

18th July 2016

Cyfrowy Polsat S.A. comments on BEREC document BoR (16) 94 “BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules”, further referred to as “document”.

1. Proposed Zero rating restrictions (document bullets 37-52)

We cannot agree with:

the proposed rule that: *„A zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated application(s) would infringe Article 3(3) first (and third) subparagraph (see paragraph 52)*

and the argument that

“The effects of such a practice applied to a specific application are more likely to “undermine the essence of the end-users’ rights” or lead to circumstances where “end-users’ choice is materially reduced in practice” (Recital 7) than when it is applied to an entire category of applications”

Giving the user additional access free of charge to a specific application or service does not in any way undermine the essence of end-users’ rights. If the user has a choice between having charged access to all applications only within the data cap where all applications are blocked or slowed down once the cap is reached or alternatively, having access to non-zero rated applications within the cap+an additional application/applications free of charge and outside the cap, every user will go for the second option. This is evidently beneficial to the user. Forbidding such practices related to zero rating is unjustified intervention in the freedom of business practices and overinterpretation of Regulation 2015/2120. Zero rated offers can be beneficial to the flourishing of innovative and useful services (also those developed in public interest and for public safety), and the assumption that current zero rating practices distort competition, followed by any regulatory restrictions in this matter should be a result of sound regulatory analyses of specific services in specific markets, according to rules of ex-post regulation. Both the EC and BEREC have frequently assured that they support innovation in the DSM. Introducing the proposed restrictions to zero-rating is a measure that seems to stand in contradiction with this.

2. Additional information obligations related to transparency measures imposed on providers of internet access services (ISPs). (document bullets 124-155)

According to art.4 par.1 of the Regulation such providers are obliged to include information related to transparency measures in the contract.

BEREC guidelines to this article require that this information is extremely detailed. Due to existing regulatory requirements the volume of current contracts is already around 70 pages (in Poland), which is burdensome to consumers. Adding information according to the proposed BEREC guidelines would result in increasing the already exorbitant contract bulk. Although in theory consumers will receive a lot of detailed technical information, in practice they will not be able to understand them nor make any use of them. For this reason we propose a much less restrictive approach to contract requirements in this matter, so that only basic information is included in the contract and the customer is given access (eg. a weblink) to more specific information provided elsewhere.

3. Estimated maximum speed and coverage maps (document bullets 150 - 154)

The proposed concept of estimated maximum speed that the ISP should set in the contract seems to disregard the specific conditions in which mobile services are provided. Moreover, it is not clearly defined in the proposed guidelines. If this concept is maintained in the final guidelines, BEREC should precisely state how exactly such speed should be measured, so that both ISPs and end-users do not have any doubts. Reference to “different locations in realistic usage conditions (...)and (...) different technologies (...)” is too general, vague and insufficient. What is more, relying on the “realistically achievable maximum speed” is also a misleading concept in the mobile network environment, where the speed available at a given moment to the end-user is determined by many factors, such as: topography (eg. geographical and building density factors), weather conditions, time, number of users served by a given BTS, etc. Due to the variability of these factors, we propose that the *estimated maximum speed* is defined as *the maximum technological speed that the mobile internet access provider is able to provide in enumerated specific technologies*.

We would like to point out that the BEREC proposal for the ISP to make available information about estimated maximum speeds by means of geographical coverage maps contradicts the Regulation requirement that such information should be included in the contract. As already mentioned, such speeds are variable in time, so placing this information in a map would undoubtedly be erroneous. Speed measurements in

different locations would not solve the problem, as such measurements are realistically valid only at the moment they are performed. The same restriction applies to indoor and outdoor conditions and measurements. For example in indoor conditions speed may vary to a high extent depending on whether the end-user is in a cellar, in the attic, on the type of material that covers the roof (eg. roof -tiles or metal sheets) etc. so it would be practically impossible to publish a map with valid information on estimated maximum speed in realistic usage conditions in a specific geographical location.

What is more, presenting on geographical maps results of ISP measurements would not solve the problem of providing the user with information that is appropriate and valid to this user at a given moment in the conditions that he/she experiences.

Returning to our proposal of defining *estimated maximum speed as the maximum technological speed that the mobile internet access provider is able to provide in enumerated specific technologies*, we would like to remind BEREC of the current practice, according to which ISPs publish coverage maps where information about speed available in a specific technology is presented. Such information should be regarded as sufficient to meet the requirements related to providing coverage information about available speeds.

4. Procedures for addressing complaints (document bullet 156)

BEREC guidelines in this bullet refer to art 4 par 2. Considering our earlier mentioned doubts and problems regarding BEREC current understanding of estimated maximum speed, we believe that there is a serious risk of ISPs being faced with user complaints and unrealistic claims resulting from such an approach, which disregards variable factors of mobile network conditions. That is why, we believe BEREC should clearly outline that complaints related to art.4 par.4 of the Regulation “Any significant discrepancy, continuous or regularly recurring” could be made only in reference to minimum or usually achievable speed.