffic situation in networks. Operators should be free to implement the measures necessary to cope with certain scenario's for traffic and service development and should not retroactively be obliged to justify such choices if not all scenarios have materialised.

23. In short: NRA's should not engage in detailed ('ex post') justification of all detailed forms of traffic management applied, but should intervene only when no reasonable justification for certain practices can be provided. NRA's should not be willing to get involved in network architecture choices, but should stick to enforcing in cases of clear violations. The BEREC Guidelines should be more fundamentally based on such an approach.

VI. Blocking of malicious and unsolicited content

24. Some supporters of strict rules claim that not imposing strict net neutrality rules would lead to endangering the use of the internet. It may be even more realistic in our view to express concern over the security of the internet and the threat that internet users may refrain from using the internet for fear of the increasing fraud, identity theft, phishing mails and other malicious content. E-mail services would largely suffer as effective means of communications if no effective anti-spam mechanisms are implemented. Parents would most likely restrict access to internet for their children if no effective control of harassing content would be possible.
25. ISP's have always been very cautious to intervene against use of their networks and services, even against use of their services for clearly malicious purposes. There is no reason to believe they will act differently in the future. Nevertheless (almost) all ISP's have implemented firewalls or other measures in their networks to safeguard their users from some forms of content (spam, viruses, other malicious content) that they do not like to receive and that could endanger the security of the IAS or of the terminal equipment of their end users. Endangering the security of the networks and users would fundamentally undermine trust in the use of the internet.
26. It is extremely important for BEREC to give guidance here, since the Regulation remains unclear on this issue. If BEREC would instruct operators to terminate the use of such firewalls and spam prevention measures there would be a serious risk for the continuity and safety of some of the services over the internet. BEREC should carefully analyse and weigh these consequences prior to interpreting the Regulation overly strict.
27. Similarly, BEREC should be clearer about the use of certain filtering options that operators can offer to customers upon their request only and of which the settings are left to the users. Even under the strict Dutch net neutrality rules the Minister of Economic Affairs has allowed an ISP to offer such ('parental control') filters as an additional offer to its IAS. Although some of the func-

tions can also be provided in the end user equipment most users do not have the knowledge to effectively protect themselves or do not want to spend the necessary time and efforts to use these tools, but nevertheless want the protection. As long as the setting of the filters are under full control of the end user it should legally be of no interest where such a filtering option is implemented. As long as such filtering options only work after a clear customer request and under full customer control they should be allowed. To achieve this purpose par. 75 needs amendment.

VII. Services other than Internet Access Services

28. Fixed and mobile broadband networks are effectively used for data services, amongst which internet access is by now the most important service. The Regulation prioritises this internet access service over all other potential services by limiting the possibility to offer such other services only under strict conditions. The draft Guidelines try to clarify these conditions, but in doing so, make them more restrictive than the Regulation requires and (thereby) fail to give more guidance in relation to potential ‘services other than internet access services (‘SoIAS’). The ETNO-GSMA response in this consultation includes a detailed analyses which we support.
29. The Guidelines clarify that linear broadcasting IPTV and managed IP voice services over fixed or mobile (VoLTE) are to be considered as SoIAS. These services are necessarily based on specific QoS requirements. A different qualification for these services indeed seems unthinkable: the managed voice services still are a basic need for customers and simply are a technologically more efficient successor of traditional TV and voice services. If the Regulation would impose barriers for such technological developments, many important features of the services (including emergency number access, legal intercept of voice, etc.) would be endangered.
30. However, future developments will also bring new and innovative services, that will be offered over a broadband connection next to the internet access services, which require special treatment in the networks. It may be critical for the development of such services to be able to have upfront clarity whether a service would qualify as a SoIAS. The strict interpretation of the Regulation, as detailed in the draft Guidelines, does not sufficiently allow full ‘self-judgement’ with sufficient certainty. As mentioned in the introduction BEREC should develop a procedure to allow ISP’s to discuss with NRA’s in such a way that it can rely on the interpretation as SoIAS. To ensure such harmonised interpretation, BEREC has an active role to play, since all EU NRA’s should apply the criteria for similar services equally. Service innovation requires ISP’s to make business plans prior to investment and uncertainty on the legal status of specific services will most likely cause business cases to not pass investment requirements.
31. The fact that the Regulation includes only ex post enforcement powers for NRA’s is not in contradiction with the need to develop such an informal procedure to create upfront clarity. It would be beneficial for BEREC and NRA’s to be involved in standardisation and service development informally, to ensure that detailed knowledge of technological and market developments are available. Also the ex post enforcement powers of NRA’s would profit from such engagement.
32. In relation to the need for clarity and certainty in order to allow innovative service development to flourish, BEREC’s conclusion in par. 108 that the qualification of SoIAS may evolve over time and could even affect existing services, should be changed. It should not be possible that the

qualification of a service as SoIAS, based on specific QOS, could change and thereby would have to comply to totally different legal requirements. Services offered in the market should be allowed to be offered consistently under the same requirements. The legal uncertainty associated to the possibility to change the rules for a service during its commercial existence would be detrimental to innovation.

VIII. Transparency obligations

33. The draft Guidelines provide for an extremely prescriptive description of how operators should comply to Art. 4 of the Regulation. We refer to the ETNO-GSMA contribution for detailed comments to this section of the Guidelines. Although KPN understands – and supports – the requirement that end users should be able to make well informed choices between various offers in the market in relation to speeds and other quality aspects of broadband services, the level of detail as described by BEREC would not achieve this goal.
34. In most member states the issue of transparency of quality of internet services has been under discussion and national implementations – based on public or self-regulation – have been achieved. Improvements of national implementations may be needed in some cases, but it would not be realistic to require detailed changes in systems and processes if it would not materially improve customer understanding and customer rights.
35. For example, the requirement that the information should be provided ‘in a contract’ should be interpreted in context of – non harmonised – national contract law. In the Netherlands for example, contractual rights are not only assessed based on descriptions in a specific document (‘contract’) only, but on the information provided by the supplier on the nature of the service prior to contracting. When judging compliance to the Regulation it should therefore not be assessed *where* the information is provided, but *whether* the information is provided sufficiently clear prior to contracting.
36. BEREC extends the requirements of the Regulation on various issues – as described in the ETNO-GSMA contribution. One specific example thereof is included in the last bullet of par 126, where BEREC states that preferably ISP’s should strive for comparability of information between different ISP’s. This issue has been debated extensively in the Netherlands. Different broadband access technologies have different specific issues in relation to the items to be published. Not only does this complicate comparability as such, but would operators have to agree on formats to publish the information in a comparable way, this could necessitate them to exchange detailed retail information on their services. For this reason the Dutch Competition Authority advised the Ministry of Economic Affairs not to include such a requirement, which could trigger violation of (in EU context) Art. 101 of the Treaty on the Functioning of the EU.
37. The Regulation requires ISP’s to inform customers on four indicators for fixed and two for mobile networks. KPN has had difficulty to understand the necessity of all these indicators. BEREC recognises correctly (Par. 139) that ‘advertised speeds’ should only be communicated in so far as relevant to a customer. Similarly, the other indicators should not be looked at mechanically, but in relation to the concrete technology and service offered to end-users. The purpose of the Regulation is clear: end-user should be informed about the upload- and download speeds services

they contract for. It differs by technology how sensitive the services are to the simultaneous usage, distance to the local network connections etc. It should therefore be possible to provide the information in a way that is best suited to the service the end-user has contracted. It might vary per service/technology whether e.g. 'normal speed' or 'minimum speed' may be presented in e.g. concrete figures, or percentages of (technical) 'maximum speed', as long as sufficient clarity is given to allow customers to verify whether the service offered meets the contractual conditions.

38. The requirements of the Regulation (and thereby of the Guidelines) tend to suggest a rather static approach to internet speeds, whereas in reality the networks and services are in constant development, usually (at least in the Netherlands) increasing significantly the service levels above the contracted level. Even though the Regulation has no explicit provision in relation thereto, it should not be required for operators to comply to the requirements for contracts already in place (long) before entry into force of the regulation, since this would effectively imply retroactive effect, wherefore the Regulation provides no legal basis. Also in future it is impossible to amend existing contracts for all network upgrades. As long as the agreed service levels are met (or exceeded) there is no reason to require (disproportionate) administrative processes. If applied otherwise that would be a strong disincentive for ISP's to upgrade quality frequently and therefore such strict interpretation would be against public interest.
39. In relation to monitoring systems for compliance with contracted speeds, it is important that the required certification mechanisms are such that no preference is included for mechanisms of certain suppliers, or mechanisms that by means of the type of measurements would promote some technologies over others. It is important that NRA's should aim at certifying systems that are easily accessible, simple to use, neutral to technologies used and have as little cost-impact as possible. In the market currently such mechanisms are already available and it is preferable to certify such existing mechanisms over the need to implement specific tools, which on all factors mentioned in the last sentence create more risks.