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Luxembourg, 15<sup>th</sup> july 2016

**Objet :** Public consultation on the implementation by National Regulators of European Net Neutrality rules – BEREC Guidelines BoR (16) 94 of June 2016

Dear Sir/Madam,

POST Luxembourg welcomes the opportunity given by BEREC to comment on the BEREC draft guidelines on the implementation by national regulators of European net neutrality rules.

It is our understanding that the draft guidelines seek to provide guidance in how different matters related to the open internet shall be handled in the future. However, several issues raised in the draft guidelines appear problematic.

POST Luxembourg's main concerns, which will be explained below, are related to the following topics:

1. General remarks on BEREC's proceedings
2. Definition of "end-user"
3. Zero rating
4. Traffic management
5. Transparency measures

## 1. General remarks on BEREC's proceedings

### 1.1. Extension of the scope of BEREC's mandate

Art. 5(3) of the Regulation 2015/2120 (henceforth "*Regulation*") stipulates that

*[...]BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines for the implementation of the obligations of national regulatory authorities under this Article.*

BEREC's mandate is thus clearly limited to issuing guidelines for NRAs. However, some provisions stated in the draft guidelines are likely to be interpreted as explicit prohibitions on operators' practices. From the numerous examples, the following can be mentioned:

- par. 25: *[...] the practice of restricting tethering is likely to constitute a restriction [...]*
- par. 38: *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 (see paragraph 52).*

It follows from Art. 5(3) that BEREC's mandate does not include any power to legislate. Therefore, per se judgments as those provided above should be avoided and the corresponding guidelines revised.

Moreover, Recital (7) of the Regulation favours a case-by-case approach should an intervention by a national authority have to occur. Thus, guidelines with per se negative judgment towards any practices are not in line with the Regulation.

### 1.2. Timeframe

It is with regret that we acknowledge the very short timeframe which BEREC grants a consultation with such impacts. Indeed, a two-month spread between the beginning of the public consultation and the implementation date leads to question BEREC's willingness to consider the industry's concerns with the issued draft guidelines.

### 1.3. Creation of a harmonized European framework

It is questionable if the approach chosen by BEREC is able to achieve a harmonized and consistent application of the Regulation throughout Member States.

At several occasions BEREC leaves discretion to NRA when it comes to assess the lawfulness of some operational or commercial practices. Hence, it may be unlikely that identical practices will receive identical treatment in different countries. In effect, similar administrative discrepancies have been observed on other regulatory issues due, for instance, to some national judicial specificities (e.g. unlawfulness of pure BU-LRIC cost model to calculate the efficient level of MTRs in Finland) and evidently different interpretation by NRAs (e.g. Equivalence of input applied in conjunction with economic replicability tests).

An overall harmonization may therefore face several obstacles.

## 1.4. Impact on overall EU policy objectives

At several occasions, it appears questionable whether BEREC has correctly estimated the potential impact on network operators' investment decisions in future networks which is potentially hampering the achievements of EU policy objectives.

For instance, several traffic management rules to be imposed on providers can undermine the success of future mobile networks (cf. point 4.1 below), while transparency rules may induce less investment in next generation access networks (cf. point 5.3).

The present guidelines should be elaborated in light of a brighter view on the global goals EU policy seeks to achieve and in particular the Gigabit society. It is however doubtful that this strict a set of rules, determined without rigorous effect-based analysis and without the essential discussion with market players, is actually contributing to these policy objectives.

## 2. Definition of "end-user"

BEREC has decided to include Content and Applications Providers ("CAPs") in the definition of end-users. However, this proceeding puts all the liability on IAS providers, despite the fact that some issues may arise on the CAPs' side. This may prove problematic especially in traffic management matters (see point 4.4 below). BEREC should revise this point to take into account the potentially limited liability of ISPs.

## 3. Zero rating

### 3.1. BEREC's approach might prove detrimental for consumer welfare

In several paragraphs (most notably 33, 38 and 39), BEREC considers whether zero-rating infringes the Regulation or not. BEREC argues that a preferential treatment of certain application restricts end-user rights, because their choice would be materially reduced. Furthermore, BEREC deems the usage of zero-rated applications beyond the included data volume as contrary to open internet rules.

However, the effects of a ban on zero-rating beyond the included data volume seem to be underestimated. Several potentially negative impacts on consumer welfare can be mentioned:

- Consumer experience would degrade
  - because of the obligation not to give a preferential treatment to certain applications. In case the internet access is blocked once the data cap is reached, a ban on zero-rating would oblige ISPs to block the access to the application, too. Consumers would then clearly be worse off than they are today, where they are still allowed to use the zero-rated application beyond the data cap and thus benefit of more data volume.
  - because of reduced possibilities of ISPs to provide innovative and differentiated offers. In a highly competitive market, service differentiation is a means for IAS providers to market clearly distinguishable offers to consumers. Among the available tools is the practice of zero-rating. Banning this practice is then likely to reduce ISPs possibilities to offers differentiated offers, which in turn leads to a "*materially reduced choice for end-users*".
- Hampering of the emergence of new and innovative applications

- Zero-rating may prove also beneficial for innovative applications since the underlying data usage is not debited from the consumers' included data volume. Hence, zero-rating may provide an efficient incentive for both CAPs, namely to develop new and innovative applications, and consumers, notably, to use them.
- Protection of not zero-rated applications to the detriment of consumer welfare
  - A strict application of BEREC's guidelines would lead to protection of application that are not zero-rated, while consumers may no longer benefit from free usage of the zero-rated applications.

BEREC should revisit its per se negative attitude toward zero-rating and apply a more rigorous effect-based analysis of this issue.

### 3.2. No distinction from "sponsored data"

In case BEREC should retain its per se negative attitude towards zero-rating, it should introduce a clear distinction between "sponsored data" and zero-rating. Without any clear distinction, sponsored data would be implicitly banned, too. However, this seems disproportionate since this practice does not entail any discrimination at all as it is offered to every CAP. It would thus be wrong to implicitly ban sponsored data by not clearly distinguishing it from zero-rating.

### 3.3. Obligation to provide information to the customer on its billing situation, free of charge

Operators are obliged to allow their customers to retrieve diverse information such as their current billing situation, information about their available speeds, etc. Providing this information must also be free of charge. A ban on zero-rating is thus contrary to other obligations laid upon IAS providers and should be revisited accordingly.

## 4. Traffic management

### 4.1. The potential need to monitor beyond IP packet / TCP header

While BEREC considers in par. 51 end-point congestion control to be in line with Art. 3(3) because it is terminal-based, the guidelines' scrutiny on network-internal traffic management are more, and even too restrictive. For instance, par. 67 states that

*"[...] the information contained in the IP packet header, and transport layer protocol header (e.g. TCP) may be deemed generic content, as opposed to the specific content provided by end-users themselves (such as text, pictures and video)."*

BEREC should address the following issues related to par. 67:

- the wording "may be" introduces uncertainty as to what will ultimately be deemed legal or not. BEREC should take into account the necessity for legal certainty.
- the potential necessity to monitor traffic at a deeper level in the TCP/IP model. For instance, IAS provider should be able to analyse the IP layer in order not to lose network diagnostic capabilities. POST Luxembourg fully agrees with BEREC that monitoring the content itself should be considered as an infringement of the Regulation. But, network diagnostic should not be considered contrary to the open internet as it may prove useful for the efficient use of network resources and thus

ultimately for the end-users. BEREC should therefore not deem this measure as going beyond those set out in Art. 3(3) second subparagraph.

In our eyes, it is important for BEREC not to confound measures necessary for efficient network usage with unreasonable traffic management measures. Par. 67 should be amended accordingly. Furthermore, BEREC should reassess the need for legal certainty.

#### 4.2. Innovation agnostic approach

BEREC's interpretation of how reasonable traffic management should be assessed puts future innovation at stake. Indeed, whereas the Regulation relies on some technical aspects of Internet traffic (latency, jitter, etc.), BEREC goes beyond the Regulation by considering that traffic treatment is non-discriminatory as long as it is treated "*agnostic to sender and receiver*".

BEREC's approach is in our eyes not future proof and may potentially undermine the success of future networks and most notably 5G networks. In these networks, sender and receiver agnostic traffic management will lead to inefficient network usage. It is in effect essential for 5G to apply different network management rules to different traffic categories as it will allow IAS providers to be more flexible and consumer-centric.

To rigid an interpretation of the Regulation will undermine the success of future 5G networks and BEREC should assess this definition by also taking account of future technological developments as well as European policy objectives, such as the Gigabit-Society.

#### 4.3. Definition of "specialized services" and case-by-case assessment

The notion of specialized services has been purposely abandoned by co-legislators so as to avoid overly heavy regulatory intervention. BEREC should therefore refrain from reintegrating this notion for the very same reason.

Moreover, as BEREC correctly acknowledges in par. 108, "*[t]he internet and the nature of IAS will evolve over time.*" and "*[g]iven that we do not know what specialized services may emerge in the future, NRAs should assess whether a service qualifies as a specialized service on a case-by-case basis.*". This will lead to uncertainty about the qualification of given service as "specialized service" and risk to hamper the emergence of new, innovative services.

Furthermore, besides the fact that there will be a lot of (unnecessary) discussion about the qualification of a service as a "specialized service", it is questionable whether BEREC's approach will actually enhance consumer welfare. Indeed, these specific guidelines may lead NRAs to regulate the quality of service (QoS), whereby consumers may consider other QoS-levels as more appropriate. Thus, NRAs would even be empowered to regulate consumer choices, which would, without a doubt, violate their prerogatives.

BEREC must revisit its guidelines relative to "specialized services".

#### 4.4. Overly extended liability of IAS providers

By including CAPs into the definition of "end-users", the draft guidelines put all the liability relative to the open internet on IAS providers. It must however be noted that some congestion issues may arise

on the CAPs' side of the network, e.g. if they have a responsibility for a portion of the link between them and the end-user.

Such an asymmetric responsibility sharing must be avoided and the corresponding guidelines accordingly amended.

## 5. Transparency measures

### 5.1. Specifying network performance

At several occasions, BEREC requires NRAs to set different thresholds of network performance end-users should be able to benefit of. However, BEREC does not provide a methodology for determining the different speed thresholds.

A lacking common methodology may involve some risks, such as:

- the risk of an arbitrary definition thresholds by NRA, potentially putting IAS providers' liability constantly at stake. The guidelines should specifically imply NRAs to consider specific network characteristics (e.g. physical limitations due the geographical area, number of connected users, etc). Otherwise, possible consequence could be a false positive liability, due to misperception of the actual maximum performance of the network at a given location. Consequently, IAS would have to announce lower threshold than those actually available. This would clearly be to the detriment of consumer welfare.
- the risk of NRAs interference in investment decisions. Given BEREC's guidelines on Art. 3(3)(c) regarding the potential necessity of network expansion and closely linked to the first bullet point above, an arbitrarily defined minimum speed (that may be unachievable by the IAS provider due to physical limitations) may be interpreted by NRAs as a necessity to promote network expansion. Such an interpretation would however only rely on a false positive because of an arbitrarily chosen threshold.
- the risk not to achieve a harmonized European framework, because the definition of thresholds is likely to differ from one Member State to another.

Moreover, BEREC must consider that, due to factors that are not under the influence of IAS providers, the indicated speeds can only be theoretical. This puts additional and undue liability on providers as those speeds might not be guaranteed and reached. Consequently, not only would providers face unnecessary complaints from customers, but the latters would also wrongly be misguided and incur lower quality of experience.

Given the potentially negative outcome, BEREC should conduct a rigorous evaluation of impact on consumer experience and assess the users' actual necessity of such technical specificities. In case this would be deemed necessary, the guidelines should be amended by provided a harmonized methodology in the discussed matters.

### 5.2. Impact on customer experience and administrative burden

It is questionable whether the provision of several different speed levels for one given contract is actually enhancing consumer experience. Many consumers are not familiar with technical specificities of IAS and may therefore be flooded with unnecessary information.

Moreover, the administrative burden for IAS providers implied by the guidelines given in par. 124 to par. 154 may prove disproportionate in the light of the aim of the regulation.

### 5.3. Less incentive to invest in fixed next generation networks

The current guidelines on transparency put at stake IAS providers' incentive to further deploy next generation networks. Indeed, as explained in points above, the current guidelines put additional liability and administrative burden on IAS provider. This in turn may induce operators to seek a safe harbour and only promote relatively low speeds which they are sure to be able to deliver. Consequently, consumers' willingness to pay may decrease for all speed ranges and so do network operators' resources to invest. The logical consequence would thus be a reduced investment in future networks.

Given the matter at stake, it is of utmost importance to consider an actual effect-based analysis so as to avoid to raise barriers for future networks.

Yours sincerely

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