



T-MOBILE AUSTRIA GMBH
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To BEREC
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Consultation@berec.europa.eu

Vienna, 18th July 2016

Subject: Public consultation on draft BEREC Guidelines on implementation of net neutrality rules

Dear Ladies and Gentlemen,

T-Mobile Austria GmbH („TMA“) appreciates the possibility to comment on BEREC’s draft on Guidelines on implementation of net neutrality rules.

TMA acknowledges BEREC’s intention to harmonize the interpretation of the EU Regulation 2015/2120 (“Regulation“) within Europe as far as possible. A fragmented interpretation of the TSM Regulation would produce high uncertainty among ISPs and market distortions, hence less investment in innovative products and infrastructure.

Nonetheless we see certain points in the interpretation of BEREC which in our point of view do not properly reflect the wording or the intention of the Regulation. In detail:

Agreements on commercial and technical conditions and the exercise of end user choice:

BEREC correctly deduces from art. 3 (2), that agreements regarding commercial and technical conditions between ISPs and end-users are allowed, as long as they do not limit the exercise of the rights of end-users laid down in art. 3(1).

In § 34 BEREC assumes that infringements of art 3 (3) “typically” restrict the exercise of end-users rights, whereas typically implies correctly, that there are important exceptions. In its consideration of art 3 (3) BEREC does not acknowledge the correct relationship between art 3 (3) and 3 (2), namely that art. 3(2) stipulates an exception to the general rule of art 3 (3).

On the contrary, BEREC assumes that “A practice where an ISP blocks, slows down, restricts, interferes with, degrades or discriminates access to specific content, one or more applications [or categories thereof], except when justified by reference to the exceptions of Article 3 (3) third

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subparagraph” would not be compatible with art. 3(3) and therefore prohibited (§ 52). BEREC therefore falsely interprets art. 3 (2) to be subordinate to art. 3 (3) and not an exception to art. 3 (3).

This would lead to absurd and contradicting results:

First of all, this interpretation would lead to the result that zero-rating in general would be prohibited: A result that is openly contradicting the intention of the legislator as well as BERECs own position.

Secondly, in practice there are several services or applications which sole purpose is to infringe art. 3 (3) in the interest of the end-user (i.e. SPAM-Filters, Anti-Virus filters, Content control for minors, etc). These services do not restrict the exercise of end-user rights, but on the contrary amplify them. Although some of these services or applications might to some extent also be provided endpoint-based, any such service or application would always be less efficient, more cost intensive and often impossible (i.e. every device form mobile phones, to smart watches, wearables and any other “less intelligent” device would still need the full spectrum of endpoint-based protection).

An implementation of such services or applications on the level of an ISP (network level) does therefore not contradict the Regulation as long as it based on an agreement following art. 3 (2) and hence **does not contradict art. 3(1), meaning as long as the end-user has the right to end the service at any time** in order to “access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the information, content, application or service, via their internet access service.”

The implementation of such individually agreed on services and applications is not to be seen as traffic management, as traffic management is treating traffic differently with the objective “[...]to contribute to an efficient use of network resources and to an optimization of overall transmission quality responding to the objectively different technical quality of service requirements of specific categories of traffic [...]”, meaning generally applicable rules and not based on specific contractual agreements between end-users and IPSs.

On transparency measures for ensuring open internet access:

In case of mobile networks the Regulation asks for “the estimated maximum and advertised download and upload speed of the internet access services”. BEREC interprets this requirement to the effect that MNOs should provide end-users a “realistically achievable maximum speed for their subscription in different locations in realistic usage conditions.” Predicting speeds for particular end-users in particular locations is technically not feasible with adequate certainty. Any prediction would rely on too many uncertain variables and is nonserious per definition. MNOs would be forced to agree on values that cannot be calculated with sufficient accuracy, leading to enormous legal uncertainty in the contractual relationship between MNOs and their end-users. Due to this fact, we strongly urge BEREC to reconsider its position and to **adjust the requirement to average speeds over the entire ISP’s network.**

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Specialized Services, Internet Access Service:

ISP's commercial basis is their network. Market forces push ISPs to adequately dimension their networks and use them efficiently. In a mobile network any new customer potentially degrades the quality for the existing customers, any provision of a specialized service per definition degrades the quality of the existing customers/services.

The regulation establishes, that network capacity should be sufficient to offer Specialized Services in additions to IAS. As a result the Regulation (in contrast to BERECs interpretation) does not prohibit ISPs from degrading IAS as long as they remain sufficient. As a consequence "general quality" should not be interpreted in a too strict way, as it should give ISPs a certain margin in which specialized service can be introduced without being forced to simultaneously increase the network capacity, as this might lead to inefficient network investments and high uncertainty for ISPs.

About 5G and ex-post regulatory approach:

Future development and application of 5G will rely heavily on differentiation in certain technical parameter, depending on the necessity of each particular service in order to better make us of networks and best increase the experience of the maximum possible end-users. For the 5G development to take place, a flexible ex post regulatory approach is needed in order not to hinder valuable business models before they develop. We also refer to the 5G manifesto published by the industry.

BEREC requires in its guidelines an ex ante application for each specialized service. This requirement would significantly slow down development of specialized services and therefore 5G. **We therefore encourage BEREC to reconsider this ex ante approach, as it is not required by the Regulation.**

We ask BEREC to take our comments into consideration in order to enable ISPs to develop new sustainable business models and not create unnecessary inhibitions to infrastructure investments.

Sincerely,
T-Mobile Austria GmbH

A handwritten signature in black ink, appearing to read 'a.g. Fer'.