



Response to

BoR (16) 94

Draft BEREC Guidelines on the Implementation by National
Regulators of European Net Neutrality Rules

18 July 2016

A. About VimpelCom

1. [VimpelCom](#) is an international communications and technology company driven by a vision to unlock new opportunities for customers as they navigate the digital world.
2. We provide mobile and fixed voice/messaging, broadband, data and digital services to more than 200 million customers, utilising our own network infrastructure in 14 markets including Italy (WIND Telecomunicazioni), Russia, Algeria, Pakistan, Uzbekistan, Kazakhstan, Ukraine, Bangladesh, Kyrgyzstan, Tajikistan, Armenia, Georgia, Laos, and Zimbabwe.

B. Key VimpelCom Observations on BEREC's draft Guidelines

3. VimpelCom welcomes BEREC's initiative to consult interested parties on its draft Guidelines on the Implementation by National Regulators of European Net Neutrality Rules. VimpelCom hereby provides this brief contribution.
4. We express our surprise that BEREC's draft is presented as guidance to National Regulatory Authorities (hereafter 'NRAs'), whereas in fact the draft (if adopted) would in fact amount to imposing considerable additional restrictions and obligations on network operators that are also providers of Internet Access Service (hereafter 'IAS') – among the other non-IAS services they provide and non-IAS services they will in future provide –, on a pre-emptive basis.
5. We are also surprised to see the obligations proposed by BEREC extending well beyond the scope of Regulation 2015/2120 (hereafter 'the Regulation'). We refer in particular to Art. 5(3) of the Regulation, which sets out BEREC's remit, which is specific to supervision and enforcement of the Regulation. BEREC's remit does not address ex-ante specification of restrictions and obligations on network, operators, and in particular does not address the interpretation of Art. 3 and 4 of the Regulation.
6. BEREC's draft Guidelines seek to intervene substantially in network operators' business decisions, notably by introducing quasi ex-ante controls over 'specialised services', to the extent that network operators' innovations would de-facto become subject to NRA approval/modification. One of the commonly understood principles inspiring the

Regulation and BEREC's draft Guidelines is 'innovation without prior permission'. Surely this principle, which BEREC seeks to enshrine in its draft Guidelines, should equally apply to IAS and to non-IAS, notably to what BEREC terms 'specialised services'.

7. We have similar concerns with regard to BEREC's proposed stance on the IAS offers of network operators, and 'zero-rating' in the IAS context in particular: BEREC's proposals constitute far-reaching ex-ante intervention, unduly constraining network operators' business decisions.

8. On the basis of the key VimpelCom observations indicated above, we ask BEREC: (i) not to exceed the remit given to it by the Regulation, and (ii) to ensure that innovation is genuinely 'without prior permission' BOTH on the internet and for other services, and in particular for existing and future non-IAS services provided by network operators.

9. **We ask BEREC to step back from the quasi ex-ante controls which are suggested throughout the document** put to consultation, in order to avoid unduly constraining: (i) innovation, (ii) justified security measures, and (iii) the ability for all market participants to compete on equal terms in an environment consisting of diversified offerings, be they evolving traditional services as we know them, content/services/applications on the internet as we know them, as well as hybrid and entirely new service propositions, which surely will emerge in the near future and longer term future.

10. We understand that many industry participants have serious issues with BEREC's proposals, and that the GSMA, of which we are a member, is providing more detailed legal analysis and substantive input.

11. Our brief comments in Section C. below reflect VimpelCom's chosen specific points of emphasis.

C. Specific VimpelCom Points of Emphasis (in the order of discussion in the draft BEREC Guidelines)

12. § 6 (read in conjunction with § 4 and 5): Treatment of (large) business users, internet interconnection, and § 89 network dimensioning. We disagree with BEREC's proposal to construe a power for NRAs to address all end-users, notably (large) business users and Content and Application Providers (hereafter 'CAPs'), who negotiate custom-made contracts with network operators. The Regulation (deliberately) does not address custom-made contracts, including internet interconnection - this matter was debated by the co-legislators with a clear outcome, and it was understood not to include (wholesale) content/cloud distribution/streaming. Yet, BEREC now seeks, by categorising all (large) business users as well as Content and Application Providers (hereafter 'CAPs') as end-users, (§4/§5), to bring internet interconnection under the NRAs' remit. BEREC does so by referring to Recital 7 of the Regulation. However, Recital 7 in our view clearly aims to address true end-users (consumers/small business users) who are in a true retail end-user relationship with an IAS provider at their location based on standard contracts, rather than large business users and CAPs who negotiate custom-made contracts. CAPs in particular seek to distribute their offerings globally or regionally from massive data centres, from internet exchanges, through content delivery networks, etc. In addition, network dimensioning (§ 89), seems to us to be clearly out of scope of the Regulation, and a matter of network engineering and related business decisions. **We urge BEREC to revise its proposals to ensure that they do not create new regulatory obligations on network operators for serving (large) business users, and on internet interconnection and network dimensioning, which are not provided for in the Regulation.**

13. § 11 and 111: Virtual Private Networks (VPNs). VPNs are today provided in various ways, primarily to large business/public sector users (and their employees) (reflected in BEREC's draft), but also to other users, including teleworkers and consumers (not sufficiently reflected in BEREC's draft), for efficiency, productivity and security reasons. Such requirements, for people working from home and at remote locations, and for regular consumers as well (online financial services, e-health, energy metering, various sensors, smart cities, etc.), are increasing in importance, given the increasing security risks associated with IAS. BEREC should ensure that it does not restrict the development

of VPNs, for any category of users, neither on IAS nor as ‘specialised services’, notably to avoid unduly interfering with objectively justified security protections, for current use cases, emerging use cases, and future innovations. **We urge BEREC to revise its proposals to ensure that they do not impede objectively justified security protections, which are likely to be an increasing necessity.**

14. § 37-43: Zero-Rating of applications accessible via IAS. We disagree with BEREC’s proposals with regard to zero-rating of applications accessible via IAS. We note in particular that the Regulation (deliberately) does not prohibit zero-rating applications accessible via IAS - this matter was debated by the co-legislators with a clear outcome, from which BEREC now appears to be deviating in its proposals. We observe that BEREC’s focus is entirely on commercial practices which it sees as being (potentially) detrimental to end-users, without giving consideration to offers providing broader socio-economic benefits, and/or which are directly valued by end-users (not to mention critical to end-users’ well-being). We object to BEREC’s suggestion that telephony/messaging/television services, which have been provided by network operators for decades preceding the emergence of the internet, to customers’ clear satisfaction proven by take-up, might at some point in the future, or even today, no longer be justifiably provided/zero-rated based on a subscription agreement, by a network operator which also happens to provide IAS. Network operators should remain free to offer these services, which never had any relationship with internet access since they preceded the emergence of the internet, as well as other and new services of their choice. **We urge BEREC to revise its proposals to remove the bias against zero-rating of applications accessible via IAS, and the bias against non-IAS innovation more generally. The purchasing decisions of end-users, in EU Member States (large variations apply) should be respected.** We also urge BEREC to take account of potential extraterritorial effect, in countries which have (far) lower GDP, in which its proposals may be even more detrimental to end-users’ well-being.

15. § 95-123: ‘Specialised Services’. In accordance with our key observations in points 6, 8 and 9 above, we emphasise our opinion that BEREC’s draft Guidelines amount to subjecting innovation in ‘specialised services’ to quasi ex-ante regulatory constraints. This stands in sharp contrast to the ‘innovation without prior permission’ principle which the Regulation and BEREC seek to protect on the internet. The differentiated treatment of

freedom to innovate between the content/applications/services on the internet on the one hand, and ‘specialised services’ provided by network operators on the other hand, is not justified, is unreasonable, and fundamentally needs to be corrected. **We urge BEREC (and the European Commission which is involved in BEREC) to remove BEREC’s proposals to impose quasi ex-ante controls over ‘specialised services’, i.e. that ‘specialised services’ would de-facto become subject to NRA approval/modification, whereas internet content/applications/services are not subject to ex-ante controls.** We also ask BEREC to clarify that, where ‘specialised services’ are concerned, the criterion should NOT be interpreted as (as is implicit in BEREC’s draft) *‘usable or offered as a replacement for any specific content/applications/service which is available on the internet’*. We refer in particular to § 101/104/107/108/180, which in our view are highly problematic in this specific regard. If BEREC’s proposed § 108 is taken as the reference, it could mean that in the future, based on an NRA’s assessment informed by the draft BEREC Guidelines, telephony/messaging/television services, which have been provided by network operators for decades preceding the emergence of the internet, might at some point in the future no longer be justifiably provided by a network operator which also happens to provide IAS. BEREC should reflect on the fundamental legal issues raised by its proposed interpretation of an EU Regulation. We reiterate that **BEREC’s Guidelines cannot unreasonably constrain pre-existing ‘specialised services’, or pre-empt the provision of ‘specialised services’, likely to emerge in the short, medium, or longer term.** Any such constraints would be clearly discriminatory compared to the standard the Regulation sets for internet content/applications/services.

D. VimpelCom Contact Details

Should you require any clarifications or further information on the elements and positions set out in this VimpelCom response, please contact:

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