GSM Association

Questions to Peter Alexiadis of law firm Gibson, Dunn & Crutcher LLP, concerning the legality of proposed BEREC Guidelines ("Proposed Guidelines") on the Implementation by National Regulators of European Net Neutrality Rules ("BoR (16) 94" of June 2016)

About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with almost 300 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai and the Mobile 360 Series conferences.

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About Peter Alexiadis

Peter Alexiadis serves as the Partner-in-charge of the Brussels office of Gibson, Dunn & Crutcher LLP. He has practised Community law in Brussels since 1989, where his practice is split between competition law, communications policy, and intellectual property law. He is the holder of postgraduate legal qualifications from the Universities of London, Sydney and Thessaloniki. Mr Alexiadis is the Visiting Professor and Course Coordinator for the LLM course on "Competition Law and Regulated Network Industries" at King's College in London, where he has been teaching for over eight years.

Peter Alexiadis' communications practice spans all aspects of regulation, policy and competition law affecting the communications sector, for both private companies and government institutions in Europe, Africa, Asia and the Middle East. His work in the sector is divided between advice for, and the defence of, private companies and counselling to government institutions. He has well over two decades of experience in conducting regulatory due diligence exercises in telecommunications sector mergers and in the drafting of regulatory overviews of the sector for IPOs. He also has extensive experience in the review of State aids schemes affecting the electronic communications sector.

Mr. Alexiadis was the principle draftsman for the European Commission study exploring the new regulatory approach brought about under the 2002 EU Regulatory Framework for electronic communications, with extensive experience in advising both operators and regulators on market definition and market power issues arising under that framework. He has worked extensively in regulatory policy matters across many jurisdictions, including: Ireland, Hungary, Greece, Romania, Portugal, Cyprus, Jordan, South Africa, Egypt, Bahrain, Thailand and San Marino.

Mr. Alexiadis has been described as one of the leading three attorneys in the world in the communications sector by Euromoney's "Best of the Best" publication, and is listed among the top 10 "most highly regarded" regulatory communications lawyers worldwide in The International Who's Who of Regulatory Communications Lawyers. He is also ranked as a leading lawyer for EU Competition by IFLR 1 000 2014 and is included in the 2016-17 The Best Lawyers in Belgium listings for Competition/ Antitrust Law, European Union Law, Media Law, Technology Law and Telecommunications Law. Mr. Alexiadis was also named the Best Lawyers' 2014-15 Brussels Media Law "Lawyer of the Year".

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GIBSON DUNN

Replies to Questions posed by the GSMA on certain issues concerning the legality of BEREC's Proposed Guidelines

18 July 2016

Questions to External Counsel

Consistent with the tenor of your article published in *Chillin' Competition* and soon-to-be published in *E-Concurrences* entitled "*Net neutrality Policy in the Mobile Sector: The Need for Competition Law Standards*", please advise on the issues below arising from the proposed BEREC Guidelines ("Proposed Guidelines") on the Implementation by National Regulators of European Net Neutrality Rules ("BoR (16) 94" of June 2016).

Overview

In the light of your responses to the specific questions below, can BEREC justify its views that the Proposed Guidelines comply with principles of constitutional law, administrative law, legality of administrative acts, general principles of EU law (particularly proportionality and non-discrimination) and the principle of legal certainty? In this regard, do you consider that the Proposed Guidelines achieve their stated aim that they "*should* contribute *to the consistent application of the (TSM) Regulation, thereby contributing to regulatory certainty for stakeholders*"?

For the reasons considered below in relation to particular questions, it is my view that, on balance, BEREC is exceeding its mandate by assuming the role of a legislator. In doing so, it appears to be acting as a body with decisional powers delegated to it by the European Commission.

As discussed in the response to Question A.1, there is no justification in the EU legal order for BEREC to act in the manner in which it purports to act, given that there is nothing in Articles 2 and 3 of Regulation 1211/2009, the case-law of the European Courts or the terms of the *TSM Regulation* (No. 2015/2120), which justifies the approach taken in many parts of BEREC's Proposed Guidelines. The *TSM Regulation* establishes a clear regime which requires that BEREC provide guidance on the principles which will inform National Regulatory Authorities ("NRAs") in their decision-making, rather than *de facto* taking positions which depart from either the text or the spirit of the *TSM Regulation*, and thereby exceeding its legal mandate. The best way of illustrating BEREC's failure to act in the manner anticipated by the legislators of the *TSM Regulation* can be seen in a number of the declaratory positions expressed by it (as discussed individually below), including *inter alia*:

- Recourse to a concept of "specialised services", when the legislature has seen fit in the *TSM Regulation* to define the relevant term in a much broader manner ("*electronic communication services other than internet access services*" are those services "*which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet the requirements of the content, applications or services for a specific level of quality*") (at paragraphs 2 and 95-123 of the Proposed Guidelines). The natural implication of such drafting by the EU legislators is to expand the scope of permissible action for Internet Service Providers ("ISPs"), not to restrict that scope. This is the natural meaning to be attributed to such language, in accordance with the wishes of EU legislators.
- The prohibition of a practice such as "zero-rating" in certain specified circumstances, despite the fact that the *TSM Regulation* makes no such prohibition, whether express

or implied (at paragraph 38 of the Proposed Guidelines). In doing so, BEREC is ignoring the wishes of EU legislators, rather than implementing them.

- The abolition of certain contractual relations retroactively (at paragraphs 130, 185 and 186 of the Proposed Guidelines) despite no such policy imperative being clear on the face of the *TSM Regulation*, and contrary to the approach taken in other EU legislation. The retroactive application of any legal provisions is a radical policy choice, and there is nothing to suggest that the EU legislators have articulated that such an approach should be followed, or that it is justified.
- The reference by BEREC (in paragraph 31 of its Proposed Guidelines) to the fact that "all commercial practices" are caught by its Proposed Guidelines, without limitation on the scope of such practices to those instances of competitive or consumer harm identified in the *TSM Regulation*. The only foreseeable result of such an extension of the scope of BEREC's powers is to further limit the ability of an ISP to manage traffic, contrary to the terms of the *TSM Regulation*.
- The application of strict control by NRAs not only on Internet Access Services ("IASs"), but also on every specialised service (paragraphs 101, 104 and 107 of the Proposed Guidelines), which introduces new measures not prescribed in the *TSM Regulation* (paragraphs 106 and 108 of the Proposed Guidelines).
- The application of a strict "traffic management" regime rather than the application of the "reasonable traffic management" principle under the *TSM Regulation* (paragraphs 46-111 of the Proposed Guidelines). Again, an extension of BEREC's reach beyond the scope of "reasonable traffic management", as prescribed in the *TSM Regulation*, is yet another limit on the actions of ISPs to innovate both commercially and technologically, including the ability to manage traffic, contrary to the terms of the *TSM Regulation*.
- The obligation on ISPs to invest into additional capacity to provide "specialised services" (at paragraph 112 of the Proposed Guidelines) absent any consideration whatsoever of how investment decisions are made in the electronic communications sector, and is at odds with the legal standards that should be used to impose such onerous remedies prescribed under competition rules.
- Prohibiting mobile ISPs from ad-blocking, irrespective of whether it may be in the express interests of consumers for them to do so (at paragraph 75 of the Proposed Guidelines), constitutes a significant erosion of consumer rights, especially when conducted in the complete absence of any considerations of the sorts of countervailing consumer benefits anticipated under the *TSM Regulation*. Such a prohibition is especially difficult to justify, given the general understanding that ad-blocking appears to be permissible at the terminal level.

Contrary to the declaratory positions of BEREC in its Proposed Guidelines, the tenor of the *TSM Regulation* anticipates that BEREC will contribute to the workings of that legislation by setting forth relevant legal and economic principles that can serve as the basis for NRAs to apply the provisions of the *TSM Regulation* in a harmonised manner. Those principles should reflect, wherever relevant and insofar as is possible, the jurisprudence of the European Courts in their application of competition rules. In its Proposed Guidelines, BEREC has failed to do so, preferring to establish a number of relatively sweeping prescriptive judgements (listed above) regarding which practices are prohibited under the *TSM Regulation*. While there is also much in the Proposed Guidelines that can be justified by reference to the terms of the *TSM Regulation*, such a prescriptive approach inevitably produces results which are either disproportionate in a number of instances or which are simply wrong in others. In both instances, the root cause of this failure has been the tendency

of BEREC to exceed its powers in prescribing absolute rules when its legitimate function is to elaborate the principles which should govern the approach of NRAs in applying the terms of the *TSM Regulation*.

It is in the above context that I believe the questions of "consistency" and "regulatory certainty" need to be assessed. In my view, BEREC has been assigned the task of setting forth working principles with which NRAs can, in fact-specific situations, determine how, and the extent to which, the various principles set forth in the *TSM Regulation* can apply in individual situations. In other words, unless a specific power has been conferred upon BEREC to do otherwise, the *TSM Regulation* requires that, other than with respect to throttling and blocking practices which are *per se* prohibited practices, it should develop general principles which can guide NRAs in the application of a harmonised approach to regulation, rather than in achieving uniform *results* in terms of regulatory outcomes. This emphasis on the harmonisation of policy rather than results lies at the heart of the EU Regulatory Framework more generally, as it maintains the importance of taking into account specific local characteristics.[1]

While it may well be the case that a number of BEREC's views are, in fact, conducive of greater "consistency" and "certainty" in terms of their ultimate result, I respectfully contend that such certainty can be simply "wrong" in light of the policy balancing that is required under the *TSM Regulation*.[2] Indeed, there is a complete departure by BEREC from its need to engage in a balancing exercise under the *TSM Regulation* (as set forth, for example, in Recital 16). Instead, it has opted to prescribe outright prohibitions at odds with the subtle policy compromises anticipated by European legislators. As such, the Proposed Guidelines in many places do not appear to be consistent with the principles of sound administration and legal certainty. If anything, the proposals of BEREC seem to be establishing strict rules systematically in favour of Content Access Providers ("CAPs"), rather than for the benefit of end-users. It is the latter class of persons which should in principle be the key beneficiaries of EU Net Neutrality policy. If this were not the case, it would lead to the absurd result that ISPs could not block or throttle content, whereas CAPs could block or throttle content, but at the same time benefit from the prohibition on blocking or throttling imposed on ISPs. Such an approach does not appear to be proportionate in its outcome, and is manifestly discriminatory in its effects.

Whether or not the Guidelines ultimately adopted by BEREC, despite the flaws identified above, can be the subject of legal challenge in their own right is an open question. Whereas the traditional view has been that "soft law" in the form of Guidelines or Recommendations may not be susceptible to legal challenge because it is not binding as a matter of law, it is nevertheless the case that individual Decisions of NRAs taking action in furtherance of such guidance will be the subject of appeal before national courts.[3] Moreover, the European Courts have increasingly considered that soft law carries equal weight with other legal

[1] For example, the thrust of EU regulatory policymaking over the years with respect to mobile call termination rates has been to arrive at an appropriate formula to determine such rates, rather than the outright prescription of such rates.

[2] Refer to P. Alexiadis, "EU Net Neutrality Policy and the Mobile Sector: The Need for Competition Law Standards", which has been published on the Chillin'Competition blog on 16 May 2016.

[3] Refer to Recital 12 and Article 4 of Article Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive"), OJ L 108, 24.4.2002, at pp. 33-50.

instruments where that soft law is followed consistently by decision-makers and where it purports to establish enforcement principles, which depart from an empowering legal instrument upon which they are based. By way of example, the European Commission is held to account to follow its own guidance with respect to its leniency and fining policies, even though those policies have no analytical basis with respect to the terms of Article 101 TFEU and Regulation 1/2003 respectively.[4]

In France, for example, the guidance issued by the French Competition Authority was recently the subject of legal challenge, having been considered to create binding legal obligations in the circumstances.[5] It is respectfully submitted that, insofar as BEREC is considered to be acting as a legislator, and to the extent that its actions are embraced by NRAs as being binding, there is an arguable case that BEREC's guidance should also be the subject of legal challenge, as occurred recently in equivalent circumstances under French law. The public policy behind the pursuit of such a claim would be to ensure that questionable laws which create legal rights or which impose legal obligations are not promulgated where they are not subject to effective legal challenge, as this would lead to a welfare loss for society.[6]

In light of this recent French precedent and the growing body of jurisprudence that has developed around the concept of "effectiveness" of enforcement of EU law,[7] there is every reason to believe that the effectiveness doctrine can also serve as the basis of legal challenge of Guidelines where they purport to establish legal rights. Given the fact that the *TSM*

[4] In these situations, European Courts are bound to grant this type of "soft law" more relevance, because they have individually generated legitimate expectations on undertakings involved in a specific Commission investigation and, as such, they impose duties on the Commission to either follow its own pre-published policy or to provide sufficiently convincing legitimate reasons to depart from that policy in the particular instance. For a discussion on this issue, refer to O. A. Stefan, "European Competition Soft Law in European Courts: A Matter of Hard Principles?" (2008) European Law Journal, Vol. 14, No. 6, at pp. 753-772.

[5] Refer to the Judgment of the French Administrative Supreme Court (Conseil D'Etat), *Société NC Numericable*, N° 390023, 21 March 2016.

[6] In the patent system, for example, policymakers arguably provide a more lenient regime for those challenging patents because it is felt to be in the society's interest that unworthy patents be removed.

[7] The principle of "effectiveness" underlies a series of developments in the sphere of judicial protection and has been recognised as a general principle of Union law by the Court of Justice of the European Union ("CJEU") (see, *e.g.*, Joined Cases C-46 and C-48/93, *Brasserie du Pêcheur v Germany and the Queen v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-1029, para. 95 and the Opinion of Léger AG in Case C-5/94, *The Queen v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECR 1-2553 at paras. 174-176). In other cases, the Court has referred to the "*effectiveness of Community law*" rather than the principle of effectiveness (see, *e.g.*, Case C-106/77, *Administrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, paras. 18, 20, 22-23; Case C-213/89, Factortante and Others [1990] ECR I-2433, para. 21; and Case C-224/01, *Köbler v Austria* [2003] ECR I-10239, at para. 33.). The principle of "effectiveness", according to Professor Tridimas, "*requires the effective protection of Community rights*" (see Tridimas, T., "The General Principles of EU law", Oxford, 2006, at p. 418). This principle differs from other general principles of law in that it is not based directly on the laws of the Member States but derives instead from the distinctive nature of the European Union. In the words of the CJEU, in its *Van Gend en Loos* ruling, the Union is a "*new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields*". Therefore, as the CJEU has explained, Union law "*not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage and which arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community*." (both citations are from Case C-26/62, *Van Gend en Loos* [1963] ECR 1).

Regulation refers expressly to the need for BEREC Guidelines in order to complete its implementation at some later point in time, it is therefore arguable that those Guidelines can be challenged either as an integral part of the *TSM Regulation* itself or in their own right because they have been conferred the status of a legal instrument through their explicit association with the *TSM Regulation.*[8] These types of legal challenges seem perfectly compatible with the doctrine of effectiveness and legal certainty, especially given the fact that the operation of the Guidelines is so intricately entwined with the force of the *TSM Regulation*. Because such a legal hybrid is "neither fish nor fowl" in the Community legal order (see Response to Question A.1), it is arguable that it can be the subject of legal challenge given that its immunity from legal challenge would call into question the effectiveness of EU law and would undermine the principle of legal certainty.

[8] Therefore, while the Proposed Guidelines issued by BEREC amount to an act which does not produce binding legal effects (*i.e*., they do not meet the specific conditions to implement a direct action under Article 263 of the Treaty of the Functioning of the European Union ("TFEU"), Article 277 TFEU, provides a party with the ability to plead illegality against institutional acts that do not satisfy the criteria for enforceability of Article 263 TFEU (annulment action). In Case T-394/08, *Regione autonoma della Sardegna and Others v Commission* [2011] ECR II-06255, the Commission had relied *explicitly* on its Guidelines in arriving at its Decision. The General Court, therefore, held that there was a direct legal connection between the contested Decision and the general measure represented by the Guidelines. In accordance with settled case-law, Article 277 TFEU expresses a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a Decision of direct and individual concern to that party, the validity of previous acts of the institutions which, even if not in the form of a Regulation, form the legal basis of the Decision under challenge, where that party was not entitled under Article 263 TFEU to bring a direct action challenging those measures. A party is thus considered to be "affected" by the measures in question without being in a position to request that those measures be declared void (see Case 92/78, *Simmenthal v Commission* [1979] ECR 777, at paras. 39 and 40, and Case T-23/99, *LR AF 1998 v Commission* [2002] ECR II-1705, at para. 272). Since Article 277 TFEU is not intended to allow any party to contest the applicability of a measure of general application in support of any action, the general measure claimed to be illegal must apply, directly or indirectly, to the issue with respect to which the action is concerned, and there must be a direct legal connection between the contested individual Decision and the general measure in question (see Case 21/64 *Macchiorlati Dalmas e Figli v High Authority* [1965] ECR 175, at paras. 187 and 188; Case 32/65 *Italy v Council and Commission* [1966] ECR 389, at para. 409; Joined Cases T-6/92 and T-52/92 *Reinarz* v *Commission* [1993] ECR II-1047, at para. 57; *LR AF 1998 v Commission*, [2002] ECR II-1705, at para. 273; and Case T-64/02, *Heubach v Commission* [2005] ECR II-5137, at para. 35).

A. Institutional and Constitutional Issues

1. Do you consider that BEREC has acted within its mandate in terms of the Proposed Guidelines, both by reference to its powers and to what is anticipated under the *TSM Regulation*?

A Directive in effect cannot masquerade as a Regulation in name

EU Regulations are designed to ensure the uniform application of Union law in all Member States. As such, they have specific characteristics in terms of their effect and applicability which differentiate them from Directives. Regulations must be of general application and binding in their entirety and must have direct effect.[9] Accordingly, they must be sufficiently precise and unconditional in their terms, with no discretion left to the NRAs in their implementation.[10] It is the effect of these characteristics which renders a Regulation immediately binding throughout the EU without the need for any transposition measures.

By contrast, a Directive is only binding as regards the policy result to be achieved in each Member State, while leaving the choice and form of implementation to the NRAs.[11] To the extent that any level of "discretion" is permissible under a Regulation, it lies in the hands of the Commission, not the Member States, the latter are only capable of being conferred "*fixed administrative powers*".[12] Member States can outline their technical modalities of compliance or implementation (but not take a contrary position on matters of substance), while also taking positions on matters not covered by the Regulation.[13] As has been made clear by the Court of Justice of the European Union ("CJEU"), any method of national implementation of a Regulation is contrary to the Treaty where it would have "*the result of*

[9] Refer to Article 288 of the TFEU where it provides that: "*A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States*".

[10] Refer to Case 43/71, *Paloti S.A.S v Ministry of Finance of Italian Republic* [1971] ECR I-1039; Case 39/72, *Commission v Italy* [1973] ECR I-101; and Case 31/64, *"De Sociale Voorzorg" Mutual Insurance Fund v W.H. Bertholet* [1965] ECR I-81. Refer also to the Opinion of Advocate-General Roemer in Case C-93/71, *Leonesio v Minstero dell' Agricoltura e Foreste* [1972] ECR I-31.

[11] Refer to Article 288 of TFEU where is provides that: "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*".

[12] For example, refer to the Opinion of Advocate-General Roemer in Case C-93/71, *Leonesio v Minstero dell' Agricoltura e Foreste* [1972] ECR I-31, where he states that: "[…] *it is clearly possible to discount the existence of any national discretionary power under the Community regulations*". Within the EU Regulation concerned, the Commission was provided with the sole discretionary power, whereas the national authorities of the Member States were only given "*fixed administrative powers*" (emphasis added). In addition, refer also to the Opinion of Advocate-General Warner in Case 31/74, *Filippo Galli* [1975] ECR I-47, where he expresses that "*it is for the Commission alone*" to enforce the provisions of the Regulation concerned.

[13] See Case C-403/98*, Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna, Organismo Comprensoriale n° 24 della Sardegna and Ente Regionale per l'Assistenza Tecnica in Agricoltura (ERSAT)* [2001] ECR 103, at para. 26: "[…] *although, by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States*".

creating an obstacle to the direct effect of Community Regulations and of jeopardising their simultaneous and uniform application in the whole of the Community".[14]

In my view, insofar as BEREC is reflecting the positions to be taken by the EU Member States, it is acting outside its "*fixed administrative powers*", whether because the substance of its Proposed Guidelines in a number of respects runs counter to the requirements of the *TSM Regulation* (see separate discussions below) or because its own powers are not capable of conferring upon it the powers which it purports to express in its Proposed Guidelines (pursuant to the doctrine of *delegatus non potest delegare*).

In the alternative, insofar as BEREC were to characterise itself as doing nothing more than reflecting the will of the European Commission (the "Commission"), it would in effect be acting as a "Euro-regulator", a task that the Commission is not entitled to delegate to BEREC.

BEREC's mandate has been exceeded

BEREC's mandate has been conferred under the terms of Articles 2 and 3 of *Regulation 1211/2009*. That mandate under *Regulation 1211/2009* does not appear to extend expressly to the subject-matter covered in the *TSM Regulation*, to the extent that the role of BEREC is seen to be limited to specific issues arising under the various Directives that make up the EU Regulatory Framework of 2003. NRAs and the Commission are only obliged under Article 3 of *Regulation 1211/2009* to take the "utmost account" *inter alia* of any guidelines issued by BEREC insofar as those guidelines are issued pursuant to the express powers conferred under Article 3(1) of *Regulation 1211/2009*. With respect, the powers listed in sub-paragraphs (a)-(n) of Article 3(1) do not envisage the role that BEREC seeks to play in issuing its Proposed Guidelines under the auspices of the *TSM Regulation*. The only sweeping power set forth in Article 3(1) is in sub-paragraph (m), but even this power is critically limited to the delivery by BEREC of opinions "aiming to ensure the development of common rules and requirements for providers of *cross-border business services*" (emphasis added). With respect, such a power does not extend to the services falling within the ambit of the *TSM Regulation*, most of which are directed towards the ordinary European citizen (as opposed to business users). As will also be explained elsewhere in this document, in the event that its Proposed Guidelines are to reflect the final version of its Guidelines, BEREC is going far beyond the development of the sorts of "common rules" that one would expect from an institution that is limited only to the exercise of advisory powers.

Given that the *TSM Regulation* has not seen fit to amend the scope of BEREC's original mandate under *Regulation 1211/2009*, while at the same time having expressly made amendments to *Regulation 531/2012* and *2002/22/EC* where it was considered necessary by European legislators to do so, one can reasonably assume that *Regulation 1211/2009* provides a comprehensive set of actions which BEREC can undertake. It should therefore follow that the Guidelines which BEREC intends to issue under Article 5(3) of the *TSM Regulation* must be issued in accordance with the mandate conferred upon it under Article 3(1) of *Regulation 1211/2009*. Acting beyond the scope of those powers renders BEREC's guidance vulnerable to the allegation that it is acting *ultra vires*. It is not sufficient for BEREC to seek to circumvent these limits to its capacity by simply asserting (as it does in BoR (16) 94) that its Guidelines have been adopted in accordance with Article 3(3) of

[14] Refer to Case 39/72, *Commission of the European Communities v Italian Republic* [1973] ECR 101, at para. 17.

Regulation 1211/2009 and Recital 19 of *Regulation 2015/2120*. With respect, a fundamental change in legal capacity for BEREC can only be achieved by means of a separate amendment (which has not occurred), and never by means of an oblique reference in a Recital to a subsequently adopted Regulation that the "utmost account" be taken of the Guidelines issued by BEREC under Article 5(3) of the *TSM Regulation*.

Moreover, Article 5(3) of the *TSM Regulation* refers to the purpose of BEREC Guidelines adopted pursuant to that provision as being in order to contribute to the "consistent application" of the *TSM Regulation, with the guidelines being designed for the "implementation of the obligations of national regulatory authorities*" in compliance with Union law.[15] In other words, there is nothing to suggest that the guidance provided by BEREC should be anything other than to clarify implementation of the *TSM Regulation* for the sake of achieving consistency, rather than to prescribe normative rules pursuant to "umbrella" principles found in the *TSM Regulation*. If the latter scenario applies, the *TSM Regulation* arguably does not satisfy the legal criteria associated with the need for a Regulation to have legal certainty on its own terms (as discussed above), which would mean that it is null and void. As will be argued later in this document, there are numerous instances where BEREC exceeds its mandate, whether by imposing obligations or by utilising legal definitions which do not exist under the *TSM Regulation.*

BEREC should not act as a de facto Euro-regulator

Finally, insofar as BEREC purports to adopt Guidelines which depart from what is prescribed in the *TSM Regulation*, the question remains whether, in so acting, BEREC is assuming the role of an "EU-regulator". However, as this author has described before in a Study for the European Commission,[16] there are limits under Union law on the extent to which the Commission is able to delegate decision-making powers that require a decision-maker such as BEREC to conduct complex economic assessments. Only an amendment to the Union Treaties or a refinement of existing judicial precedent by the CJEU could allow the creation of a Euro-regulator exercising powers which are either not expressly delegated to the Commission or to the NRAs under empowering Regulations or Directives.

Thus, in its *Meroni* Judgment,[17] the CJEU made it clear that the power of delegated decision-making is constrained by the powers received under the Treaty. Discretionary powers cannot be delegated, but those powers relating only to data collection and the fulfilment of procedural issues can legitimately be the subject of delegation. It is clear that there are existing data collection and monitoring powers ascribed to BEREC under the *TSM Regulation*, and there is absolutely no question that those BEREC functions are legitimate

[15] Refer to Article 5(3) of the TSM Regulation: "*By 30 August 2016, in order to contribute to the consistent application of this Regulation, 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*".

[16] Refer to Gibson, Dunn & Crutcher Final Report (A study for the European Commission), "Impact of Institutional Issues in Review of the EU Framework for Electronic Communications – Institutional Issues in the Review of the ECNS Regulatory Framework", May 2007.

[17] Refer to Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authorityof the European Coal and Steel Community* [1957-1958] ECR I-133.

and legal. In its subsequent *Romano* Judgment,[18] the CJEU confirmed that an administrative body created pursuant to a Regulation cannot be empowered to adopt acts having the force of law. Thus, while it is consistent with prevailing jurisprudence that BEREC can and should provide guidance to NRAs in the form of broadly acknowledged principles of law and economics, it is equally clear that it should not engage in declaratory views that seek to have the force of law.

The various Articles of the *TSM Regulation*, when supplemented with its Recitals, are clear in their meaning. To the extent that they require elaboration, as I have argued elsewhere,[19] that is available through recourse to competition law principles. By going beyond that mandate and taking definitive positions in the abstract on matters that require fact-specific assessment of complex economic evidence, BEREC is arguably acting in a manner which is at odds with its powers vested in it under the terms of its empowering *Regulation 1211/2009* or under the *TSM Regulation*, and with respect to which the Commission is not in a position to delegate.

Conclusion

The role of BEREC under the *TSM Regulation* has the potential to create a hybrid legal instrument which has no place in the EU legal order. The use of BEREC to establish declaratory positions in furtherance of the supposed policy aims of that Regulation exacerbates the legal uncertainty regarding the enforceability of that legal instrument. BEREC's role needs to be confined to that of an advisory body which clarifies the principles set forth in the *TSM Regulation*. However, in order to ensure that BEREC does not exceed its mandate, that advisory role must be based on the clarification of principles found in existing EU precedents. To the extent that BEREC goes beyond that function and acts as a lawmaker in its own right without the support of a statutory instrument to do so – and in the absence of the Commission being able to delegate its authority to this end – it is acting *ultra vires*.

2. Does BEREC and its constituent NRA membership have the necessary powers to effectively implement the terms of the *TSM Regulation*, if it were to proceed to enforce its Proposed Guidelines?

NRAs have express powers conferred upon them to adopt measures which can be the subject of the Commission's review under Articles 7-7a of the *Framework Directive.*[20] These Articles serve as the basis of the review mechanism used to determine the legality of NRA

[18] Refer to Case 98/90, *Giuseppe Romano v Institut National D'assurance Maladie-Invalidité.* [1981] ECR I-1241.

[19] Refer to P. Alexiadis, "EU Net Neutrality Policy and the Mobile Sector: The Need for Competition Law Standards", *op. cit.*

[20] Refer to Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 337, 18.12.2009, at pp. 37-69. See also Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, at pp. 33-50.

Decisions adopted in relation to specific NRA functions related to the finding of market power or the exercise of dispute resolution powers (Article 20 of the *Framework Directive*; see also Recitals 32-33) regarding the imposition of remedies adopted further to the policy goals established under Article 8 of that Directive. It is clear that these provisions do not confer any of the relevant powers under the *Framework Directive* upon the NRAs to implement effectively the terms of the *TSM Regulation*.[21]

The other source of power for NRAs can be found in the various terms of the *TSM Regulation*, which confers upon NRAs a series of powers relating to: (i) monitoring and compliance with open internet rules;[22] (ii) the examination of traffic management practices in terms of end-users' rights;[23] (iii) ensuring that Internet Access Service (IAS) is not degraded;[24] (iv) responsibility to assess commercial practices in order to ensure that the *TSM Regulation* is not circumvented; and (v) the setting of minimum Quality of Service ("QoS") requirements on ISPs.[25] It is clear that these powers relate to functions which are designed to monitor and to control technical parameters of IASs so that compliance with the policy goals underpinning the *TSM Regulation* can be ensured. Even the power to assess commercial practices (such as zero-rating) in order to determine their compatibility with the *TSM Regulation* is limited, insofar as there is no statement contained in the *TSM Regulation* which suggests that *de novo* decision-making going beyond what is expected from NRAs is set forth in the Regulation.

Accordingly, there is no obvious mandate for NRAs to impose regulatory obligations on ISPs unless they are in furtherance of well understood principles of existing EU law which are derived from the obligations contained in the *TSM Regulation* and which confer greater meaning to its provisions (*e.g.*, principles of competition law). The powers conferred on NRAs through the *TSM Regulation* are insufficient in this respect to justify a number of positions taken by BEREC in its Proposed Guidelines, insofar as they extend predominantly to technical issues, while envisaging a residual power on NRAs to prevent "circumvention". The circumvention foreseen, however, is from the principles set forth in the *TSM Regulation* itself, rather than contained in *de novo* rule-making established by BEREC in its Proposed Guidelines. By contrast, the powers of NRAs listed in the *Framework Directive* are silent as to the types of skills that need to be activated with regard to those matters arising from the operation of the *TSM Regulation*.

3. Given the flexibility apparently accorded to ISPs under the *TSM Regulation* to satisfy transparency requirements in Article 4, is it appropriate for BEREC to prescribe detailed and specific rules on transparency?

[21] Refer to Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, at pp. 1-18 ("*TSM Regulation*").

[22] Refer to Recital 18 and 19, as well as Articles 4 to 6 of the *TSM Regulation*.

[23] Refer to Recitals 11 and 18, as well as Articles 3 to 5 of the *TSM Regulation*.

[24] Refer to Recitals 11, 15 and 19, as well as Articles 3 and 5 of the *TSM Regulation*.

[25] Refer to Recitals 9, 17, 19, as well as Articles 3 to 5 of the *TSM Regulation*.

The rules that are currently in place under Article 4 of the *TSM Regulation* envisage a 'technical function' which should be satisfied by a "proportionate" regulatory burden on ISPs so as to provide ISPs, end-users and NRAs with a sufficient level of legal certainty that is required under the Regulation.[26] Thus, there are limits regarding the transparency measures that BEREC might propose, given that the responsible EU legislators have already had the opportunity to consult with stakeholders during the drafting of the *TSM Regulation* and have already taken a view – on the face of the Regulation - as to what is "necessary" and "proportionate" to achieve the objectives of the *TSM Regulation*.[27]

The question remains whether the *TSM Regulation* is sufficiently clear and precise on issues of transparency in order to be able to achieve the policy objectives sought.[28] In this regard, while Recital 18 of the *TSM Regulation* provides that BEREC is to provide guidelines on transparency issues,[29] BEREC has not been conferred powers with which to elaborate on the provisions of Article 4, and no legislative authority has been conferred upon it to create new transparency and compliance obligations on ISPs, especially if those rules are not necessary to strike a balance between the potentially conflicting interests of stakeholders. In addition, BEREC's mandate, as described in Recital 18 of the *TSM Regulation*, only refers to the "methodology" which should be established through the Guidelines.[30] This specific terminology refers to the mechanism as described in Article 4(4) (how monitoring of contractual parameters may lead to contractual non-conformity). Thus, Recital 18 cannot be used as sound basis of a "general mandate" to define the transparency obligations included in Article 4.

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[26] Article 5(4) of the Treaty provides that: "*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality*". As BEREC is not defined under the Treaty as an institution (as it was set up by the Member States - for a list of the EU institutions, refer to: http://europa.eu/about-eu/institutions-bodies/) any measures that go beyond what is necessary and proportionate, must therefore be justified by the Commission. The principle of proportionality can be invoked by individuals as well as Member States (see *e.g.*, Case 116/82, *Commission v Germany* [1986 ECR I-2519; and Case 37/83 *Rewe-Zentrale v Landwirtschaftskammer Rheinland* [1984] ECR I-1229).

[27] Refer to: Case C-331/48, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa et al.* [1990] ECR I-4023, at para. 13: "*The* [CJEU] *has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness* [of the] *measures* [must be] *appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question*". Refer also to Joined Cases C-133/93, C-300/93 and C-362/93, *Antonio Crispoltoni v Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v Donatab Srl.* [1994] ECR I-4863, at para. 40; Case C-180/96, *United Kingdom v Commission* [1998] ECR I-2265, at para. 96; and Case C- 189/01, *H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij (Foot and mouth disease)* [2001] ECR I-5689, at para. 80.

[28] Refer to Case 43/71, *Paloti S.A.S v. Ministry of Finance of Italian Republic* [1971] ECR I-1039; Case 39/72, *Commission v Italy* [1973] ECR I-101; and Case 31/64, *"De Sociale Voorzorg" Mutual Insurance Fund v W.H. Bertholet* [1965] ECR I-81. Refer also to the Opinion of Advocate-General Roemer in Case C-93/71, *Leonesio v Minstero dell' Agricoltura e Foreste* [1972] ECR I-31.

[29] In addition, Recital 18 of the *TSM Regulation* provides that: "*National regulatory authorities should enforce compliance with the rules in this Regulation on transparency measures for ensuring open internet access*". In doing so, it does not provide that they should "enforce" the BEREC Guidelines, but should only take the "utmost account".

[30] Refer to recital 18 of the *TSM Regulation*, which provides that: "[…] *The methodology should be established in the guidelines of the Body of European Regulators for Electronic Communications (BEREC) and reviewed and updated as necessary to reflect technology and infrastructure evolution* […]".

For example, it is arguable that BEREC's interpretation of Article 4(1)(d) goes beyond what is proportionate and necessary to achieve the objectives sought by the *TSM Regulation*, as it requires ISPs to provide *detailed technical parameters* in individual contracts which are arguably of no discernible benefit to the end-user. On the contrary, all that Article 4(1)(d) requires is "*a clear and comprehensible explanation*", rather than the specification of detailed technical parameters. There is a material distance between these two concepts, and the necessary policy concerns suggested in the *TSM Regulation* being capable of being satisfied by much less onerous obligations.

While the use of such an excessive standard will no doubt be justified by BEREC as leading to a more "consistent application" of the *TSM Regulation*, as is required under the terms of Article 5(3), the public policy mischief sought to be addressed by the obligation proposed by BEREC is disproportionately burdensome in addressing that mischief. One would have thought, for example, that existing NRA practices regarding transparency norms would be more than sufficient to satisfy what are very generic transparency requirements in the *TSM Regulation* under Article 4. One can only imagine, *in arguendo*, that greater levels of detail might be required to detect any circumvention of a basic internet access principle. However, EU legislators have not seen fit to prescribe specific transparency requirements with respect to such a matter. It should follow that, having taken the decision not to seek greater detail for what is clearly a more problematic enforcement issue, it would be disproportionate to require onerous transparency measures with respect to matters which are not problematic under the *TSM Regulation*.

4. Has BEREC exceeded its mandate when prohibiting certain zero-rating practices which are not prohibited under the *TSM Regulation*?

With regard to the practice of zero-rating, the *TSM Regulation* neither defines, nor does it explicitly or implicitly apply an outright ban on ISPs concluding zero-rating commercial agreements. Such commercial agreements do not on their face, it is submitted, infringe Article 3(3) of the *TSM Regulation*, which provides that ISPs are obliged to "*treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used*." Indeed, the Commission has itself confirmed the view that zero-rating "*does not block competing content and can promote a wider variety of offers for price-sensitive users, give them interesting deals, and encourage them to use digital services*".[31] Such a normative view is a long way removed from the clear rule-making that one associates with *ex ante* regulation and is wholly consistent with the approach adopted under competition rules; by contrast, the roaming

[31] See the Commission's Press Release "Roaming charges and open Internet: questions and answers", 30 June 2015. In addition, zero-rating practices are used as a tool whereby mobile network operators are able to differentiate themselves by offering customised content with their own services, which can effectively strengthen competition between the different providers. Further: (a) ISPs have incentives to maintain a diversity of actual and potential content providers and are therefore not likely to participate in activities that could possibly foreclose competition; (b) the most common zero-rating programs are carrier initiated and thus, do not require financial compensation from the content provider; (c) many small content providers engage in zero-rating; and, (d) zero-rating critics have not demonstrated any harm *per se* to competition or consumers from zero-rating, or even evidenced harm to individual competitors. Refer to J. A. Eisenach, "The Economics of Zero Rating", NERA Economics Consulting, March 2015, at p.7.

pricing aspects of the *TSM Regulation* are clear in their prescription that tariff information must be provided for free (*i.e.*, zero-rated).[32]

As regards the possibility of action being taken under the *TSM Regulation* to address a potentially anti-competitive zero-rating policy,[33] it is clear that such a practice would only be likely to foreclose competitors if put into effect by an undertaking with market power (*i.e.*, a form of vertical foreclosure), as would be the case with all below-cost pricing strategies.[34] Having said that, in accordance with the *TSM Regulation*, the wider implications of zero-rating can also be addressed as a particular embodiment of the non-discrimination principle (which means that traditional jurisprudence and administrative practice on non-discrimination should serve as the basis for assessment). Where that alleged discrimination involves a third-party, Article 101 TFEU would also offer regulators the possibility to take appropriate action where a significant portion of the relevant market is affected, even in the absence of market power.[35]

Nevertheless, under paragraph 38 of its Proposed Guidelines, BEREC expressly prohibits zero-rating practices in those circumstances where: "*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*". While certain circumstances may exist where such a practice may discriminate against internet traffic by blocking some traffic when the cap is reached, the wording of the *TSM Regulation* implies that *all* such practices must be evaluated under an "effects" based test by the NRAs (as *per* paragraph 43 of the Proposed Guidelines). Moreover, as witnessed in practice,[36] the

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[32] The policy decision not to ban zero-rating practices outright was foreseen by Commissioner Oettinger in his answer to a question on zero-rating put forward by the European Parliament on the 15 January 2016. Commissioner Oettinger also tacitly acknowledges that EU competition law rules are sufficient to deal with any such concerns arising from anticompetitive zero-rating practices. (http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-014462&language=EN). Indeed, the reaction of Dutch, Slovenian and Norwegian officials to the adoption of the *TSM Regulation* is instructive, insofar as they have each interpreted (in the public domain) its provisions as running counter to their own existing national rules prohibiting zero-rating practices.

[33] Refer to J. A. Eisenach, "The Economics of Zero Rating", *op. cit.*, who underlines that the current zero-rating models observed in practice do not appear to raise any significant competition concerns, namely because: (i) most zero-rating programs are carrier initiated and do not involve payments to carriers by the providers of the zero-rated content; (ii) in sponsored data programs where content providers are providing payments to carriers, there appears to be no evidence that such arrangements involve exclusivity; and (iii) there is no *prima facie* basis for concluding that zero-rating programs involving exclusivity would be anti-competitive.

[34] For example, see Case COMP/38.233 − *Wanadoo Interactive* (2003); Case T-340/03, *Telecom v Commission* [2007] ECR II-107; Case T-339/04, and Case C-202/07, *France Telecom v Commission* [2009] ECR I-02369.

[35] Only a situation leading to the charging of excessive prices would be likely to be problematic because, as stated by M. Cave & P. Crocioni, in "Net neutrality in Europe", Communications & Convergence Review 2011, Vol. 3, No. 1: "*Ex ante intervention is currently inappropriate as there is no evidence of ISPs charging CAPs. In the future, even if they started to do so, this would not necessarily be a concern. For example, absent restrictions a two-tiered system could emerge with prioritised access offered for a fee and best efforts access remaining free. A concern about a competitive bottleneck would probably arise only if ISPs started to charge a "high" price for best efforts.*

[36] The outright prohibition of zero-rating can have negative repercussions on allowing new entrants to enter the marketplace: in the Netherlands, Vodafone was fined for concluding an agreement whereby it zero-rated the HBO-Go service, which directly competes with Netflix. In addition, in Slovenia telecommunications operators have been prohibited from concluding zero-rating agreements with new-entrants who might

outright prohibition of zero-rating practices would prevent new entrants from entering the marketplace to compete with incumbents, as zero-rating provides new entrants with a competitive edge.

In addition, under paragraph 52 of the Proposed Guidelines, BEREC also submits that NRAs are to apply a prohibition on applying a data cap where a zero-rated application is not blocked. However, if such a prohibition were to apply, it is inconceivable how emergency calls could be delivered *via* data. Similarly, it is surely inconceivable that policymakers should object to zero-rating services which have an educational or other social component, but this would be the natural outcome of an approach which does not consider that the balancing of interests is relevant. [37]

It is thus arguable that the proposed prohibition by BEREC of zero-rating practices exceeds its mandate, as BEREC has failed to take due account of other factors which, under the terms of the *TSM Regulation*, could justify such a practice in the event of an objective policy trade-off being made under the *TSM Regulation* between potential foreclosure and the pursuit of otherwise credible public policy options. NRAs should be guided with respect to the policy trade-off that needs to be made by them, rather than being confronted with two examples of illegal zero-rating practices whose competitive effects in practice may be materially different to that anticipated by BEREC in individual circumstances.

The same concern applies with respect to BEREC's assumption that a higher price or a zero-rate is *de facto* more likely to be discriminatory than a discounted rate. Again, this is an assumption which may or may not be correct depending on the characteristics of the relevant service. For example, a provider of a music app may prefer to charge a higher data rate (and collect a percentage of the revenue from the operator) than to charge for the content itself. This renders the collection of revenue much easier for both the content provider and the customer and is similar to the commercial model already in place for premium rate services. Rather than reducing the development of new applications, it is likely to stimulate the development of smaller services by providers who do not have the funds to invest in complex revenue collection exercises. Similarly, if a customer care app is provided for free, it will make very little difference to customer choice, but will provide significant benefits to the customer in controlling their data usage and spending.

5. Does the mention or omission of specific practices in the Proposed Guidelines constitute any potential risk of infringement of the Human Rights provisions in the Treaties or the ECHRC if a particular interpretation of the concept of "non-discrimination" is enforced (*e.g.*, acting to protect minors, ad-blocking *etc.*)?

otherwise become effective competitive constraints to incumbents such as Spotify and Dropbox. This is the opposite effect of what the Proposed Guidelines should be promoting.

[37] According to one commentator, "*a blanket prohibition would have complex effects that are not well understood. What is fairly clear, however, is that it would put NRAs in the miserable position of denying benefits to consumers that the market players would otherwise be willing to give them. For this reason, it is perplexing that European consumer advocates have been the most vocal advocates of a position that most likely increases effective prices to consumers"* (refer to J.S. Marcus, "New Network Neutrality Rules in Europe: Comparisons to those in the US", 25 May 2016 (available here). Moreover, the prohibition of zero rating beyond the specified cap might place ISPs in the unenviable position of being in breach of Article 3 (3) of the *TSM Regulation* by the blocking of the zero rated service which is not actually agreed upon between the end-user and the ISP.

There is a growing consensus that general principles of human rights, as contained in the *Charter of Fundamental Rights of the European Union* (the "Charter"), incorporated into the general body of EU law as a result of the enactment of the Treaty of Lisbon in 2007,[38] the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the "Convention") and general principles of EU law (including more recently by express reference in legislation such as *Directive 2009/140/EC*), have a role to play in the application of principles of Net Neutrality, as they find their broader application in the right to freedom of expression and the right to information (see Article 10).[39] This general view is shared by BEREC in its other policy statements.[40]

However, it must be wrong to think that the rights prescribed under the Convention rest solely to the benefit of CAPs. Thus, Article 11 of the *Charter,* Article 10 of the Convention and Article 19(2) of the UN *International Covenant on Civil and Political Rights* respectively all refer to the fact that the right to freedom of information includes the right to "*receive, seek and impart information*". This means that the rights of consumers are at least of equal weight to those distributing content. Indeed, the Council of Europe is clear that the right to freedom of information is directed towards *end-users* enjoying "*the greatest possible access to Internet-based content, applications and services of their choice, whether or not they are offered free of charge, using suitable devices of their choice*".[41]

There are *two* unforeseen implications of the approach taken by BEREC in its Proposed Guidelines:

1. *First*, if one were to wrongly ignore the wishes of end-users, one would end up by compelling them to accept certain types of objectionable content which they would otherwise prefer to avoid. In this way, a strict application of the non-discrimination principle would mean that an ISP would not be able to have ad-blocking offered to them by their ISP (see the Proposed Guidelines at paragraph 75). However, the inability of an end-user to exercise such fundamental choices seems to be anathema to a Net Neutrality policy which purports to put the end-user at the heart of the rights protected by the *TSM Regulation*. As such, it is strongly arguable that the removal of the ability to engage in such practices violates their human rights in terms of the right to freedom of information. It is also arguable that the removal of such rights, in the circumstances, is in violation of the principle of privacy found in Article 8, as consumers would be denied the right to preserve their privacy if a strict approach were taken to the principle of non-discrimination.

[38] See Article 6(1) of the Treaty of Lisbon, OJ C 306/13 2007. See, further, Charter of Fundamental Rights of the European Union ("CFREU"), OJ C 83/02 2010. Note that the CFREU had been formally adopted in December 2000 in Nice by the European Parliament, Council and Commission.

[39] Refer to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) (Rome, 4 November 1950; T.S. 71(1953)) (as amended by its Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010).

[40] For example, refer to "BEREC Response to the European Commission's consultation on the open Internet and net neutrality in Europe" ("BoR (10) 42"), 30 September; and "BEREC Guidelines for quality of service in the scope of net neutrality", ("BoR (12) 131"), 26 November 2012.

[41] Refer to the Explanatory Memorandum of the Council of Europe: http://www.coe.int/en/web/internet-users-rights/access-and-non-discrimination-explanatory-memo.

2. *Second,* the approach taken by BEREC conflicts with the principle established by the case-law of the European Courts,[42] that laws should not be retroactive unless there is an overriding public policy reason for hindering the legitimate expectations of individuals that illegality is something that can only be identified on a forward-looking basis. In addition, the CJEU also requires that a measure must indicate in its statement of reasons why retroactivity is necessary.[43] These requirements must be satisfied whether retroactivity is expressly stated in the measure itself or is the material result of its contents.[44] Accordingly, it is arguable that EU human rights rules have been infringed if certain proposals in BEREC's Proposed Guidelines are ultimately implemented where there exists no overriding public policy rationale (let alone one that has not been reasoned) for requiring such retroactive measures. Such a finding could potentially result in the measure being declared invalid or, where appropriate, non-binding insofar as its retroactive effects are concerned.[45]

6. Is it appropriate for the Guidelines to deal with a concept such as "specialised services", when the *TSM Regulation* uses a much broader concept of "services other than open Internet services"? Is the introduction of new definitions consistent with BEREC working within its mandate?

As noted above, a Regulation must be sufficiently precise and unconditional in its terms, with *no discretion being left to the National Authorities in their implementation*.[46] While Article 5(3) permits BEREC to issue Guidelines which provide for a "consistent application" of the *TSM Regulation*, it does not permit (whether expressly or by implication) the introduction of new terms and definitions that are left undefined by the Regulation itself. In this context, it is perhaps symptomatic of a wider detrimental issue that the Proposed Guidelines refer to "European Net Neutrality Rules" whilst the *TSM Regulation* refers to "open internet". By introducing legal definitions without antecedents in the *TSM Regulation*, BEREC is exceeding its mandate of interpretation and is acting contrary to the principle of legal certainty. The extent to which any degree of discretion might be permissible in order to evaluate complex economic evidence is in the hands of the Commission, and does not lie with the EU Member States. The latter can only be conferred "*fixed administrative powers*" under a Regulation and cannot assume a definitive position which departs from what is stated in the Regulation itself.

For example, the Proposed Guidelines introduce two new definitions which do not appear within the *TSM Regulation* itself.

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[42] Refer, *e.g.*, to Case 98/78 *Racke v Haupzollant Mainz* [1979] ECR 69, at para. 20; Case 99/78 *Decker* [1979] ECR 101, at para. 8; and Case C-110/97 *Netherlands v Council* [2001] ECR I-8763, at para. 151.

[43] Refer to Case 1/84 R *Ilford v Commission* [1984] ECR 423, at para. 19.

[44] Refer to Case C-368/89 *Crispoltoni I* [1991] ECR I-3695, at para. 17.

[45] Refer to Tridimas, T., *The General Principles of EU Law*, Oxford, 2009, at p. 254, quoting Case 158/78 *Biegi v Haupzollamt Bochum* [1979] ECR 1103.

[46] Refer to Case 43/71, *Paloti S.A.S v Ministry of Finance of Italian Republic* [1971] ECR I-1039; Case 39/72, *Commission v Italy* [1973] ECR I-101; and Case 31/64, *"De Sociale Voorzorg" Mutual Insurance Fund v W.H. Bertholet* [1965] ECR I-81. Refer also to the Opinion of Advocate-General Roemer in Case C-93/71, *Leonesio v Minstero dell' Agricoltura e Foreste* [1972] ECR I-31.

First, a new legal definition that has been introduced by BEREC in paragraph 2 of its Proposed Guidelines is the term "specialised services". While that expression is used in common parlance to signify a category of value-added services that fall outside the scope of "internet access" services, this expression is now being used by BEREC instead of the much wider expression used under the *TSM Regulation*, namely, that of "*services other than Internet access services*".[47] These are those services "*which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet the requirements of the content, applications or services for a specific level of quality*". This concept constitutes a departure from the commonly understood idea of "specialised services", which had been used widely in the earlier stages of the Net Neutrality debate.[48] Across the Member States, the most common applications which are considered to fall within the scope of the "specialised services" category include Voice over Internet Protocol ("VoIP"), Internet Protocol Television ("IPTV"), Video on Demand ("VoD"), and health services. In the US, the FCC has found it very difficult to define "specialised services" and has even established a Working Group to explore the issue.[49]

The use of a broader concept by EU legislators might be explained by the conclusion in the *TSM Regulation* that there are wide discrepancies between different national service offerings, "*varying from none to all operators offering specialised services in parallel to offering Internet best-effort access service*".[50] While BEREC states that it has used the term "specialised services" as a 'shorter expression' for interpretation and definitional purposes, this raises a range of potential implications regarding the interpretation of such services. This is especially the case given the fact that the narrower the definition used, the greater the likelihood that ISPs will be subject to heavier regulation. Although BEREC has not listed precisely which services fall within the "specialised service" category, preferring to provide examples, it is questionable whether BEREC is mandated under the *TSM Regulation* to be using a different and stricter terminology than that already defined for such services under the *TSM Regulation* by EU legislators.[51] Any such action must run the risk of undermining legal certainty, if for no other reason than it detracts from what is usually understood to be a directly enforceable provision of a Regulation. In fact, the drafting of the *TSM Regulation* required a long process of discussions among stakeholders (and in particular the Council of

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47 Refer to Article 3(5) of the *TSM Regulation*: "[s]*ervices other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality*".

48 Refer also to BEREC Report, "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe: Findings from BEREC's and the European Commission's joint investigation", 29 May 2012 ("BoR (12) 30"), where "specialised services" are defined as those services which "*differ from (public and best effort) Internet access service in that they provide a generally guaranteed quality of service*". "Best efforts" has been the traditional standard for the treatment of data in a neutral manner and as efficiently as possible.

49 Refer to the Report prepared by the Specialized Services Working Group, Open Internet Advisory Committee Federal Communications Commission on, "Specialized Services: Summary of Findings and Conclusions", 20 August 2013.

50 Refer to BoR (12) 30 at p. 11.

51 For example, in paragraph 106 of the Proposed Guidelines, BEREC attempts to define "specialised services" be referring to specific technical parameters (such as "logically separated" and "strict admission control"). Thus, BEREC is using a different and stricter terminology than that which was anticipated by the legislator, who explicitly decided not to include such terminology in the final text of the *TSM Regulation*.

the EU, the European Commission and the Parliamentary Committees) in which terminology was analysed at length and the use of the term "specialised services" was taken into consideration and ultimately discarded.

Second, another definition introduced by BEREC without any direct equivalent under the *TSM Regulation* is that of a "sub-internet service" (paragraphs 17, 35 and 52 of the Proposed Guidelines), which is described by BEREC as a service "*which restricts access to services or applications (e.g., banning the use of VoIP or video streaming) or enables access to only a pre-defined part of the internet (e.g. access only to particular websites)*".[52] BEREC goes on to explain that, according to its 'understanding', such services infringe Articles 3(1), 3(2) and 3(3) of the *TSM Regulation* as they "*provide a limited access to the Internet*". While it is indeed possible that such practices might in certain circumstances amount to an infringement of Article 3 of the *TSM Regulation*, it is not within BEREC's power to create a new legal definition that is not found in the Regulation itself (nor to prohibit such services outright without analysis of the facts), BEREC has been provided only with the authority to interpret the existing definitions within the *TSM Regulation* insofar as they are not clear or require further elaboration. In this instance, it has yet again manufactured a legal definition which it equates with a harmful practice, but which is unforeseen in the *TSM Regulation* and whose harmful effects should only be assessed on a case-by-case basis. Indeed, this definition changes the terms of the *TSM Regulation* in a fundamental way, the Regulation only applies to internet access services and to non-internet access services to the extent they are optimised. Non-internet access services which are not optimised are not covered by the *TSM Regulation*.

Third, the definition of "application" intended by BEREC as a shorthand expression for "applications and services" (in paragraph 2 of its Proposed Guidelines) is not necessary and is used by BEREC to interpret the *TSM Regulation* to demarcate between the "applications" offered by a CAP (a further new definition introduced by BEREC) and the electronic communications services that are offered by electronic communications providers which are already subject to comprehensive regulation.

In these circumstances, it seems hardly appropriate to assume that BEREC is merely assisting NRAs to interpret legal principles which are already deemed to form part of their legal order. Such conduct might indeed be acceptable if a Directive were the subject of interpretation and elaboration, but is at odds with what a Regulation is designed to represent within the EU legal order.

7. By prescribing actions which are retroactive in effect, is BEREC acting in accordance with the terms of the *TSM Regulation*?

The principle of retroactivity is a generally applicable principle of EU law, and can be identified in a series of cases before the European Courts.[53] For example, in *GrSa Fleisch*, the CJEU made it clear that "*the substantive rules of Community law must be interpreted as*

[52] Refer to paragraph 17 of the *TSM Regulation*.

[53] According to T. Tridimas in "The General Principles of EU Law", Second Edition (2006), Oxford University Press, at p. 252, provides that: "*the principle of legitimate expectations imposes strict limitations on the retroactive application of Community law*".

applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them" (at paragraph 22).[54] This also follows from the Judgment of the UK's Court of Appeal, where it ruled in *O'Brien v Ministry of Justice*[55] and in *Walker v Innospec*[56] that the application of a principle of new EU law will not have retroactive effect unless it is clear that the legislator intended otherwise. In addition, a noted jurist has remarked that it is not appropriate as a matter of principle for an abstract legal rule to be accorded retroactive effect, whereas a decision addressing individual parties may have such a character.[57]

Thus, retroactivity is subject to *two* cumulative conditions: (i) it must be necessary to achieve the relevant measure's objectives; and (ii) the legitimate expectations of those affected must be respected.[58] It is clear that neither of these conditions has been met. *First*, the retroactive application of measures in the Proposed Guidelines is not necessary to achieve the objectives of the measure in question in most instances, as an analysis of the facts on a case-by-case analysis needs to be carried out where an infringement of the *TSM Regulation* is believed to have taken place. *Second*, the wording in Article 4 (apart from sub-paragraph 4) of the *TSM Regulation* is not sufficiently clear on its face as to whether its obligations have retroactive application, which would mean that it would infringe the legitimate expectations of ISPs.[59]

Given the above jurisprudence, it appears to be wholly inappropriate for BEREC to provide retroactively effective rules, as it purports to do under paragraphs 130 and 186 of its Proposed Guidelines.[60] At best, the retroactive application of those rules would only appear to be appropriate where, under a competition law assessment, it was felt that existing contractual relationships needed to be modified, amended or abandoned because their effect was anti-competitive. The perceived market failures flowing from the breach of Net Neutrality principles can be effectively addressed through the application of competition law principles, irrespective of the specific institutions responsible for the implementation of the *TSM Regulation*. To the extent that contracts may be subject to regulatory scrutiny by NRAs, NRAs will, no doubt, maintain the power to amend them, should they determine that regulation is the necessary answer. Further, while recourse to competition rules has the potential of addressing a range of potential anti-competitive concerns and market failures,

54 Refer also to *Commission v Freistaat Sachsen* (at para. 36).

55 Refer to the Judgment of the UK's Court of Appeal, *O'Brien v Ministry of Justice* [2015] EWCA Civ 1000 (Case No: A2/2014/1195 & 1061).

56 Refer to the Judgment of the UK's Court of Appeal, *Walker v Innospec and others* [2015] EWCA Civ 1000 (Case No: A2/2014/1195 & 1061).

57 Refer to C. Waldhoff, "*Recent developments relating to the retroactive effect of decisions of the ECJ*" (2009) 46 Common Market Law Review, Issue 1, at pp. 173-190.

58 Refer to T. Tridimas in "The General Principles of EU Law", *op. cit*., at p. 254.

59 For a range of situations where non-criminal retroactive cases involving EU Regulations were annulled by the CJEU, refer to cases: Case C-368/89, *Crispoltoni v Fattoria Autonoma Tabacchi di Città di Castello* [1991] ECR I-3695; Case 232/81, *Agricola Commerciale Olio v Commission* [1984] ECR 3881; Case 264/81, SpA Savma v Commission [1984] ECR 3915; and Case 224/82, *Meiko-Konservenfabrik v Germany* [1983] ECR 2539.

60 Paragraph 130 of BEREC's Proposed Guidelines provides that, "*Articles 4(1), 4(2) and 4(3) apply to all contracts regardless of the date the contract is concluded or renewed. Article 4(4) applies only to contracts concluded or renewed from 29 November 2015*".

should they arise in practice, market experience also suggests that end-users are well served by many such business models/tariff plans in practice.

In addition, while Article 10 prescribes that the obligations enter into force as of 30 April 2016, however, it also lists a number of exemptions to the application of that deadline. The listed exceptions within paragraph 2 of Article 10 *do not* specifically refer to Articles 4(1)-(3), and it would therefore be inconceivable why those provisions would have a retroactive application. If the legislature had intended for such a retroactive application, it declined to do so expressly, which suggests that no variation from this general deadline should be permitted.

By analogy, both the *Universal Services Directive*[61] and the *Consumer Rights Directive*[62] contain "general" consumer protection provisions for contracts concluded between the end-user and the respective operators, while containing no references to the retroactive application of the rules to contracts prior to the adoption of the relevant legislative instrument. The *TSM Regulation* also makes no direct reference whatsoever to the retrospective application of Articles 4(1),[63] 4(2) and 4(3). By contrast, BEREC at paragraph 130 of its Proposed Guidelines expresses the view that the provisions apply "*to all contracts regardless of the date the contract is concluded or renewed*".[64] While the *TSM Regulation* refers to "any contract", a consistent application of similar consumer protection provisions (*i.e.*, within the *Universal Services Directive* or the *Consumer Rights Directive*), it is safe to assume that the more reasonable view would be that Articles 4(1), 4(2) and 4(3) do *not* have a retrospective effect in the absence of a clear intent from the EU legislator that this is the outcome that is anticipated.

Article 4(4) on the other hand, specifically provides that: "*Any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated by the provider of internet access services in accordance with points (a) to (d) of paragraph 1 shall, where the relevant facts are established by a monitoring mechanism*

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61 Refer to Article 20(4) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ("Universal Service Directive"), OJ L 108, 24.4.2002, at pp. 51-77, where it provides that: "*Subscribers shall have a right to withdraw from their contracts without penalty upon notice of proposed modifications in the contractual conditions. Subscribers shall be given adequate notice, not shorter than one month, ahead of any such modifications and shall be informed at the same time of their right to withdraw, without penalty, from such contracts, if they do not accept the new conditions*".

62 Refer to Article 9(1) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22.11.2011, at pp. 64-88, where it provides that: "*Save where the exceptions provided for in Article 16 apply, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14*".

63 Article 4(1), read in conjunction with Recital 18, aims at facilitating consumers' "*informed choices*", which should in principle only refer to new contracts entered into by them.

64 Refer to Article 4(1) of the *TSM Regulation*. The incorrect interpretation by BEREC may stem from the changes made following the review of the original draft *TSM Regulation*. Thus, the change in drafting from "an" to "any", on the one hand, and from "shall specify" to "specifies", on the other, may be considered to have changed the impact of the provision.

certified by the national regulatory authority, be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law. This paragraph shall apply only to contracts concluded or renewed from 29 November 2015". There is clear intent in this provision by the legislator for paragraph 4 of Article 4 to apply to all contracts concluded or renewed from 29 November 2015. The fact that retroactivity is specified in this instance so clearly, while the legislation remains silent in all other situations, is a very strong indicator (in accordance with the principle of *expressio unius est exclusio alterius*) that the retroactive application of legislation is something that should be signalled in unambiguous terms, given its important enforcement implications.

Furthermore, given that Articles 4(1), 4(2) and 4(3) seek to address specific "market failure" issues through transparency measures, rather than addressing more general consumer protection issues (*lex specialis derogati legi generali*), it is only reasonable to assume that these provisions would envisage that a fact-specific analysis needs to occur to establish whether or not a market failure has occurred. It would be in these circumstances, after a positive finding of market failure, that the termination of existing contracts would be an appropriate response. Absent such a situation, the retroactive application of the *TSM Regulation* more generally would be disproportionate and incompatible with the principle of legal certainty.[65]

B. Other Definitional Issues

1. Is it consistent that regulatory obligations should be "future proof" that the Guidelines do not address what is expected under a 5G environment, especially as regards the application of traffic management principles?

The deployment of 5G technology will deliver virtually ubiquitous, ultra-high bandwidth "connectivity" not only to individual users but also to connected objects (foreseen in the *TSM Regulation* as "machine to machine" communications, as *per* Recital 16). A wide range of "specialised service" applications and sectors will be served in a 5G environment, including professional uses (*e.g.*, assisted driving, eHealth, energy management, possibly safety applications). The result of increased demand will inevitably lead to greater challenges in network management. In the words of one commentator: "*This seems completely incompatible with traffic management limited to technical requirements. Thus strictly drafted net neutrality guidelines may hamper Europe's 5G aspirations*".[66] In addition, at Recital 9, the *TSM Regulation* recognises the need for "*reasonable traffic management*", as well as an "*efficient use of network resources and to an optimisation of overall transmission*

[65] The principle of legal certainty requires that those subject to the rules should be able to determine clearly the scope of their rights and obligations. In addition, the related concept of legitimate expectations is a corollary to the principle of legal certainty: those who act in good faith on the basis of the law as it is or it seems to be at the time of the acquisition of their rights should not be frustrated in their exploitation of those rights in the future. The benefits of legal certainty in this context should be seen through the lens of "effectiveness" in the application of EU law. See, in general, T. Tridimas, "The General Principles of EU Law", Second Edition (2006), Oxford University Press, at pp. 242-251 (especially at p.242 *ff*).

[66] See R. Kenny, "Net Neutrality: Guidelines or straitjackets?", EurActiv.com, 2 May 2016. (Available at: http://www.euractiv.com/section/digital/opinion/net-neutrality-guidelines-or-straitjackets/).

quality".[67] This leaves open the possibility of operators delivering 5G applications through their networks as the technology enables them to prioritise certain services as long as the availability of open IASs does not suffer as a result.

While not directly acknowledging 5G within the context of its discussion on traffic management in its Proposed Guidelines, BEREC is leaning towards a restrictive interpretation of what amounts to "reasonable traffic management" for all content.[68] For example, paragraph 50 of the Proposed Guidelines provides that "*even though packets can experience varying transmission performance (e.g. on parameters such as latency or jitter), packets can normally be considered to be treated equally as long as all packets are processed agnostic to sender and receiver, to the content accessed or distributed, and to the application or service used or provided*". Thus, the Proposed Guidelines depart from the definition of "reasonable traffic management" provided under the *TSM Regulation* because they purport to prohibit differentiation between different packets, yet the ability to so differentiate lies at the heart of any reasonable commercial strategy to manage traffic. By limiting the commercial freedom of ISPs in this way, BEREC is compromising the future widespread take-up of 5G technology, given that the optimum use of 5G will occur where ISPs are in a position to differentiate between packets, and hence the use to which they are put.[69]

The failure to be "forward-looking" is illustrated in paragraph 11 of its Proposed Guidelines, where BEREC provides details concerning the current functioning of Virtual Private Networks ("VPNs"). However, in doing so, it fails to acknowledge that the present structure of VPNs will be impacted by, and will also evolve with the introduction of, 5G technology.

Moreover, at paragraph 106 of its Proposed Guidelines, BEREC provides that: "*If assurance of a specific level of quality is objectively necessary* [to be determined by the NRAs]*, this cannot be provided by simply granting general priority over comparable content*" (referring to Recital 16 of the *TSM Regulation*). However, a natural reading of that Recital suggests that BEREC's interpretation is overly narrow in scope, as BEREC has failed to take due account of the full text of Recital 16.[70] If read in its broader context, the provision of 5G

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67 Refer to Recital 9 of the *TSM Regulation*.

68 The "5G Manifesto for timely deployment of 5G in Europe", published on 7 July 2016 for the European Commission, has expressed the view that: "*Automated driving, smart grid control, virtual reality and public safety services are examples of use-cases with distinguished characteristics which call for a flexible and elastic configuration of resources in networks and platforms, on a continuous basis, depending on demand, context and the nature of the service. According to the telecom industry, BEREC's draft proposal of implementation rules is excessively prescriptive and could make telcos risk-averse thus hampering the exploitation of 5G, ignoring the fundamental agility and elastic nature of 5G Network Slicing to adapt in real time to changes in end-user / application and traffic demand. The 5G objective of creating new business opportunities and satisfying future end-user needs would be at risk, with a regulation not coherent with the market demand evolution*".

69 On 7 July 2016, the Commissioner for the Digital Economy and Society, Günther H. Oettinger, welcomed the development of the so-called "5G action plan". He stated in his blog that: "*I very much welcome the 5G Manifesto and discussions today with the high-level industry group. These will help us focus on the key levers to ensure European digital leadership in 5G. I will come forward with a 5G Action Plan in the autumn*". Commissioner Oettinger also recognised the need for Europe not to miss out on the opportunity to deliver 5G technologies, including the high levels of investment and the need to "*work together towards a common practical goal*".

70 Refer to Recital 16 of the *TSM Regulation*, where it provides that "*National regulatory authorities should verify whether and to what extent such optimisation is objectively necessary to ensure one or more specific and key features of the content, applications or services and to enable a corresponding quality assurance to*

technologies could be a highly relevant issue in determining how NRAs interpret what is considered to be "objectively necessary" in terms of traffic management. Depending on the interpretation which NRAs may accord to that expression, the net result is that it may allow the provision of some 5G technologies, but not others.[71]

In paragraphs 101, 104 and 107 of its Proposed Guidelines, BEREC focuses its attention on NRAs being able to control all "specialised services", independently of their impact on IASs, and allowing for their provision only where they can satisfy the obligation to demonstrate the need for levels of quality not assured over an IAS. However, in paragraph 108 of its Proposed Guidelines, BEREC concedes that the characterisation of services as either "specialised" or IAS, evolves over time. By introducing the prescriptive measures on NRA control and verifications for all services today, despite their susceptibility to change over time, BEREC risks impeding the successful deployment of different services enabled by 5G technologies; accordingly, the evolving regulatory characterisation of services will run the risk of regulatory uncertainty by not compromising the timely exploitation of 5G technology challenges.

In such circumstances, with the advent of 5G technology challenging the basic working assumptions about how capacity can and should be managed efficiently, the risks of over-regulation (or a "Type I" error in competition law terms) are very significant. Moreover, the failure to accord due weight to the impact of 5G technology undermines one of the core principles of the EU Regulatory Framework for electronic communications – namely, that *ex ante* regulation must be "forward-looking".[72] Departing from such an overarching principle of EU regulatory policy appears to be especially counter-intuitive, given not only the commitment of the European Union to have 5G deployed across all parts of the EU by the year 2020,[73] but also the concern that, whichever regulatory regime is imposed to address Net Neutrality issues, it may come to an abrupt end within four years (or, at best, require significant re-assessment).[74]

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be given to end-users, rather than simply granting general priority over comparable content, applications or services available via the internet access service and thereby circumventing the provisions regarding traffic management measures applicable to the internet access services".

[71] The "5G Manifesto for timely deployment of 5G in Europe" *op. cit*., has taken the view that: "*The EU and Member States must reconcile the need for Open Internet with pragmatic rules that foster innovation. The telecom Industry warns that the current Net Neutrality guidelines, as put forward by BEREC, create significant uncertainties around 5G return on investment. Investments are therefore likely to be delayed unless regulators take a positive stance on innovation and stick to it. Telco and Industry Verticals concur that the implementation of Net Neutrality Laws should allow for both innovative specialised services required by industrial applications and the Internet Access quality expected by all consumers*". Therefore, the danger of introducing restrictive Net Neutrality rules, in the context of 5G technologies, business applications and beyond will not fit well "Network Slicing".

[72] Refer to, more generally, P. Alexiadis "Balancing the Application of *Ex Post* and *Ex Ante* Disciplines under Community Law in Electronic Communications Markets: Square Pegs in Round Holes?", chapter in *Rights and Remedies in a Liberalised and Competitive Internal Market* (edited by Eugène Buttigieg, Jean Monnet Professor, University of Malta and Judge of the General Court), March 2012.

[73] Article 9 of the *TSM Regulation* provides that: "*By 30 April 2019, and every four years thereafter, the Commission shall review Articles 3, 4, 5 and 6 and shall submit a report to the European Parliament and to the Council thereon, accompanied, if necessary, by appropriate proposals with a view to amending this Regulation*". This commitment of its own accord suggests that a "forward-looking approach is a *necessity* and not an option if 5G is to be deployed by 2020.

[74] A tacit acknowledgement of the significance of 5G technology on traffic management practices can be witnessed in the very recent announcement that Korea is deploying a wholly separate network to carry traffic

2. Is the principle of Net Neutrality being applied in a proportionately and non-discriminatory manner if its main beneficiary is Content Access Providers ("CAPs"), rather than the 'end-users'? In this regard, it is appropriate for BEREC to "understand" the concept of 'end-user' to encompass CAPs?

Article 2 of the *TSM Regulation* provides that the definitions set out in Article 2 of the *Framework Directive*[75] also apply under that Regulation, without itself directly defining the concept of an "end-user" to include CAPs. Accordingly, in its Proposed Guidelines BEREC defines an "end-user" in the same terms as the *Framework Directive,* namely, "*a user not providing public communications networks or publicly available electronic communications services*".[76] BEREC also refers to the definition provided under the *Framework Directive* for "user"[77] and concludes that an "end-user" for the purposes of the *TSM Regulation* encompasses individuals, businesses, as well as CAPs. However, the *TSM Regulation* does not define an "end-user" to include a CAP (merely cross-referring to the definitions under the *Framework Directive*), and the need to accord a CAP a different regulatory status from an end-user is borne out by the fact that a CAP is afforded different legal rights and seeks to benefit in its own particular way from the pursuit of different policy objectives under the *TSM Regulation*.[78]

It is also important to note that *Framework Directive* was concluded back in 2002 at the time when it was not envisaged that CAPs would be caught by the Directive. Therefore, referring to the definitions within the *Framework Directive* that was not aimed at defining CAPs or even including them within a wider definition, does not seem appropriate in this particular context.[79]

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dedicated to "the internet of things": Refer to the BBC article, "South Korea launches first Internet of Things network", 5 July 2016.

75 See the *Framework Directive*, at Article 2(n).

76 While the title of the *TSM Regulation* refers to "*user*" (on the basis of the *Universal Services Directive*), the body of the text only refers to "end users" and does not refer to "users" at any point within the text (apart from "*user experience*" in Recital 9 of the *TSM Regulation*).

77 Refer to Article 2(h) of the Framework Directive, which provides that: "*"user" means a legal entity or natural person using or requesting a publicly available electronic communications service*".

78 While it may be correct, for definitional purposes, to have CAPs falling within the definition of "end-user" provided for under the *Framework Directive*, BEREC has then gone further to provide that CAPs are protected under the *TSM Regulation* in-so-far as they use an IAS to reach *other* end-users. This interpretation by BEREC cannot be correct, however, as CAPs are protected insofar as they use their own IAS to distribute and/or access content under Article 3(1) – *i.e.*, as end-users of an IAS.

79 Recital 10 of the *Framework Directive* provides that: "*The definition of "information society service" in Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of information society services spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content*".

Further, Recital 3 of the *TSM Regulation* provides as follows: "*The internet has developed* [...] *with low access barriers for end-users, providers of content, applications and services and providers of internet access services*".[80] It follows that the *TSM Regulation* itself identifies three separate groups of users (*i.e.*, end-users, CAPs, and providers of IASs). The Recitals and operative provisions that follow also confirm this approach. Recital 6 and Article 3(1) both refer to 'their' IAS,[81] which can only logically be interpreted as referring to a *customer's IAS*.[82]

Article 3(1) of the *TSM Regulation* uses the terminology '*use and provide*', which further highlights the fact that an interpretation of "end-user" under the Regulation cannot include both CAPs and end-users under the same legal definition, with a clear separation of their activities being envisaged. The right to '*use and provide*' is a specific right granted to the end-user and not to the CAP. Recital 7 of the *TSM Regulation* lends further support to this proposition, as it states that in order to exercise the right to provide applications and services, end-users can agree tariffs for specific data volumes or speeds.[83] This can only logically refer to the person who is purchasing the service rather than to CAPs, who will of course not be agreeing the tariffs and volumes that the customer will purchase. In this regard, the practical consequences of following BEREC's approach would be to eliminate the right of consumers to make choices in the context of Article 3(1) of the *TSM Regulation*, as the right contemplated by that provision cannot in practice be exercised by multiple "end-users" (*i.e.*, the customer and an infinite number of CAPs).[84]

BEREC also expresses the view that: "*CAPs are protected under the Regulation in so far as they use an IAS to reach other end-users*".[85] In this situation, BEREC appears to be taking a position that is not supported by the wording of the *TSM Regulation* when it concludes that CAPs can benefit from protection under the Regulation insofar as they provide Internet Access Services, while being only subject to the provisions of the *TSM Regulation* which govern "specialised services". This then raises the question of whether the *TSM Regulation* permits CAPs to block or prioritise certain content on their applications. While in most cases it would not be in the interests of any CAP to do so, the opposite conclusion might arise if the CAP has market power and operates as a search engine or as a large application platform. While the *TSM Regulation* is silent on this issue, BEREC seems to have embraced a position, by treating CAPs so differently to ISPs, which goes beyond the policy objectives that should be pursued by the *TSM Regulation*.

In addition, BEREC also provides that "*some CAPs may also operate their own networks and, as part of that, have interconnection agreements with ISPs; the provision of interconnection is a distinct service from the provision of IAS*".[86] This comment also supports the view that CAPs have features which distinguish them from end-users, which in turn supports the view that they constitute different categories of users that should be identified and defined separately, BEREC, however, does not see fit to do so for regulatory purposes.

[80] Refer to Recital 3 of the *TSM Regulation*.

[81] Refer to Recital 6 and Article 3(1) of the *TSM Regulation*.

[82] Recitals 7 and 18 of the *TSM Regulation* further confirm this point.

[83] Refer to Recital 7 of the *TSM Regulation*.

[84] This, in turn, undermines the ability of ISPs to offer parental controls and other products such as ad-blocking.

[85] Refer to para. 5 of the Proposed Guidelines.

[86] *Ibid*.

In addition, BEREC does not acknowledge that a CAP operating its own network is also in a position to block or throttle IAS content, which is clearly at odds with technological reality.

One can therefore conclude that the *TSM Regulation*, as interpreted by BEREC, appears to have deferred to the interests of CAPs ahead of the interests of end-users, and sees the former category as being the prime beneficiaries of the *TSM Regulation*. With respect, such a reversal of public policy priorities seems to be disproportionate in its outcome, and clearly discriminatory in its effects.

C. 'Discrimination' and 'Proportionality' Issues

1. **Is it appropriate for the Proposed Guidelines to specify that there is an obligation on ISPs to demonstrate the necessity of optimisation independently of the impact on the Internet Access Services (see paragraphs 104 and 106 of the Proposed Guidelines)?**

Paragraph 106 of the Proposed Guidelines states that: "*If assurance of a specific level of quality is objectively necessary, this cannot be provided by simply granting general priority over comparable content. It is understood that specialised services are offered through a connection that is logically separated from the IAS to assure these levels of quality*".

In reaching this conclusion, BEREC contends that the powers granted to NRAs (under Recital 16 and Article 5(2) - traffic management, and under Articles 3 and 4 - capacity and transparency/monitoring requirements) means that they are able to impose an obligation on ISPs to demonstrate the "necessity" of optimisation strategies *independently* of any impact of such optimisation services on IAS. However, Recital 16 clearly requires that a balancing of optimisation strategy should occur as measured against its impact on IAS, and there is no implication that the question of whether or not it is a "necessity" is something that should be assessed beyond its impact on IAS.[87] Thus, insofar as there is no degradation, throttling or blocking of IAS taking place, it is neither necessary nor proportionate for an NRA to determine anything beyond the "objective test" of necessity set forth under the *TSM Regulation* (especially given that this legal instrument does seek to define the concept of "specialised services"). Further, the overarching objective of the *TSM Regulation* is to protect IAS and not to prevent new or innovative "specialised services" from entering the marketplace, which might be the net result if an NRA does not believe that a certain service needs to be optimised as a result of its own assessment of the situation, and in the absence of a determination concerning the impact of optimisation practices on IAS.

The suggestion that NRAs have the powers to investigate the "necessity" of optimisation practices independently of their impact on the IAS, appears to be counter-intuitive and disproportionate to the objectives of the *TSM Regulation*. If an ISP seeks to optimise its

[87] Recital 16 of the *TSM Regulation* provides that NRAs "*should verify whether and to what extent such optimisation is objectively necessary to ensure one or more specific and key features of the content, applications or services and to enable a corresponding quality assurance to be given to end-users, rather than simply granting general priority over comparable content, applications or services available via the internet access service and thereby circumventing the provisions regarding traffic management measures applicable to the internet access services*".

content, it does not appear to be relevant for an NRA to investigate the reasons for such "necessity" to so optimise content (as it is safe to assume that this is based on a commercial rationale), but *only* insofar as it seeks to ensure that the optimisation of the services does not have a negative impact on the IAS (*i.e.*, determining whether it has the tendency to circumvent the primary IAS obligation under the *TSM Regulation*).[88]

Further, because BEREC has taken the approach that "specialised services" are "logically separated from IAS",[89] it necessarily follows that such services are, in the eyes of BEREC, always provided separately. However, given that Recital 16 of the *TSM Regulation* provides that "specialised services" can either be combined with IAS or provided separately, an analysis of such services without balancing their impact on IAS would be disproportionate in terms of addressing policy goals sought to be pursued by the *TSM Regulation.*

2. Is it appropriate that the "specialised services" can only be provided under the terms of the *TSM Regulation* if and when ISPs have sufficient capacity to provide Internet Access Services (see paragraph 112 of the Proposed Guidelines)?

Paragraph 112 of BEREC's Proposed Guidelines provides that: "*Specialised services shall only be offered when the network capacity is sufficient such that the IAS is not degraded (e.g. due to increased latency or jitter or lack of bandwidth) by the addition of specialised services. Both in the short and in the long term, specialised services shall not lead to a deterioration of the general IAS quality for end-users. This can, for example, be achieved by additional investments in infrastructure which allow for additional capacity so that there is no negative impact on IAS quality*".[90]

For mobile network operators, traffic volumes can be very difficult to predict, especially given the varying number of users at certain periods and in certain locations. Given the existing capacity constraints, there is a high likelihood that QoS levels and speed of content delivery would be compromised where such congestion occurs.[91]

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88 As one commentator has concluded from a commercial point of view that "necessity" should be assessed from the perspective of demand on the part of content, application and service providers, using end-user demand as a proxy which also helps to address the issue of comparable content (see R. O'Donoghue and T. Pasco, "Net Neutrality in the EU: Unresolved Issues Under the New Regulation", 15 March 2016, SSRN Academic Papers portal, at pp. 4-5).

89 In paragraph 106 of the Proposed Guidelines, BEREC attempts to define "specialised services" by referring to specific technical parameters (such as "logically separated" and "strict admission control"). By doing so, BEREC is using a different and stricter terminology than that which was anticipated by EU legislators, who *explicitly* decided not to include such terminology in the final text of the *TSM Regulation*.

90 Refer also to Article 3(5) of the *TSM Regulation*, which provides that: "*Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users*".

91 Article 4(1)(d) of the *TSM Regulation* provides that: "[…] *a clear and comprehensible explanation of the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users' rights laid down in Article 3(1)*". *First*, Congestion across the network is inevitable even where ISPs continue to invest in the performance of the network; *Second*, internet access on mobile networks has performance restrictions

The use of the 'proportionality principle', which is a general principle of Community law, lies at the heart of what is deemed to be permissible under the *TSM Regulation* to govern traffic management measures. Where traffic management measures need to go beyond what might be considered to be 'reasonable' in the circumstances, specific measures are foreseen which might be necessary to prevent impending network congestion, given the tendency of mobile networks to suffer from heavy congestion for temporary or exceptional periods (*i.e.*, during on-peak times) (Recital 15). Long-term congestion needs to be addressed by the network operator through investment in "sufficient capacity", while making available the necessary capacity for the provision of any "specialised services" without generating any "detriment" to the quality of general IASs (Recital 17). Beyond the normative principles set forth in Article 3(3) on the scope of legitimate traffic management techniques, ISPs will exceptionally be permitted to discriminate between certain traffic as to content where specific public policy imperatives are present, but only for as long as is necessary.[92]

In the absence of being able to invest in such network expansion measures, mobile operators will increasingly need to engage in optimised traffic management techniques (including the use of data compression technology, as envisaged in Recital 11)[93] to deliver high quality service broadband applications. In turn, if they are not able to deliver such high quality applications, they will not be able to generate the data streams necessary to help fuel next generation network investment.[94] It is these data streams that will trigger a "virtuous cycle" of investment that creates greater capacity, which in turn ensures the availability of IAS (rather than *vice-versa*). It is critical that this causal link between investment incentives and

which are not within the full control of the ISP (such as the end-users location, the capacity and usage of the cell or even weather conditions); and *third*, ISPs cannot set a specific performance rate, this can only be reasonably guaranteed on the basis of an estimated minimum/maximum speed. According to O'Donoghue and Pasco: "[T]*his in turn rather begs the question of whether the baseline should be the "minimum" or the "normally available" speed or something else and if so, what these are and whether this should be measured on an individual or average basis. It would seem wrong that a particularly inefficient operator should be allowed to take advantage of its inefficiency and use as a low baseline over which it could then offer higher quality non-internet access services (assuming of course that efficiencies are objectively available to that operator but it has simply decided to, e.g., chronically under-invest). Equally, it would be too demanding to take the "maximum" speed as a benchmark, given that Article 3(5) should not be interpreted in such a way that stifles innovation*". See R. O'Donoghue and T. Pasco, *op. cit.*, at p.4.

[92] Article 3(3) specifies that such conditions can range from the need to: (a) comply with EU law or EU-compliant national law; (b) preserve the integrity and security of the network; or (c) prevent impending network congestion.

[93] In this regard, while the position stated in the *TSM Regulation* appears to be reasonable at first blush as regards the inability of ISPs to base prioritisation or discrimination policies on the precise nature of data or the identity of the sender with respect to encrypted traffic, it is nevertheless the case that an ISP may at times need to know the identity of a user or the nature of the content being transmitted so as to more effectively calibrate the content with either the character of the network or even the mobile handset itself. Otherwise, the unintended consequence is that certain traffic might be de-prioritised (legitimately, according to the *TSM Regulation*), which might otherwise have been given more expedited treatment, because the ISP is in a better position to reconcile certain types of traffic with its network configuration and applications specialisations.

[94] The investment imperative is acknowledged in the "5G Manifesto for timely deployment of 5G in Europe" *op. cit.*, where it states that: "*5G is expected to require significant investments over time, including a new radio access layer, high bandwidth backhaul links, core network upgrades and, for certain scenarios, increased densification of cell sites. Such investments will take place if the right regulatory environment is created in particular in the context of the forthcoming review of the European Electronic Communications Framework*". Refer also to M. Mace, "The Truth about the Wireless Bandwidth "Crisis", June 2011 (http://mobileopportunity.blogspot.de/2011/06/truth-about-wireless-bandwidth-crisis.html).

increases in capacity investment needs to be understood, rather than specific types of investment being mandated.

The idea that foreseeable and long-term capacity constraints should be addressed, where possible, by forward-looking capacity investment decisions by ISPs (see Recitals 15, 17 and 19) is a concept that is, in fact, based on the Commission's competition law enforcement strategy in the energy sector,[95] rather than on existing regulatory models in the electronic communications sector.[96] In a sector such as mobile communications, where industry characterised by disruptive technology and shorter innovation cycles, long-term capacity planning is fraught with uncertainty. One therefore needs to be very cautious in making assumptions about the scale and scope on which mobile operators can make such long term, forward-looking investments. It would appear that only the case-by-case approach of competition law policy can achieve an appropriate result in the particular circumstances of each case in the electronic communications sector.

By contrast, the energy sector is characterised by capacity planning over a very long timeframe, ranging from 10-25 years depending on the particular energy source being developed. As such, it is considered to be perfectly reasonable in an energy sector context for a competition authority to oblige operators with a dominant market position to plan their capacity in such a way as to reasonably accommodate wholesale access for retail competitors.[97] Such a policy, however, appears to be at odds with the internet sector, which is characterised by numerous and relatively short innovation cycles and business models which also change rapidly. Moreover, Commission precedent has predicated that such capacity investment obligations in interconnectors be imposed on energy undertakings only where they have been demonstrated to occupy a position analogous to an "essential facility" (yet alone the much lower standard of "dominance").[98]

Accordingly, it seems to be disproportionate to subject all ISPs, irrespective of whether or not they hold real market power, to be responsible for the management of their capacity in such a way as to be under an absolute obligation to offer IAS which cannot be adversely affected by the growth of "specialised services". While recourse to traditional internet

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[95] For example, refer to the Commission merger Decisions in the energy sector: Case No COMP/M.1853 – *EDF/EnBW*, Commission Decision of February 7 2001; Case No COMP/M.2947 - *Verbund/EnergieAllianz*, Commission Decision of 11 June 2003; Case No COMP/M.3696 - *E.ON/MOL*, Commission Decision of 21 December 2005; Case No COMP/M.3868-*DONG/Elsam/Energi E2*, Commission Decision of 14 March 2006; and Case No COMP/M.3440 - *EDP/ENI/GDP*, Commission Decision of 9 December 2004.

[96] See, for example, the European Commission's *Explanatory Note* (Brussels, 9.10.2014, SWD(2014) 298) accompanying the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 9.10.2014 C(2014) 7174 final (*Relevant Markets Recommendation*); and Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.9.2010, pp. 35-48.

[97] For example, refer to Case AT.39315 - *ENI* (2010); Case AT. 39316 - *GDF* (foreclosure) (2010); Case AT. 39317 - *E.On* (gas foreclosure) (2010); and Case AT. 39402 - *RWE* (gas foreclosure) (2009). See also to the merger Decisions above. Refer also to the example in the oil and gas sector, where the allocation of scarce supplies among existing customers was considered to be appropriate (see Case C 77/77, *Benzine en Petroleum Handelsmaatschappij BV v Commission* (1978)).

[98] Refer to Case AT.39315 - *ENI* (2010); Case AT. 39316 - *GDF* (foreclosure) (2010); Case AT. 39317 - *E.On* (gas foreclosure) (2010); Case AT. 39402 - *RWE* (gas foreclosure) (2009). See also Commission merger cases in footnote 82.

standards of care such as “best efforts” seems appropriate, the standard required by BEREC in its Proposed Guidelines appears to be disproportionate and unable to take due consideration of the genuine technological challenges faced by mobile operators in managing their networks in the manner required by BEREC.

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