Net Neutrality: BEREC Guidelines on European Net Neutrality Rules

BT response to the consultation

18 July 2016

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1. Introduction and summary

1. BT is one of the world's leading communications services companies, serving the needs of customers in the UK and across 180 countries worldwide. Our main activities are the provision of fixed-line services, broadband, mobile and TV products and services as well as networked IT services. In the UK we are a leading communications services provider, selling products and services to consumers from our Consumer Division, and small and medium sized enterprises and the public sector through our Business and Public Sector Division. Our group company EE is the UK's largest mobile operator. Our Wholesale and Ventures Division sells wholesale products and services to communications providers in the UK with Global Services supplying complex communication products including high quality managed networks and IT services to multinational corporations and overseas companies and governments.
2. We have long supported the goals of an open internet and continue to do so. BT was a signatory to the UK's voluntary codes on the open internet and traffic management agreed through the Broadband Stakeholder Group[1] ('BSG') adopted in 2011 and 2012 and is a signatory to the revised consolidated version of those codes agreed following adoption of the Regulation. We strongly believe in delivering customers a great network experience enabling them to use any applications and services they wish through their internet service.
3. We therefore welcome the opportunity to respond to BEREC's consultation on 'Guidelines on the Implementation by National Regulators of European Net Neutrality Rules' ('the Guidelines'). It is however disappointing that the draft Guidelines have only been issued for public consultation at this late stage. Consultees are left in the position of having only a short window to respond and more importantly BEREC has little time to reflect on any comments received. We hope that BEREC genuinely uses this consultation to 'road test' the draft Guidelines. In that spirit the commentary that follows does not seek to challenge the laudable aim of ensuring an open internet, which we support, but rather to ensure that that objective is effectively achieved in a proportionate manner. The issues to which the draft Guidelines refer are technically complex and BEREC must be careful to ensure that its guidance is proportionate, workable and does not go beyond what the Regulation provides.
4. Before turning to the detail of the draft Guidelines, the following general points should be kept in mind:
    - The draft Guidelines can only provide guidance on how the Regulation should be interpreted and applied in practice. The draft Guidelines must not seek to amend the Regulation nor create new law. As drafted, the draft Guidelines, in a number of material respects, go significantly beyond providing guidance.

[1] The BSG provides a neutral forum for organisations across the converging broadband value-chain to discuss and resolve key policy, regulatory and commercial issues, with the ultimate aim of helping to create a strong and competitive UK knowledge economy. The BSG's diverse network includes telecoms operators, manufacturers, investors, ISPs, mobile network operators, broadcasters, new media companies, content producers and rights holders, as well as central and local government, devolved administrations, Ofcom and others.

- The draft Guidelines should play a positive role in fostering innovation by providing a clear framework within which industry, not just telecommunications providers, can develop new services and ultimately monetise the enormous investments that are needed to roll out future technologies including 5G. A core limb of the recently published 5G manifesto is that the net neutrality rules must support the roll out of innovative services.[2]
- The draft Guidelines should be drafted at a level of principle rather than seeking to define technological approaches. There is a real risk that prescriptive guidance will stifle innovation and moreover become obsolete in a short time frame especially given the rapid advancement of technology in telecommunications. Moreover, BEREC should be wary of being overly prescriptive in case that leads to unintended consequences.
- As regards consumer protection measures, the draft Guidelines should not consider net neutrality in a vacuum. There already exists a significant volume of consumer protection regulation and codes which achieve many of the objectives of the Regulation. There is a real risk of duplication and consumer confusion if BEREC continues to push for a blank canvass approach. The Regulation gives NRAs significant scope to decide how best to implement the provisions on transparency in their respective markets.

5. Moving on to the detail of the draft Guidelines, in section 2, as regards CAPs we conclude that BEREC's interpretation of the definition of 'End-user' is wrong in law, is unnecessary and creates practical difficulties. We explain how the definition of end-user applies in the context of business customers and why some of the new definitions introduced by the draft Guidelines rather than clarifying the Regulation introduce further uncertainty.
6. In Section 3 we propose that the section of the draft Guidelines on zero rating be re-cast, in particular having greater regard to principles developed under competition law and economics, so as to provide a clearer framework for assessment. We also explain why it is wrong to prohibit zero rated services from continuing to be available to a customer once that customer reaches their data allowance. A number of perverse outcomes flow from this requirement that could never have been the intention of the Regulation.
7. In sections 4 and 5 we explain the vital importance of encouraging the development of innovative services, especially in light of the EU objective of rapid roll out of 5G.
8. In section 6 we review the requirements on traffic management concluding that they are overly prescriptive and depart from the balance struck in the Regulation. In section 7 we assess the guidance on the transparency requirements of the Regulation and conclude that BEREC's approach is unduly onerous, duplicative of existing legislative requirements, and ultimately unhelpful for consumers who are the very people that are intended to be protected through greater transparency. Finally in section 8 we look at the specific issue of parental filters.
9. Overall we urge BEREC to adopt a proportionate approach to regulating net neutrality. As BEREC may be aware, as noted above in the UK ISPs have, for many years, been

[2] The 5G manifesto is signed by nearly 20 telcos including BT, Deutsche Telekom, Ericsson, Hutchison, Nokia, Orange, Telefonica, Telenor, and Vodafone. It outlines what is needed in order to deliver 5G coverage across Europe.

signatories to the BSG's codes of practice on the open internet and traffic management transparency. Since their inception there has not been a single formal complaint by any content provider. The success of these codes demonstrates that principle based guidance can ensure great outcomes for consumers and the wider internet ecosystem without there being a need for prescriptive technical guidance.

2. Scope of the Regulation

Definition of 'end-user' – content providers (Guidelines: paragraphs 4-5)

10. When reading the paragraphs that follow BEREC should keep the following key points in mind. The Regulation does not permit ISPs to discriminate (block, degrade etc) against content or applications based on commercial rivalry. For instance, where one ISP provides both IAS and content services another ISP that also provides content services cannot discriminate against its rival's content. On the same basis mobile operators cannot discriminate against services that compete with their own services such as messaging and voice services (e.g. by blocking applications such as Skype). ISPs are also not permitted to take measures to prevent content providers from making their content available on the internet. These practices are clearly prohibited under Article 3(3) – i.e. illegal traffic management. It does not however follow from this that the customer taking the IAS cannot chose to block access to content or applications that they do not wish to use or view (such as adult content). This is because the customer is empowered by Article 3(1) to make such choices – that is their right. For clarity however, we do not consider that ISPs are permitted to abuse this right by offering services that block access to content or applications on the basis of commercial rivalry. For instance it would not be permissible to offer a mobile service that bars access to VoIP providers in exchange for a lower tariff.

11. The draft Guidelines state that BEREC understands that the definition of 'end-user' encompasses both consumers and CAPs. It is true that in so far as a CAP subscribes to an IAS then in relation to that service (to which they have subscribed) the CAP is an end-user. In the language of Article 3(1) the CAP is exercising rights "*via **their** internet access service*" [our emphasis]. However BEREC goes further in essence arguing that in a two sided market both the consumer (at one end requesting the content) and the CAP (at the other end providing the content) are end-users. This is stated to flow from the definition of end-user in the Framework Directive. Read in its proper context this is not what the Framework Directive provides and moreover a natural reading of the Regulation confirms that content providers are not encompassed within the definition of end-user. Given that BEREC's position is wrong in law, the guidance on this point cannot be retained in the final version of the Guidelines.

12. The text of the Regulation makes a clear distinction between end-users and content providers. Recital 3 provides as follows: "*The internet has developed … with low barriers for end-users, providers of content, applications and services and providers of internet access services*.' Three relevant groups are separately referred to[3]; first end-users; second CAPs; and third providers of IAS. This is entirely logical. The recitals and

[3] This does not mean that an end-user cannot also be a content provider, however where it is it can only avail itself of the Article 3(1) rights in relation to an IAS to which it has subscribed.

operative provisions that follow confirm this approach. Recital 6 and Article 3(1) both refer to 'their' IAS. This can only logically be read to refer to the customers' IAS. Recitals 7 and 18 further confirm this.

13. The words 'use and provide' in Article 3(1) lends no support to an interpretation that CAPs are end users (where they have not subscribed to their own IAS). The right to use and provide is a right granted to the customer end user and not to all CAPs. This is conclusively confirmed by Recital 7 which provides that in order to exercise the right to use and provide applications and services end users can agree tariffs for specific data volumes or speeds. This can only logically refer to the person who is purchasing the service, rather than to all CAPs, as it is that person who will agree the tariffs and volumes.

14. The European Commission's Q&A[4] on net neutrality is instructive:

    "*The agreed rules establish a right of all internet end-users (**consumers and businesses**) to access and distribute legal content, services and applications of their choice*." (our emphasis) This clearly explains what is meant by an end-user.

    "*Based on this new legislation, all content and application providers will have guaranteed access to end-users in the open internet. This access will not be dependent on the wishes or particular commercial interest of internet service providers*." (our emphasis) The CAP has a right to access the end user but is not itself the end user. As we note above we agree that ISPs are not permitted to block content based on commercial rivalry but are permitted to execute their customers' choice where a customer does not want to access particular applications or services.

    "*National regulatory authorities shall monitor and enforce compliance with the open internet rules. These authorities will thus have the power and obligation to examine how the traffic management practices of internet service providers affect the end-users' (consumers and businesses) rights to access and distribute content, applications and services of their choice*." Again the point is clearly made as to who is envisaged to be an end user.

    It is absolutely clear from these quotes that the term end-user is not referring to CAPs. Indeed the European Commission has explained this diagrammatically.[5]

15. The practical consequences of BEREC's interpretation are of serious concern. The reference to choice in Article 3(1) cannot be exercisable by multiple persons (the customer, an individual CAP, multiple CAPs), otherwise in the event of conflict there is no way to determine whose choice prevails. This has particularly serious consequences as regard parental filtering (see section 8 below).

16. Moreover, the Framework Directive does not support BEREC's interpretation. The Framework Directive definition of end-user does not seek to encompass content-providers in the manner that BEREC envisages (i.e. where the content provider has not subscribed to an IAS) . Recital 10 of the Framework Directive is instructive explaining that ISPs may provide internet services as well as services not covered by the framework directive, such as the provision of web based content. In such circumstances, i.e. where web based content is not covered, it is difficult to see how the definition of

[4] Roaming charges and open Internet: questions and answers. 30 June 2015.
[5] https://ec.europa.eu/digital-single-market/en/eu-actions-net-neutrality

'end-user' could include all content providers. Indeed the term 'end-user' in the Common Regulatory Framework is largely used in the Universal Service Directive which does not deal with rights of content providers. The Framework Directive definitions should therefore be read in their correct context.

17. It is instructive that BEREC has previously stated that *"the term end-user will be used in the wide sense defined in 2(n) FD20 as* "*a user not providing public communications networks or publicly available electronic communications services". This definition encompasses – as illustrated in Figure 1 – different types of end-users, namely those that produce content and applications (CAPs) and users. Note that the term user – as applied in Fig. 1 – relates to persons/entities that, in general linguistic usage, are often called residential users, who mainly consume content but who may also produce content.*" However under the Framework Directive in order to be an end-user you must first be a user as the term end-user means a user not providing publicly available electronic communication services. Therefore the term end-user is used simply to exclude some users (such as entities taking wholesale supply) from the definition of end-user.
18. Finally, stretching the definition of end-user in this manner is unnecessary given the protections that flow from the NRAs' role in monitoring compliance with the Regulation including the provisions concerning blocking etc of content (see Article 3(3)). It is the provisions on reasonable traffic management that protect content providers.
19. To conclude, the following key points apply in relation to the definition of end user:
    - The end-user is the customer taking the IAS, be that a consumer or a business entity. To the extent that such a customer is also a provider of content then it will enjoy the rights in Article 3(1) i.e. the ability to distribute its content via the IAS to which it has subscribed.
    - The definition 'end-user' is used rather than 'subscriber' or other such term, to give flexibility to cover business models where the customer does not for instance subscribe to the service.
    - In the case of supply to business customers, the end-user is the direct customer rather than the customers of that business or that businesses' employees (see further below).
    - Save as provided in the first bullet, CAPs at large are not end-users. This does not give rise any issues in a two sided market because CAPs are protected under Article 3(3).
20. References to 'end-user' in the text that follow refers to end user as properly defined in this section 2.

Definition of 'end-user' – business customers

21. Where IAS services are sold to business customers the Guidelines should make clear that the end user will be the entity purchasing or taking the service rather than the employees or customers who may use the service. Two scenarios help illustrate this in practice:
    - *Cafés, restaurants, hotels etc who then offer their customers Wifi access* – in this instance the end-user is the café, restaurant or hotel who has taken the service

from the ISP. That end-user is then entitled to decide what service is made available to its customers. For instance in a restaurant or train station the end user may decide that it does not want its customers to access adult material, for instance due to concerns that minors may access inappropriate content.

- *Corporate customers* – where a corporate entity (e.g. Siemens, BMW etc) purchases an IAS it is the end-user under the Regulation rather than each employee who may use the service in performing their jobs. The corporate customer, as the end-user, has control over how that service is then provided to its employees. Employees may be barred, for instance, from accessing adult material or other material that they do not need to access in order to perform their jobs. This is similar to many businesses barring employees telephony access to premium rate services.

Services that are not publicly available (Guidelines: paragraphs 10-12)

22. Services that are not publicly available are not IAS and thus are outside the scope of the Regulation. BEREC agrees and explains that therefore Wi-Fi hotspots, made available for instance by Cafes or restaurants, fall outside the scope of the Regulation since those services are made available only to customers of that enterprise and hence are not publicly available (in any event such customers are not end-users as explained above). Moreover, internal corporate networks, since they are available only to employees of the organisation, likewise must fall outside the Regulation.

Other definitions used in the Guidelines

23. The draft Guidelines use a number of definitions that are not used in the Regulation and therefore cause concern that the draft Guidelines may go beyond the scope of the Regulation.
24. The first is ‘specialised services’ (Guidelines paragraph 2 and then used throughout). Whilst we welcome that this term is defined in the first section in ‘terminology’ we would be concerned should this term be given a more narrow meaning than the broad wording of Article 3(5) provides and hence would prefer that the definition ‘Services other than IAS’ (SoIAS) be used.
25. The draft Guidelines refer to ‘sub-internet’ services as those which restrict access to services or applications or enables access to only a pre-defined part of the internet. (Guidelines: paragraph 17) Sub-internet services are said to infringe the Regulation. We urge BEREC to adopt a more nuanced approach to such services, whilst clearly blocking providers on commercial grounds (e.g. VoIP services) would be prohibited there potentially exist services that BEREC would classify as sub-internet which are in fact unproblematic – for instance a walled garden service that allows access only to sites that are suitable for children or services that protect customers from phishing (see the section 8 below). It is important to note that services that do not provide access to virtually all end points of the internet are not IAS and thus are outside the Regulation.

3. Zero rating (Guidelines: paragraphs 28-45)

26. Zero rating and other commercial practices have the potential to drive significant consumer welfare. Commercial practices can support the development and uptake of innovative services (such as bank and utility companies offering online applications for free where customers can check usage and billing information), grow data adoption amongst audiences who are yet to embrace data services (such as senior citizens and budget constrained consumers) and more generally give customers the confidence to access data hungry services. Indeed the European Commission has highlighted some of the benefits of zero rating: *"[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."*[6] BEREC has already been referred to numerous studies and examples highlighting the benefits of zero rating.

27. Whilst there are numerous existing examples of zero rated offers, zero rating is still in its infancy with its true benefits yet to be unlocked. We anticipate that numerous new offers will come to market in the coming years as telecoms providers offer innovative services as a competitive differentiator in what are highly competitive markets. The commercial models underlying new propositions and indeed the propositions themselves are relatively nascent and it is not possible now to predict exactly what offers will come to market. The Guidelines should empower telecoms providers to innovate and offer customers the services they desire with regulators intervening only where there is material harm. An overly restrictive, or even unclear, approach in the Guidelines is likely to act as at best a drag on innovation and at worse a barrier to it, ultimately reducing consumer welfare. As we explain in more detail below, we urge BEREC to acknowledge the positive benefits that zero rating can deliver to customers and amend the Guidance so that it provides a clearer framework for assessment at a principle level. We agree that an assessment of individual practices cannot be conducted at this stage given that a full assessment is required having regard to range of factors – there can be no *per se* prohibition on any practice. It is also important to note that there are many commercial practices other than zero rating, such as sponsored data, and these too are subject to an overall detailed assessment.

28. In this section we first explain the applicable legal test, we then review the text of draft Guidelines and finally we address the specific issue of the requirement that if general access to the internet is switched off where a customers' data allowance is exhausted, all zero rated services must also be switched off.

Applicable legal test set out in the Regulation

29. The Regulation permits any commercial practice provided that the consumers' rights in Article 3(1) are safeguarded. Given that the Regulation has less than half an article addressing commercial practices, it is Recital 7 that provides the practical assessment framework. First, it explains that national regulatory authorities should be empowered to intervene where agreements or commercial practices which, by reason of their scale,

[6] Commission Press Release dated 30 June 2015

lead to situations where end user's choice is materially reduced in practice. To this end the assessment should take account of the respective positions of the ISP and the content or application provider. Moreover it makes clear that it is the very essence of the consumers' rights that should not be undermined.

30. A number of points flow from Recital 7:

    - First, to assess whether a customers' rights under Article 3(1) are limited within the meaning of Article 3(2), there is materiality threshold such that the very essence of their rights must be undermined.

    - Second, in order to conduct that assessment, the Regulation borrows heavily from the principles applied under competition law and economics. The references to market positions, scale and materiality are all well understood in that context. Indeed by borrowing these principles clarity is given to the type of assessment that needs to be conducted. It is this clarity that will give operators the confidence to deliver innovative services to their customers. This does not however mean that the test requires a finding of breach of competition law but rather that the principles applied in competition law and economics will form a very material part of the assessment.

    - Third, it is clear that NRAs assessments will, being an oversight compliance function, be ex-post. Prior to launching a service, operators are unlikely to be able to form a definitive view as to whether zero rating, applied in a particular way, is or is not problematic. For instance the impact of a particular practice may depend on the success of the proposition offered and competitive responses to the proposition may re-shape the market.

31. The language used in the press releases from the European Commission supports these points.

32. EU Commission second Q&A:

    "*National authorities will be required to monitor market developments, and will have both the powers and the obligation to assess such practices and agreements, and to intervene if necessary to stop and to sanction* ***unfair or abusive commercial agreements*** *and practices that may hinder the development of new technologies and of new and innovative services or applications*." [our emphasis]

33. This clearly echoes the language of competition law on abuse of dominance and establishes a relatively high threshold for intervention.

34. EU Commission first Q&A.

    "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. But we have to make sure that commercial practices benefit users and do not in practice lead to situations where ***end-users' choice is significantly reduced****. Regulatory authorities will therefore have to monitor and ensure compliance with the rules."* [our emphasis]

35. The materiality point is again emphasised as is the point that regulators should look at the impact on customers.

The assessment criteria in the Guidelines

36. Overall we are concerned that the draft Guidelines as drafted are overly rigid and increase uncertainty which will ultimately deter operators from offering services that will bring real consumer benefits. We acknowledge the difficult task of providing guidance in this area however we urge BEREC to recast the Guidelines to make them clearer and more workable in practice.

(a) Assessment criteria with which we agree

37. We agree with BEREC on the following points:

- That operators remain absolutely free to determine the tariffs for specific data volumes and speeds and we welcome the acknowledgement that where speeds and volumes are applied in an application-agnostic manner end-user rights are unlikely to be affected.
- That operators can choose to bundle subscriptions to services in addition to their core telecommunications services (such as music or film subscriptions) without risk of infringing the Regulation, even if the subscription to such services is provided at a discount.
- That choice of comparable services needs to be materially reduced in order for it to qualify as a limitation on the exercise of end-user rights.
- That a comprehensive assessment of the effect of any arrangement is required. As we note above however, it should be made clear that for NRAs this will largely need to be an ex-post assessment having regard to all features of the market. Regulatory authorities should only intervene to address real harm. In competitive markets customers are generally well served by aggressive competition between operators.

(b) Areas of concern

38. The draft Guidelines contain no reference to the positive benefits that may flow to consumers from zero rating. This gives an overall negative flavour to the draft Guidelines which is unjustified having regard to the text of the Regulation. We are also very concerned that the draft Guidelines lack a coherent overall basis for assessment of commercial practices. Instead various assessment criteria are listed in a binary or black and white manner without nuance. Having clearer regard to competition law principles, aligned to Recital 7, would make for a far clearer basis for assessment.

39. Our specific comments on the assessment criteria are as follows:

- The draft Guidelines explain that zero rating within a category of applications (e.g. one music service but not others) is more likely to restrict end user choice than zero rating an entire category of applications (e.g. all music services). Whilst true as generic statement (of course being more likely does not however mean it will in fact restrict end-user choice), the Guidelines need to be clearer that this is only one factor in the comprehensive assessment, and regulators should not assume that where this factor is present that end user choice will be materially reduced in practice. There will be many cases where zero rating within a category of applications has no material impact on consumer choice. For instance, there are number of music streaming

services, the fact that one service is offered on a zero rated basis does not mean that there would be a material impact on consumer choice. This is analogous to a mobile operator offering one music providers' service at a discounted monthly rate, it does not follow that that discount would materially restrict choice.

- Whilst it is relevant to have regard to the aims of the Regulation, it is important to emphasize that the Articles that follow Article 1 are the means by which the aims are to be achieved. Hence Article 1 clearly explains that the Regulation establishes the rules (i.e. Articles 2-6) to achieve those aims. The aims of the Regulation are not in themselves a substantive test for assessment. The test for assessing commercial practices is set out exhaustively in Article 3(2). This is important because an aim such as '*safeguarding equal and non-discriminatory treatment of traffic*' is capable of many interpretations. Lack of clarity will in all likelihood result in at best cooling, and at worse paralyzing, the development of innovative services that provide real end-user benefits, which is not the intention of the Regulation.
- Whilst we agree that competition law principles should be applied when assessing the market position of ISPs and CAPs, such principles do not provide that an ISP or CAP would need a 'weak' market position in order to indicate that there is unlikely to be problem. Aside from hard-core restrictions of competition, such as cartels, competition problems are unlikely to arise in the absence of market power. A lively competitive market, such as the UK mobile and fixed markets, have a number of sizeable players however the fact that they are not 'weak' does not mean that the conduct they adopt on the market is likely to be problematic from a competition law perspective.
- We agree that an assessment of the effect on consumers is relevant, however this should include assessment of the positive effects of zero rating. Moreover, the bullet in paragraph 43 that states '*whether the end-user is incentivised to use … certain applications*' is too vague to be of any practical application. Zero rating will have some incentive effect in all cases, but this not mean that the practice is problematic – it will always be a question of degree and overall assessment.
- Whilst we disagree with the definition of end-user, all of the requirements listed in relation to CAP-end-users would be relevant under a competition law and economics assessment. It would make far more sense for these factors to be assessed with such competition principles as the frame of reference. Indeed for some of these points it only makes sense for them to be assessed in this manner such as material harm to competition in the market, barriers to entry and exclusionary conduct. As we note above this does not mean that an infringement of the Regulation can only arise where there is a breach of competition law.
- The scale of the practice and the presence of alternatives is absolutely crucial in any assessment. Again this has all the hallmarks of an assessment aligned to competition law principles. In a competitive market customers will often have many choices available to them and indeed the prospects of foreclosure of CAPs that offer innovative services is unlikely as there will always be competing providers seeking competitive advantage by encouraging the use of innovative services.
- Paragraph 45 of the draft Guidelines makes a number of generic statements with no evidence in support. These statements should be removed or significantly clarified as they undermine the comprehensive assessment that is stated to be required. For instance, zero rating one application within a category (e.g. video) will not necessarily

lead to users spurning other services. For instance zero rating may grow the overall use of data without affecting consumption of other services. As an illustrative example, an ISP chooses to zero rate a music service that previously counted towards a customer's allowance. The effect is that when using that music service the customer no longer eats into their data allowance and can instead use the allowance that would otherwise have been used on that music service to consume other services.

- Moreover, zero rating a particular application rather than a class is stated to be more likely to impact the continued functioning of the internet as an engine for innovation. No evidence in support of this provided. Indeed many examples can be thought of where there will be zero rating by one provider of a particular service with no impact whatsoever on the internet as an engine for growth. For instance if an operator choses to make one email service (e.g. Outlook) zero rated it is inconceivable that this would have the effect that BEREC is concerned by. In that regard where an innovative service grips consumers' imagination it often spreads globally at a rapid pace (think of the rapid growth of applications such as Whatsapp or UBER). It is inconceivable that an individual ISP's practice in one EU market would halt development of the internet as an engine for innovation. As a very simple example consider the following scenario: ISP A choses to zero rate music supplier B; ISP C zero rates music supplier D; whilst ISP E offers x amount of data for free to the music supplier of the customer's choice; whilst ISP F offers unlimited tariffs. This is not an unrealistic scenario for example in the UK, Vodafone offers discounted subscriptions to Spotify, EE to Deezer whilst a number of operators (including GiffGaff) offer unlimited tariffs. In this scenario, a comprehensive assessment may reveal that there is no impact on the internet as an engine innovation even without having regard to global trends. We urge BEREC not to try and simplify what will be complex assessments by reducing the Guidelines down to generic black and white statements that are unlikely to hold true following detailed assessment.
- The Unfair Commercial Practices Directive (UCPD) provides no useful guidance as to how an assessment of commercial practices under the Regulation should be conducted and as such the reference to it should be deleted to avoid confusion. Indeed the footnote in which it is referred effectively acknowledges that it has limited relevance at best given the different aims of the respective pieces of legislation.

Specific issue of switching off zero rated services where data allowance is used

40. The draft Guidelines provide that all zero rated services must be shut off once a customer reaches their monthly data allowance. Whilst what happens when a cap is reached is a relevant factor when carrying out an overall compliance assessment, this binary statement is wrong in law and is divorced from practical reality. Paragraphs 38 and the third bullet of paragraph 52 of the draft Guidelines must therefore be deleted.
41. The legal basis for this is stated to be Article 3(3) first and third subparagraphs of the Regulation i.e. that to continue to offer a zero rated service when a customers' data allowance has expired would amount to discriminatory treatment and amount to illegal traffic management. It is said that operators would be offering a sub-internet service. The correct legal position is:

- Zero rating is to be assessed under Article 3(2). If a commercial practice does not materially restrict end user choice it is unproblematic. As part of that assessment the NRA may consider the impact of continuing zero rated services once the customers data allowance is exhausted.
- Article 3(3) concerns traffic management within the internet access service. It is not relevant to zero rating as it does not concern price discrimination but rather concerns measures such as blocking and throttling.
- The argument that Article 3(3) is infringed because all services other than the zero rated service are blocked fails because such services are never blocked in a meaningful sense. Customers are always able to continue using all services provided they are willing to purchase an additional data allowance. In practice the step required to do so is minimal, and generally ISPs are incentivised to make the process of purchasing additional data as easy and straightforward for the end-user as possible. Customers can always choose whether they wish to use services other than their zero rated service or not, this is no different to a customer who has a run on data rate choosing to consume no services other than the zero rated service.

42. The practical consequences of such an approach are highly undesirable. For example, many mobile operators (and to a lesser extent fixed line operators) include an allowance of data within the monthly tariff package. In order to prevent customers from suffering bill shock, when that data allowance expires the customer must purchase a further allowance of data. This is seen as preferable to having a run on data rate because it allows customers to control their spending. This is particularly important for mobile operators for a numbers of reasons including that data is relatively more expensive than on fixed networks[7] and for instance because parents often contract on behalf of their children and so may have less control over the data used (unlike for fixed broadband subscriptions where the purchase decision is made at a household level and the bill payer has complete control over total data use). Following BEREC's interpretation, mobile operators, for example, would have two choices, neither of which are desirable from a consumer perspective:
    - First, to terminate the zero rated service as soon as the monthly data allowance has expired. If a customers' choice was to only use the zero rated service, this would force the customer to purchase data they do not require in order to continue using the zero rated service. Data allowances are often offered on a use it or lose it basis, i.e. where the data is not used within the month it is purchased it is lost. Therefore customers may need to purchase data that lasts only a few days before they lose it. Moreover, pre-paid customers often have lower incomes and are more budget conscious, such that the likely outcome is that once their data has expired they will not purchase any more data. Such customers will lose their zero rated service to no beneficial purpose – i.e. they will simply consume nothing further in that month; or

[7] Many fixed operators have run on data rates because the charges for fixed data are typically less than those that apply to mobile data. Some mobile operators allow customers to fix the volume of run on data that can be charged to their account (for instance £10 per month). However the same issue arises that on BEREC's logic all zero rated services would need to be switched off once this data cap is reached.

- Second, for post-paid customers to be charged a run on rate for additional data use purely so as to ensure that the free rated service would continue to be available. This wouldn't be possible for pre-paid customers.

43. There are also wider practical consequences of BEREC's approach. These include:

- All customers will be unable to purchase additional data from their ISP using a zero rated webpage. For example, currently pre-paid mobile customers on the EE network can top up their accounts using an online app that is zero rated – by definition as the customer has no data allowance left the webpage needs to be zero rated. Post-paid customers also use zero rated webpages to purchase additional allowances. The absolute ban that BEREC proposes would mean that customer can only top-up by phone or voucher at great inconvenience.
- Information currently made readily available to customers via online applications, such as billing information and phone and SMS allowances would not be available where the customer has exceeded their data allowance as these web pages are currently zero rated. Moreover, customers would be unable to use online services provided by their operator such as facilities for payment of bills. Some fixed operators throttle a customers' IAS when they fail to pay their bill. This throttling allows the customer to access the webpage that allows them to pay their bill online whilst also allowing them to continue using communication channels, primarily email, so that they can send and receive information concerning their bill. Such practices should not be considered problematic under the Regulation.[8]
- Websites of important social value that some operators currently provide on a zero rated basis (for instance to government advice pages) would be switched off. A good example of a service that is being considered in BT relates to schools. Not all consumers take an unlimited fixed offering. Where the school would like students to use online resources for instance to do homework, BT would consider making all such webpages zero rated. This allows children to use educational resources for free without reducing their parents' monthly data allowance. To switch such zero rating off would only serve to reduce the children's welfare with no wider 'net neutrality' benefits. Further examples include sites that provide information in critical life and death situations such as suicide hotlines and hotlines for protection of minors suffering abuse. In the latter case where the minor may need a parent to top-up the mobile allowance switching off access to such sites when the data allowance is expired could result in very serious consequences.

44. In light of the above we urge BEREC to guide NRAs to adopt a case by case assessment of the effect of continuing zero rated services once a data allowance has expired. To do otherwise results in perverse outcomes that are highly undesirable for consumers.

[8] BEREC's guidance on 'sub-internet' offers should acknowledge that these kinds of arrangement are permissible and to the extent that access to such webpages is zero rated this also should not cause concern even if they continue to be available once other pages are throttled until the customer pays their bill.

4. Specialised services (Guidelines: paragraphs 95-123)

Policy framework

45. In today's world, examples of specialised services include IPTV and VoLTE. The draft Guidelines confirm that these are the types of service that the Regulation permits. Whilst this confirmation is welcome, it is wholly insufficient. The Guidelines must go much further by setting a permissive framework for the development of future services and by doing so positively encourage all industry players, not just telecommunications providers, to participate in the development of such services. As Commissioner Oettinger has recently explained, the Guidelines should foster the development of innovative 5G- and IoT-services. Doing so will boost online innovation, benefit consumers and businesses and help the EU achieve its wider objectives.
46. It is not possible today to know which services will ultimately be developed. Indeed the impetus for such services will come from many diverse sectors, including broadcasting, automotive, health and heavy industry. Moreover technology in the telecommunications industry is fast moving such that the manner in which services are delivered is constantly changing. In light of these facts the Guidelines should not be prescriptive and nor should they focus on specific technical requirements, such a logical separation. Prescriptive guidance is likely to become rapidly out of date and poses a real risk of stifling innovation. The suggestion that the Guidelines could be updated in the future is insufficient – industry players are already looking at innovative new services and cannot wait for future iterations of the Guidelines to confirm whether they are permissible.
47. We urge BEREC to not only explain the safeguards that the Regulation provides to protect IAS but to also put forward the positive case for specialised services and the role that they can play in supporting the heavy investments needed to roll out future network technologies.

Commentary on the guidelines

48. Whilst we urge BEREC to re-cast the draft Guidelines having regard to the EU's wider policy objectives outlined above, we make the following comments on the existing text:

    - It should be made clearer that subject to the safeguards to protect IAS the Regulation is permissive and supportive of specialised services. Hence the Regulation makes clear that providers of IAS and providers of content, applications and services shall be free to offer specialised services.

    - Given this general position, and given that specialised services are likely to be innovative in nature, the requirement for necessity of optimisation should be interpreted broadly. This will help foster the development of new services.

    - The Guidelines should clarify that whilst NRAs have a supervisory role, there is no requirement to obtain authorisation in order to provide specialised services (see paragraph 101 of the draft Guidelines which refers to verification by NRAs). The reference in the recitals of the Regulation to NRAs verifying whether optimisation is necessary refers simply to NRAs general oversight function and not to requirement to do this in each and every case. NRAs must exercise their supervisory obligations

in a proportionate manner. Aligned to paragraph 101 of the draft Guidelines, the key point of verification for NRAs is to monitor the market to ensure, on an ex-post basis, that specialised services are not a sham in the sense that they are devised only to circumvent the provisions of the Regulation protecting IAS in particular the provisions on traffic management.

- The Guidelines must avoid reaching technical judgments, because to do so is likely to stifle innovation. The Regulation avoided prescriptive technical language, with that approach having been rejected then it should not be re-introduced now. For instance, there is no requirement in the Regulation that specialised services must be offered through a connection that is logically separated (paragraph 106 of the Guidelines). The Regulation simply provides that quality of service must be objectively necessary but does not define how individual ISPs must technically satisfy that requirement. This requirement risks outlawing both existing and future services on both fixed and mobile networks. As an illustration, paragraph 106 of the draft Guidelines assume a specific delivery model for specialised services which is not universally true today (it appears to assume that content will be delivered unicast rather than multicast) and may not be true in the future.

- The Guidelines should be clearer that the requirement to ensure sufficient capacity in the network, involves an overall assessment of whether the network has been sufficiently dimensioned for both IAS and specialised services (paragraphs 112-116 of the Guidelines). The text in this part of the draft Guidelines is confused and unworkable from a mobile perspective. The draft Guidelines provide that "*there can be no negative impact on IAS quality*." This is not what the Regulation provides and conflates two different requirements. The extent to which specialised services can impact IAS is established by the wording that specialised services must not be offered to "*the detriment of the availability or general quality of IAS*" (see next bullet point for commentary on this issue). This issue is relatively easily resolved as paragraphs 114 and 115 set a sensible basis for assessment, i.e. the NRA will assess how ISPs have estimated the additional capacity required for specialised services and how they have subsequently ensured that the network has been sufficiently dimensioned. The preceding paragraphs can then be deleted. It is important to note that quality of service cannot be assured simply by adding capacity to the network because even momentary congestion at a particular point in the network can affect high priority, real time applications regardless of the amount of bandwidth that those services require. Increasing capacity will not reduce latency.

- The permissible impact of specialised services on IAS is established by the wording that specialised services must "*not be to the detriment of the availability or general quality of IAS*." (see paragraphs 117-121 of the Guidelines) On a mobile network where RAN capacity is a shared resource (between all users on the network) by definition where a specialised service is prioritised over IAS it will (for the period of congestion) have an impact on users of IAS in the particular location where congestion occurs. Such degradation is not prohibited by the words 'availability or general quality of IAS'. These words must refer to a broader assessment of the IAS service that the operator makes available. Recital 17 confirms this broad approach referring to an assessment of quality of service requirements, the levels and effect of congestion on the network, an assessment of actual versus advertised speeds and

the performance of IAS v non-IAS services and the quality of services as perceived by customers. Paragraph 119 is welcome but the proceeding paragraphs require further clarity.

- We agree that where a customer takes both an IAS and specialised services there is no infringement of Article 3(5) where the specialised services to which that provider has subscribed impacts that customers' IAS. The requirement in that scenario is limited to one of transparency in accordance with Article 4(1)(c). However the draft Guidelines introduce a new requirement that the customer must be able to obtain a minimum speed for any IAS subscribed to in parallel with specialised services. (see paragraph 118 of the draft Guidelines) It is unclear what is meant here as the draft Guidelines go on to state that when activated the specialised service can impact the customers' IAS. The latter point is correct and the wording that the customer must be able to obtain the minimum level of speed must be deleted. The term 'activated' however requires further clarity. This must mean both when a customer enables or uses the service. This is because for certain services the act of enabling the service will impact their IAS. For instance where the fixed access line is optimised to deliver certain specialised services, including IPTV, the IAS received by that customer may be affected because there is a trade-off between headline speed and line stability.

5. Driving the adoption of 5G

49. We agree with Commissioner Oettinger that the Guidelines must support the wider EU objective that 5G networks be rapidly rolled out. This objective will only be achieved if operators can monetise the heavy investments that they have made, and continue to make, in rolling out their 4G networks as well as any future investments needed to roll out 5G, which will be significant.
50. There are two areas where the Guidelines can assist. First, the policy position on zero rating and sponsored data must be permissive to assist operators in making a return on their investments. Second, 5G has the potential to unleash a wave of innovative specialised services. To bring this potential to reality the regulatory environment must be supportive such that operators and third parties will be incentivised to develop specialised services and so that operators can then monetise those services to pay for the 5G roll out. The Guidelines should make clear that operators have complete freedom to devise ways to monetise specialised services, the purpose of the Regulation is only to ensure that IAS is not compromised. Provided that is the case operators are free to develop any models they wish to monetise specialised services. This may include whether they chose to exempt data used by such services from a customers' general data allowance.
51. The Guidelines should set out the positive benefits that specialised services will bring. Whilst we do not know today exactly what services will be developed, the Guidelines should call out some of the possible future use cases so that operators and third parties can take confidence that these types of services are positively encouraged. Such use cases may include:
    - Health applications – the reliability of communication is essential for the automation of services in critical life and death situations. In the future it is possible that high capacity low latency services will allow health services to be streamlined such as enabling remote diagnostics that usually can only be performed in hospitals.

- Industrial and manufacturing use cases – these use cases demand massive-machine type communications to enhance manufacturing processes and monitor safety of industrial applications. It is the comprehensive end to end system that 5G promises that will allow broad uptake of these services from around 2020.
- Automotive – this is a key area of focus, requiring both low latency and high reliability for certain functions such as collision avoidance.

52. The Guidelines should be careful to emphasize that there need not be a negative correlation between development of specialised services and IAS. In fact if operators are able to effectively monetise the 5G opportunity the benefits that flow from roll out of 5G networks will flow to all users on the network regardless of whether they choose to take specialised services.

6. Traffic management (Guidelines: paragraphs 46-94)

53. Effective traffic management is essential to delivering high quality customer experience. The Regulation recognises this by permitting operators to deploy reasonable traffic management in order to make efficient use of the network resource and to ensure optimisation of overall transmission quality. This is particularly important for mobile networks which face a number of unique challenges. The Guidelines must tread carefully so as not to rule out reasonable traffic management measures that are in fact permitted and should be sufficiently flexible so as to remain relevant as technology evolves. We would therefore urge BEREC to row back from prescriptive technical guidance and instead focus on the key principles that operators must apply when deploying traffic management. This is not an attack on the principle of net neutrality to which we are supportive but rather that the Guidelines should be sufficiently flexible to allow ISPs to effectively manage their networks.
54. It is not only technology itself that is changing but also the way in which technologies are used together to create innovative propositions. For instance, the Guidelines need to recognise the potential for hybrid fixed / mobile solutions as well as solutions that use a mixture of IAS and non-IAS services. An overly rigid interpretation of the rules on traffic management may prevent innovative services coming to market which, when properly analysed, do not conflict with the goals of the Regulation. For instance, it is possible that mobile infrastructure may support fixed services, for instance where a customer has a poor fixed connection it may be supplemented by available mobile connectivity where there is idle capacity on the mobile network. However when mobile customers require that capacity it is appropriate that they should be prioritised over the fixed customers. This example is simply illustrative of the kind of issues that may arise where services are offered that rely on both fixed and mobile inputs.
55. The Guidelines should acknowledge that operators are permitted to quality segment between different IAS services. Whilst the Regulation prohibits commercial discrimination between different applications and services (WhatsApp v Messenger etc) it supports quality segmentation as regards offers made to the customer end-user. For instance, it is expressly permitted to offer different speeds and data volumes to customers. More widely therefore, an operator may, for instance, choose to offer a range of product offerings that cater for different market segments and customer requirements.
56. In a competitive market the end-user is able to attain the services they require by shopping around as different service providers provide different services and at different

prices. For example some providers operate high contention ratios to keep costs down to their end-user whilst other providers offer very low contention rates with a highly resilient service to customers where connectivity and throughput is critical, such as for business customers. All the varying services meet the objective of providing access to all sites (or nearly all sites as defined) whilst allowing the customer to obtain their requirements at the price they are prepared to pay.

57. Hence as it is reasonable and proper for customers to choose their provider of choice to meet their requirements, it must also be reasonable and proper in a competitive market for providers to offer a range of products that cater for different customer needs and requirements whilst always providing access to all sites. We therefore urge BEREC to allow the market to provide the range of offerings that exist today and scope for commercial innovation for tomorrow. To even counter the thought of a 'Vanilla' Internet would stifle European competiveness against the rest of the World.

58. We believe that this accords with what BEREC had in mind where it previous stated: *Some ISPs use price differentiation based on providing some kind of added value, e.g. through providing faster broadband speeds or "gamer tariffs" which provide the required latency levels to ensure a good gaming experience. In the future, this may lead to other types of differentiation, whereby end-users might be able to pay more for assured quality of service (e.g. for HD streaming) or for a less assured quality of service for end-users who use only email and web browsing. ISPs may also consider the best models to combine such options with the various possible ways for people to access the Internet (home, office, nomadism, etc.)*"[9].

59. Specific comments on the draft Guidelines are as follows:

- IP interconnection falls outside the Regulation, we therefore welcome the text in paragraph 47 which confirms this. Given this, it is inappropriate for other parts of the draft Guidelines, such as paragraph 6, to suggest that terms for IP interconnection may fall foul of the Regulation.
- The reference to transparency in Article 3(3) is implemented through Article 4(1)(a), and is therefore not an additional obligation of transparency (see paragraph 56 of the draft Guidelines).
- The draft Guidelines state that where traffic is encrypted, that in itself is not a reason to treat that traffic differently. However, the Guidelines must also acknowledge that in such circumstances the operator may be unable to determine the nature of the traffic and in which case it may (inadvertently) be treated differently to equivalent types of traffic. (see for instance paragraph 57 of the draft Guidelines)
- We agree with paragraph 58 (last bullet) of the draft Guidelines that operators will ultimately need to balance the competing requirements of different traffic categories or competing interests of different groups. Clearly this a matter of judgment to be exercised by the ISP as to how it considers this balance should be made. In general it is the operators rather than the NRAs that will be best placed to exercise this judgment. NRAs should not seek to make this judgment unless the Regulation is clearly infringed.

[9] BEREC Guidelines for Quality of Service

- As regards the information that operators can use to differentiate / monitor traffic, the draft Guidelines must be amended to make clear that operators are permitted to use the domain name. (paragraphs 66-67 of the draft Guidelines) This does not involve viewing the specific content that the user has accessed (such as the text or pictures). If this is not permitted then operators will be unable to effectively identify different categories of traffic. This would give rise to wider undesirable consequences, including in relation to zero rating. For example, if a zero-rated offer is made whereby all video content is zero rated, if operators are unable to effectively identify video content then the offer would have to be limited to those video services that the operator is capable of identifying. This is undesirable having regard to the objectives of the Regulation and the impact it would have on consumers.
- Paragraph 70 of the draft Guidelines provides that where traffic management measures are permanent or recurring their necessity may be questionable. Such a far reaching statement either needs to be clarified or removed. That paragraph rightly explains that necessity can materialise regularly over a period of time and by definition therefore if it occurs regularly it will be recurring but that this is not problematic. Networks need to be dynamic to respond to changes in technology, it may be the case that future technologies allow more effective traffic management that ultimately allows the network to be used more efficiently. Even if used on a recurrent basis this should not be seen as problematic.
- As regards the exemption that permits measures to protect the security and integrity of the network (Article 3(3)(b)) the draft Guidelines note that this could be used to circumvent the Regulation because security is a broad concept. (paragraph 83 of the draft Guidelines) This seems highly unlikely in practice and NRAs should be cautious of intervening against security measures that operators deem necessary to protect their networks.
- Paragraph 89 takes a simplistic approach to dimensioning networks and should make clear that should an NRA have concerns as to whether a network is sufficiently dimensioned it would need to undertake a balanced and realistic assessment.
- Paragraph 119 refers to the inherent difficulties that mobile networks face due to factors such as difficulties anticipating where active users will be located. However the draft Guidelines should make clear that unforeseeable circumstances also arise on fixed networks. We suggest the words ‘do not normally’ be replaced with ‘occur less frequently’.

- As we note above in relation to specialised services, the draft Guidelines are wrong to give the impression that investment in capacity alleviates the need for traffic management. Operators have the right to deploy reasonable traffic management as this allows the network resource to be efficiently used and indeed not all traffic management concerns capacity.

7. Transparency measures (Guidelines: paragraphs 124-163)

Requirements in relation to advertising

60. BEREC is only permitted to guide NRAs on the terms of the Regulation. BEREC cannot offer guidance that falls outside the scope of the Regulation and cannot create additional powers for NRAs or additional requirements for providers of internet access services. BEREC states that NRAs "*could set requirements on defining minimum speed under Article 5(1)*[10]" however this is not reflected in the Regulation. The Regulation references advertising in the context of:

    - "*assess[ing] the impact on the availability and general quality of internet access services by analysing … actual versus advertised speeds*"; and

    - information that must appear in IAS contracts.[11]

61. It is unclear why BEREC considers that advertising regulation falls within the scope of the Regulation. The Regulation does not seek to govern the content of advertisements and limits its scope to "*establish[ing] common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights*". Advertising in the UK and across much of Europe is subject to effective regulatory and self-regulatory regimes, underpinned by the relevant sections of the Unfair Commercial Practices Directive (UCPD). Given that the distinction between the aims and scope of the UCPD and the Regulation are drawn out in the draft Guidelines ("the former mainly addresses commercial practices which are directly connected with a promotion, sale or supply of a product (i.e. mainly advertising and marketing) whereas the latter establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights") it is unclear why BEREC has adopted this position.

62. By granting advertising regulation powers to NRAs, BEREC goes beyond the scope of the Regulation and risks undermining the established self-regulatory systems and creating confusion as to which bodies enforce national rules on broadband speed advertising. There is a real risk of duplication of existing information but in slightly different forms. Each NRA will need to carefully consider what requirements are already in place in their own member state (see further below). In the UK, at least, broadband speed advertising is subject to a body of regulatory guidance and precedent, and additional, competing rules enforced by the NRA would only serve to confuse consumers rather than add clarity.

BEREC assumes that Regulators are starting from a blank canvass and hence has no regard to existing regulatory requirements

63. There is an abundance of regulation already in place dealing with or touching on many of the issues referred to in Article 4. BEREC effectively ignores this and sets out detailed prescriptive requirements as if it was working with a blank canvass. BEREC should acknowledge that existing regulation may already deal with some of the requirements of

[10] Paragraph 141

[11] (Article 4(d))

Article 4 (in whole or part) and that it may be desirable for NRAs to use existing regulation as a base and add to that in so far as there are additional requirements. This is a far more proportionate approach that assuming a blank canvass.

64. We provide the example in relation to advertising above however further examples include complaint procedures and transparency of traffic management. As regards complaint procedures, further regulation in the UK is unnecessary. Ofcom's General Condition 14 states that "*The Communications Provider shall have and comply with procedures that conform to the Ofcom Approved Code of Practice for Complaints Handling*". BERECs proposal is unnecessary, over prescriptive and unrealistic; handling complaints about internet access does not warrant the creation of a single point of contact for all net neutrality related complaints and would add unjustified costs (paragraph 156). BEREC should keep in mind that operators have many millions of customers who call customer services to deal with a range of issues, the idea that the customer would have a single point of contact for net neutrality issues is unworkable. Customers are already offered numerous ways to file a complaint and it is unnecessary to outline all of the methods that should be made available to a customer. General Condition 14 also sets out that Communications Providers needs to be member of an Alternative Dispute Resolution scheme. Communications Providers need to refer customers to this scheme if they haven't resolved a customer's complaint within a fixed time period, or if the ISP and the customer have reached a deadlock situation. These processes work well in the UK and adding separate processes for internet access complaints could lead to customer and agent confusion.

65. As regards transparency requirements for traffic management, in the UK the BSG has published a Key Facts Indicator[12] which providers of IAS use to explain the traffic management they apply. This allows customers to compare traffic management applied by different providers, it is easy to digest, and is a proportionate way of providing customers with the transparency that they need as it avoids technical and confusing language.

Information requirements should be proportionate and be genuinely useful to consumers

66. The additional information that BEREC states should be provided to customers is neither consumer friendly or useful. (see draft Guidelines commentary generally on Article 4(1)) BEREC state that the information should be "*meaningful to end-users*"[13] however the level of detail goes beyond what is currently provided in the UK and specifies requirements that are unrealistic to incorporate into contractual terms. Irrespective of traffic management, in mobile networks, available internet access speeds are affected by a variety of factors such as coverage, location specific deployment of certain technology (for instance the availability of LTE Advanced in a number of cities), the customer's device and capacity in the network at any given time. Areas which have 2G or 3G coverage only will typically have lower speeds than areas with 4G coverage. Traffic management is likely to have significantly less impact than all of these other factors. The value of providing the additional information is therefore limited.

67. More generally, the amount of contractual and regulatory information Communications Providers have to provide to customers when they enter into a contract is significant and we question the extent to which customers can absorb this additional information. Adding more information is unlikely to improve their understanding. We consider that the customer's contract should clearly signpost where they can find information about the

[12] http://www.broadbanduk.org/policies/the-open-internet/open-internet-key-facts-indicators/

[13] Paragraph 126

impact of traffic management on the IAS. The draft Guidelines suggest that more information has to appear in a consumer's contract however practically this information will be have to be incorporated by reference. Given that under the CRA pre-contractual representations are binding there is no need for this information to appear in the contract.

The provisions of Article 4 are not retrospective

68. Paragraph 130 of the draft Guidelines, states that Articles 4(1)-(3) apply regardless of the date the contract is concluded or renewed. BT therefore understands that BEREC's view is that all existing contracts (whatever date they were entered into) must be amended to include the information required in Article 4(1). This cannot be correct as a matter of law as it risks rendering Article 4(4) redundant. Article 4(4) provides that discrepancies between actual performance as against that specified in accordance with Article 4(1) would trigger remedies under national law, however that provision only applies to contracts entered in from 29 November 2015. However if Article 4(1) requirements must be incorporated into all contracts (and would thus be enforceable as a matter of contract law) then the limitation in Article 4(4) falls away. This cannot be what the legislator intended.

69. We also note that if BEREC is correct that zero rated services must be switched off once a data cap is reached this may put the ISP in breach of its existing customers' contractual terms. Legal certainty would dictate that this should only apply to new contracts.

Further specific points

70. Paragraph 127 provides that information should include two levels of detail, firstly high level information and then "*more detailed technical parameters and values*". It is inconceivable that a customer will want to review technical parameters and values and hence providing such information serves no useful purpose and indeed may have a negative impact. There are many existing regulatory obligations to provide information to customers in a prominent manner, if such technical information is also required to be made available it undermines the prominence of that other information.

71. Paragraph 129 should be deleted, BEREC's role is not to opine on the scope of Directive 93/13/EC (Unfair Terms in Consumer Contracts).

72. Paragraphs 131 and 132 require both a concise and comprehensive explanation of traffic management techniques. The explanation cannot realistically be both, it will either be concise (which is preferable as consumers' do not want comprehensive explanations) or comprehensive.

73. Paragraph 134, it is highly unrealistic to suppose that a customer will wish for an explanation as to how delay, jitter and packet loss affect their services. It is also important to BEREC to have regard to the fact that a telephony contract is a legal document and is highly undesirable that it becomes a depository for all sorts of guidance (for instance paragraph 135, - information and examples of what kind of data usage would lead to the data cap being reached including indications in relation to popular applications).

74. Paragraph 139, we agree that there is no requirement to advertise speeds, it is only if speeds are advertised that they must comply with the Regulation.

75. Paragraph 150 provides that maximum speeds on a mobile network should be provided in a manner so that the customer can understand the realistically achievable maximum speed in different locations. This goes far beyond what the Regulation requires and is only likely to confuse customers rather than assist them.

8. Parental controls

76. In order to protect minors and to allow customers to choose what content they access, such as adult and violent content deemed unsuitable, UK government policy is that providers of IAS should offer customers parental filters. These are offered by the major fixed and mobile players, for instance on the fixed side all of the major players, Sky, BT, Virgin and TalkTalk offer such filtering free to their customers. These allow customers the flexibility to control what they view, for instance we offer customers the option to use one of our three pre-set filters with functionality to control different filters on different devices, and can be de-activated or activated at any time. These are permitted under Article 3(1) because as noted above the end-user (being the customer) is free to choose what content they wish to access
77. Article 3(1) grants customers the right to choose what content they access (see '*of their choice*'). Parental filters simply implement a customers' choice. Importantly, customers are able to change their choice at any time and switch the parental filters off. Any alternative interpretation would force customers to expose themselves and their families to material that they do not wish to see. BT is concerned that BEREC's interpretation of the definition of 'end-user' undermines customer choice. It would be unworkable if both the CAPs (i.e. every content provider on the internet) and the consumer is able to choice which content is accessed – one must prevail over the other. As stated above, the definition of 'end-user' does not include CAPs unless they themselves take an IAS. However, even if BEREC were correct that the definition of end-user includes CAPs, then the right granted to CAPs cannot be so wide as to force customers to view content against their wishes. A parental filter does not prevent a content provider from distributing their content it simply allows a customer to enforce their choice of what content they wish to see.
78. Moreover, in the context of business customers it is the business end user (i.e. the business entity (Café, restaurant etc) that determines what filtering is applied when its customers or employees use the service it has purchased. Therefore in the context of say a Café offering its customers Wifi access the Café owner, as the end user, can determine what services are accessible. In any event as BEREC notes, given that the Café owner will be offering the service to a closed user group, provision of Wifi to its own customers falls entirely outside the scope of the Regulation.
79. Where a customer is exercising choice, the provisions of Article 3(3) are irrelevant. The filtering does not prevent the customer from viewing content that they may wish to see but simply allows the customer to effectively block content that they do not wish to view or be viewed. It should be kept in mind that if providers of IAS are prevented from assisting customers in this way then those customers would be forced to use less effective measures to try and achieve the same result. As a matter of policy, it is clearly undesirable that customers should be prejudiced in this manner.
80. Parental controls are not the only service that customers may take from their ISP that involves network level protection. For instance BT offers its fixed customers a product called 'BT Protect' that warns or blocks customers if they are about to visit malicious malware and phishing sites. The customer can choose to ignore or switch off BT Protect at any time. For the same reasons as apply to parental filters there is no reason why such a product should be prohibited on net neutrality grounds.

Definitions used in this response

BSG	Broadband Stakeholder Group
CAPs	Content and application providers
End-user	As defined in the Regulation and the Framework Directive – we explain how this should be interpreted in section 2
IAS	Internet Access Service
ISP	Internet Service Provider, in this document used as a shorthand for providers of an IAS.
NRA	National Regulatory Authority
RAN	Radio Access Network
Specialised Service	Services other than IAS 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.
The Guidelines	Guidelines on the Implementation by National Regulators of European Net Neutrality Rules
The Regulation	Regulation (EU) 2015/2120 of 25 November 2015