Public consultation on BEREC guidelines on the implementation by National Regulators of European Net Neutrality rules

Liberty Global's response

Liberty Global – Corporate Affairs
18 July 2016, Brussels

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LIBERTY GLOBAL

Purpose of the consultation

Regulation (EU) 2015/2120 included new Net Neutrality rules to safeguard equal and non-discriminatory treatment of traffic in the provision of Internet Access Service. The regulation was adopted in November 2015 and came into force on 30 April. It specified that BEREC lay down guidelines on the implementation by NRAs of their obligations to monitor and ensure compliance with the rules. The guidelines aim to contribute to the consistent application of the Regulation, thereby contributing to regulatory certainty for stakeholders.

The draft BEREC guidelines was approved for public consultation at the BEREC Board of Regulators meeting in Vienna, Austria on 3 June 2016.

BEREC published, on 6 July 2016, for consultation the first draft guidelines on the implementation of new net neutrality rules.

The role of public consultation is to provide BEREC with valuable feedback from stakeholders and to increase transparency. In accordance with the BEREC's policy on public consultation, BEREC will publish a summary of all contributions received, respecting any confidentiality requests.

The public consultation run from 6 June 14:00 (CET) to 18 July 14:00 (CET) 2016.

About Liberty Global

About

Liberty Global plc (“Liberty Global”, “Liberty”) is the world’s largest international TV and broadband company with operations in more than 30 countries across Europe, Latin America and the Caribbean. We invest in the infrastructure that empowers our customers to make the most of the digital revolution. Our scale and commitment to innovation enable us to develop market-leading products delivered through next-generation networks that connect our customers who subscribe to over 59 million television, broadband internet and telephony services. We also serve over ten million mobile subscribers and offer WiFi service across six million access points.

Key facts

- World's largest international TV and broadband company
- Leading operator in Europe; Liberty Global Group
- Established player in Latin America and the Caribbean; LiLAC Group
- Revenue: $18.4 billion
- Employees: 37,000
- 54 million homes passed
- 27 million customers
- 57 million RGUs (video, internet, and voice subscribers)
- 7 million mobile subscribers and 6 million WiFi access points

Our Operations

Liberty Global operates in 12 European countries (Austria, Belgium, Czech Republic, Germany, Hungary, Ireland, Netherlands, Poland, Romania, Slovakia, Switzerland and United Kingdom) under the consumer brands UPC, Unitymedia, Ziggo, Telenet and Virgin Media, and in over 20 countries in Latin America and the Caribbean under the consumer brands VTR, Flow, Liberty, Mas Movil and BTC. The LiLAC Group also operates a submarine fiber network throughout the region in over 30 markets.

Our Products

We offer innovative and enhanced video products, including revolutionary media and entertainment platforms Horizon TV and TiVo, Video on Demand, High Definition TV, and Digital Video Recorders. Our next-generation broadband internet services deliver market-leading downstream speeds up to 500 Mbps and our feature-rich VoIP telephony is accompanied by mobile voice and data services in a growing number of markets. We also provide a complete range of advanced broadband internet, voice, and video services to business customers.

Our Vision

Our company vision simply stated is “Connect. Discover. Be Free.” Our market-leading broadband internet, voice and video services and innovative product bundles empower millions of people to discover and experience the endless possibilities of the digital world, and we’re constantly striving to enhance and simplify their lives through meaningful innovation. At the same time, we are focused on bringing an amazing entertainment experience to even more customers—through significant investment in our networks and by driving incremental penetration of our advanced services.

Liberty Global's response to consultation

Introduction – Executive summary

Liberty Global welcomes the opportunity to provide comments on BEREC's guidelines. We appreciate national regulators commitment to maintaining constructive dialogue with networks operators across Europe on net neutrality issues.

As the largest international cable network operator we are committing many hundreds and millions of euros each year to investing and upgrading our fixed and mobile broadband connectivity products in order to empower our customers to make the most of the digital revolution. We are actively upgrading our networks, connecting more households and enlarging our footprint as we deliver on our goal of helping to build a Gigabit society. In 2016, across our European markets, we will extend our cable footprint to connect an additional 1.5m homes, with an additional 7m homes planned over the next 3 years (2016-2018).

Such large scale investments are necessary to meet the growing demand for bandwidth and the concurrent high intensity usage of our network assets. As such it is essential for network operators to be able to explore new innovative business models to bring broadband new services and applications to consumers in a sustainable, long-term and cost effective way.

Liberty Global believes in the open internet, in safeguarding consumer transparency and in the importance of innovation of commercial practices. The European Commission's Net Neutrality regulation in our view takes a pragmatic and generally well balanced approach to establishing a common European framework for the regulation of traffic management, and for safeguarding the open internet, whilst ensuring the development of specialised 'managed services' does not impair the quality of the general internet access services. In our view, progressive and future-proof net neutrality legislation should promote, not restrict, the development of higher quality, guaranteed service delivery products from service providers, as these are key to unlocking and supporting future digital services and meeting end user needs.

Accordingly, we anticipated BEREC's guidelines would seek to maintain the pragmatic and flexible approach taken by the regulation.

However, there is clear evidence that in a number of substantive and strategic areas, BEREC's draft guidelines overstretch the boundaries of the regulation, the effect of which is to increase ambiguity for operators seeking to develop new products and services, whilst at the same time increasing the potential for internal market fragmentation.

Zero-rating

In particular, we believe the guidelines precautionary approach to zero-rating practices is unwarranted and will inhibit the ability of internet service providers (ISPs) and content and applications service providers (CAPs) to explore new business models.

Whilst the EU law does not forbid zero rating, as currently drafted the Guidelines give national regulators wide discretion to prohibit zero-rating practices. We think this approach is wrong as we do not share BEREC's assessment that zero-rating products will materially disturb the competitiveness of the ISP and CAP markets. On the contrary we observe that there is an intense and robust level of competition at both the application, service and network access layer of the European market place, a level of competition which is of clear benefit to consumers seeking the best possible broadband quality, price and service delivery.

Accordingly, we have reservations with the guidelines in their approach to the competitive assessment of zero-rating practices. In particular, we believe the guidelines predisposition for NRAs to undertake an ex-ante assessment of these practices, and according to a standard of proof that has no basis in the underlying Regulation nor in competition law practice, is fundamentally wrong and not in line with the Regulation. The result of this process will be that operators will be required to receive pre-authorisation of commercial broadband offerings with NRAs, slowing development and time-to-market of innovative offerings for consumers.

In addition, we also observe a worrying tendency in the guidelines to provide NRAs with the ability to intervene and set broadband pricing where they see 'agreements or practices which have an effect similar to technical blocking of access'.

In light of the foregoing, we would urge that the Guidelines are amended to align with the Regulation, and acknowledge that ISPs can offer sponsored data offers and zero rated offers, as long as the end user choice is not materially impacted in practice. Additionally, we believe the guidelines desire to give NRAs power to assess commercial practices ex-ante is unnecessary as the economic 'effects-based' approach can effectively tackle specific market behaviours and outcomes that could compromise consumer welfare.

Finally, we believe the guidelines incorrectly overlook the wider consumer enhancing benefits of zero-rating practices, and would benefit from taking a more holistic view of the ISPs/CAPs value chain. Zero-rating and sponsored data can be used by network operators and ISPs, either in conjunction with content and service providers or independently, for the benefit of end users. Such services include:

- Free access to customer care and top up websites
- Provision for customers to trial new services (e.g. video or music streaming) without having to worry about data consumption costs
- Extend the reach of online services to new market segments (low-income, price sensitive etc)
- Provide citizens with extensive access to important online services (for example access to charity helplines, information, healthcare, transport and travel services, emergency services etc)

BEREC also disregards the fact that zero-rating means consumers receive more data while paying the same price; and that consumers can still access all end points of the internet.

Zero-rating will present a new opportunity for all players across the distribution chain to compete more intensely: for CAPs, who can benefit from more use of their services, for ISPs, who can find a new way to differentiate their offerings, and most importantly, for consumers, who end up getting **more for less**.

Fundamentally, we believe the guidelines restrictive approach to zero-rating practices is unwarranted, goes beyond the scope of the Regulation and will limit the ability of network operators and Internet service providers to explore new business models which enhance consumer welfare and respond to rapidly evolving and increasingly specific demands. The development of such two sided business models is a common feature of the CAP value chain a feature we believe can usefully be developed in combination with ISPs.

Specialised services

We have reservations that the BEREC guidelines conclude that the preferred way to deliver any kind of services (including specialised services) is via best effort Internet access service and only under extraordinary circumstances, should ISPs and CAPS use other means to deliver their services, which must be done in a 'logically separate' manner.

In our view, this approach runs counter to principle of technology neutrality and imposes a regulatory mandate to deliver broadband services via best effort Internet for the delivery of applications and services.

The guidelines recommend NRAs undertake a thorough ex-ante analysis of ISP's service delivery strategy, in order to justify why specific services cannot be delivered via the best effort Internet. Consistent with our observations on the zero-rating section, a requirement for NRAs to undertake an ex-ante assessment of an ISPs technology or capacity planning decision on how to most efficiently and cost effectively deliver a broadband offering will have a materially negative affect on the development and time-to-market of new offerings. Such an overly restrictive and stringent interpretation of the regulation will inhibit innovation and the development of key future specialised services and networks/delivery methods, designed to meet end-user demand.

Traffic management

In general, whilst the guidelines respect the spirit of the regulation, NRAs are encouraged to view traffic management practices as something to be carefully monitored ex-ante and they are (wrongly) characterised as a remedy of last resort.

We would encourage BEREC to more clearly emphasize the fundamental role that Traffic Management plays in the delivery of services and maintenance of the network and its resources. Equally we believe the restriction on the use of traffic management in case of “commercial considerations” is the wrong approach, given operators are likely to be unable to effectively offer managed or specialised services to distinct user groups without the ability to implement traffic management techniques.

Zero Rating

General remarks

Competition law and competition authorities already equipped to curb potential anti-competitive zero-rating practices

We endorse the economic "effects-based" approach suggested by BEREC, which entails amongst others examining the market position of ISPs and CAPs, the range of choice consumers have, and the overall competitiveness across the levels of the ISP-CAP distribution chain. This approach is in line with competition law standards, and safeguards a case-by-case analysis of the specific facts and circumstances pertaining to a specific zero-rating practice in a given Member State.

Ex-post competition law can effectively tackle specific market behaviours and outcomes that compromise consumer welfare. This is not less true when it comes to zero-rating: national competition authorities and the European Commission are fully equipped to address any concerns with regards to anti-competitive zero-rating practices. Zero-rating can only lead to foreclosure to the detriment of consumers if consumers are not effectively able to switch both fixed and mobile providers in response to the implementation or extension of zero rating policies. As set out below, we consider that this situation does not apply in EU markets.

Indeed, we would encourage BEREC to align its guidelines with the approach taken in the regulation itself. Article 3 (2) explicitly allows ISPs to conclude contractual agreements on tariffs for specific data volumes and speeds as well as other commercial and technical conditions. Recital 7 outlines under which circumstances NRAs may intervene based on established competition law standards and the "respective market positions" of the involved providers of content, applications and services.

Hence we believe the guidelines should be aligned with the Regulation to acknowledge that ISPs can offer sponsored data offers and zero rated offers, as long as the end user choice is not materially impacted the assessment of which is made ex-post and in accordance with the principles of competition law.

BEREC's main concern in the context of zero-rating products (the "leveraging" of market power from an upstream to a downstream market) is not a novel concept in theory and economics of competition law. In our view, there is no "gap" to be found in competition law that the guidelines need to fill in by postulating new powers, as the existing framework is flexible enough to adapt to numerous situations, including zero-rating.

We do not see why NRAs should encroach upon competition authorities' field of expertise and do not believe that such an intervention would have beneficial outcomes for consumers. In our view, competition authorities already have a full toolbox in their disposal to intervene and assess zero-rating practices with the suggested "effects-based" analysis. The suggested "overlap" of responsibilities between regulatory and competition authorities creates confusion, is not supported on legal grounds and rather strikes as a "mix-and-match" of jurisdictions. It could stifle innovation that would benefit both consumers and CAPs. In our view, competition authorities already have a full toolbox in their disposal to intervene and assess zero-rating practices with the suggested "effects-based" analysis (if intervention is deemed necessary).

Putting aside the fact that competition authorities are fully capable to intervene in potential anti-competitive behaviour on the basis of competition law, we would like to point out that the likelihood of such a competition problem arising is very limited for the following reasons:

Competition at all levels of the ISP-CAP supply chain is and will remain intense, preventing anti-competitive zero-rating practices

We understand BEREC's main hypothesis to be that price discrimination in the form of zero-rating in the downstream market of ISPs will distort competition / limit choice in the upstream market of CAPs. Zero-rating

effectively reflects a vertical connection between upstream players (Internet Service Providers, "ISPs", fixed / mobile) and downstream players (Content and Applications Providers, "CAPs"). Long-standing economic theory crystallised in European legislation and case law suggests that vertical links generally lead to pro-competitive effects and overall increase consumer welfare. In theory, only if market power were to be found at one or more levels of the distribution chain described in the BEREC guidelines and comprised of ISPs and CAPs, could zero-rating raise concerns for anti-competitive conduct (either in form of vertical agreements or abuse of dominant position) arise.[1] We firmly believe this is a very unlikely scenario because:

The market of ISPs is competitive: The European telecommunications market (fixed and mobile) is performing increasingly well in terms of delivering consumer welfare. The European telecommunications industry has witnessed tectonic shifts in the relationships between and amongst fixed and mobile operators. The continuous emergence of new players that constrain the behaviour of traditional operators, the deployment of advanced networks that compete with traditional infrastructures, and the widespread delayering of the electronic communications distribution chain through technological convergence prove the dynamic nature internet access providers operate into. This dynamic nature is mirrored in Europeans' changing consumer patterns and increased demand for faster, better-quality, diverse services. The vast majority of European citizens today enjoy a real choice of providers, offering a wide variety of services, functionalities and quality at higher speeds and competitive prices.[2]

Should the case arise that market failure exists in a broadband market through the presence of one or more firms with significant market power, the National authority is in a good place to deal with such a situation.

The market for CAPs is competitive: The chances that zero-rating products disturb innovation and reduce choice in the content and applications markets diminish when one takes a look at the downstream CAPs market. The market for CAPs is an extremely dynamic. Entry and exit of content and application players takes place ad infinitum, offering consumers ample choice; consumers have the final say for the success of a CAP, as what constitutes popular content today is surpassed by more innovative content tomorrow; disruptive business models, original ideas, intuitive user interfaces and practicality are only a few parts in the equation of a CAPs' success. Moreover, CAPs break and redraw single country boundaries; there are plenty of examples where a CAP's popularity transcends national borders and spreads across countries or globally.[3] The ability of CAPs to reach users anytime anywhere across both fixed and mobile networks means that competitive constraints can originate from any point of the world. In this context, it is questionable how harmful zero-rating by a single operator in a single (even large) Member State can really be for competition in the global internet. All the disruptive elements in the CAPs' market described above practically render any attempt to use zero-rating products in anti-competitive manners highly implausible for the ISP in question.

In this context, it is also worth noting that some of the most popular mobile apps such as WhatsApp do not consume significant amounts of data; hence zero-rating (or not zero rating) such apps would not materially hinder end users as their data capacity usage would be immaterial.

[1] See for instance European Commission guidelines on vertical restraints (2010), p. 5: "For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, i.e. if there is some degree of market power at the level of the supplier or the buyer or at both levels".

[2] The European Commission's annual Digital Agenda Scoreboards and Connectivity reports can back up these arguments. See for instance, European Commission 2016 Digital Agenda Scoreboard, accessed at: https://ec.europa.eu/digital-single-market/en/download-scoreboard-reports.

[3] To give the most prominent examples: Netflix, YouTube, Skype, WhatsApp,

The guidelines do not discuss how zero-rating can benefit end users

We believe the BEREC guidelines overstate the degree to which zero-rating will influence consumer choice and preferences. Whether content and applications prove successful or not is a multi-faceted question that touches not only upon only pricing strategy, but also originality, practicality, user friendliness and other factors. BEREC seems to be taking the link between cause (zero-rating) and effect (foreclosure) as granted. To our knowledge, a real case of foreclosure induced by a zero-rated product has never been examined before.

We believe the guidelines would benefit from taking a more holistic view of the ISPs-CAPs distribution chain that would consider the positive effects zero-rating could generate. BEREC should not overlook the beneficial impact zero-rating may have on innovation, choice and the functioning of the global internet.

Zero-rating and sponsored data can be used by network operators and ISPs, in conjunction with content and service providers, for the benefit of end users. Such services include:

- Free access to customer care and top up / 'walledgarden' websites
- Provision for customers to trial new services (e.g. video or music streaming) without having to worry about data consumption costs
- Extend the reach of online services to new market segments (low-income, price sensitive etc)
- Provide citizens with extensive access to important online services (for example access to charity helplines, information, healthcare, transport and travel services, emergency services etc)

Benefits also include:

- Competition enhancement and potential increase of downstream competition:
    - Zero rating is a useful tool in enhancing competition and allowing more internet service providers (hereinafter – ISP) to enter the market. This market is particularly difficult to enter for virtual operators and resellers as they cannot differentiate their service as it is difficult to compete with the incumbent on price or quality of service.[4] Such new market entrants and '*maverick'* providers must differentiate themselves in the market and create a brand image by marketing efforts.[5] For instance, they may choose to differentiate themselves by zero rating social media websites and music streaming services to attract younger customers.
    - In addition to promoting competition between ISPs, zero rating may also increase downstream competition between content and application providers (hereinafter – CAP)_allowing new services to gain needed exposure. New CAPs may easily get lost in a huge pool of new offers. Zero rating may nudge the users to engage in new services.
- Network effects:
    - ISPs and CAPs operate in markets that are known to have network effects, in which the value of the network to customers grows with the addition of other customers. Thus, it is often in the interests of both the consumers and the service providers to promote its growth. Governments often even subsidize participation in industries with network effects through direct or indirect government subsidies (e.g., universal service for telephone and, more recently, broadband adoption) because it increases consumer welfare.
- Social benefits: Access to internet for lower income consumers and ability to increase democratic participation

There is no legitimate reason why consumers should have to bear all the costs for their Internet subscriptions or be restricted in their ability to benefit from new services such as music and video streaming. Across internet and media industries, content providers and advertisers played a major role to increase the distribution and diversity of

[4] Ellen P. Goodman, *India's Ban on Facebook's Free Service Is an Overreaction*, The Guardian, February 2016.
[5] Roslyn Layton, Silvia E. Calderwood, *Zero Rating. Do hard rules protect or harm consumers and competition? Evidence from Chile, Netherlands and Slovenia*, August 15, 2015 p. 5,13.

content. Indeed, a large number of Internet companies that offer free services also use two sided business models having advertisers contribute to the funding of their activities.

This predisposition to highlight the (uncertain) negative effects of zero-rating while remaining silent about the potential positive effects strikes as discriminatory itself. For instance, instead of reducing choice in the market, zero-rating in practice offer nascent CAPs a platform to grow and a way to reach audience, build scale and compete with existing and well-branded CAPs, increasing consumer choice for CAPs; and instead of improving the market position of incumbent operators, it could offer an option to smaller operators, virtual operators and resellers to differentiate their services and compete more strongly with incumbents and network owners, increasing consumer choice for ISPs[6]. BEREC disregards the fact that zero-rating means consumers receive more data while paying the same price; and that consumers can still access all end points of the internet.

In any event, BEREC does not support its negative approach on zero-rating by relevant qualitative / quantitative evidence on the anti-competitive effects of zero-rating. To quote BEREC's earlier finding in the BEREC Report on OTT services, "*most NRAs report that the present cooperation between OTT and ECS providers, in the form of cost or data sponsoring* [zero-rating], *so far seems to have no or little effect on competition and consumers in the ECS markets*". The report goes even further to say that "*different kind of joint offers and partnerships may strengthen competition and lead to both reduced prices and increased choice for consumers*".[7]

Conclusion

In making the above observations, we struggle to see how zero-rating products could materially disturb the competitiveness of both ISP and CAP markets. We are confident that there is no gap to fill in competition law, and that competition authorities can in any event adequately deal with any anti-competitive zero-rating; in this respect, the involvement of regulators is unnecessary and the confusion of having two different authorities adjudicating on the same issues in potentially contradictory ways will stifle innovation and consumer choice, not enhance it.

We believe that zero-rating will present a new opportunity for all players across the distribution chain to compete more intensely: for CAPs, who can benefit from more use of their services, for ISPs, who can find a new way to differentiate their offerings, and most importantly, for consumers, who end up getting **more for less**.

Fundamentally, we believe the guidelines restrictive approach to zero-rating practices is unwarranted, goes beyond the scope of the Regulation and will limit the ability of network operators and Internet service providers to explore new business models which enhance consumer welfare and respond to rapidly evolving and increasingly specific demands. The development of such two sided business models is a common feature of the CAP value chain a feature we believe can usefully be developed in combination with ISPs.

Specific remarks – assessment per paragraph

Para 33: "*An ISP may bundle the provision of the IAS with an application. For instance, a mobile operator may offer free access to a music streaming application for a period of time to all new subscribers (as opposed to zero-rating, which is explained in paragraphs 37-40).*"

> **Comments Para 33**: There is little difference between zero-rating and common place discounts that are accepted as normal consumer welfare enhancing practises by BEREC. One could see cost sponsoring and data sponsoring as two sides of the same coin: the end result is that consumers get more for the same price.

Para 38: "*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)*"

[6] We see this happening in Europe, where in certain Member States a few smaller mobile operators have zero rated music / social media applications, in an effort to differentiate their offerings from those of the incumbent firms (e.g. Austria, Hungary).

[7] Body of European Regulators for Electronic Communications, Report on OTT services, January 2016, BoR (16) 35, p. 35.

Comments Para 38: We would like to point out that we understand this use case as a combination of zero-rating and blocking. Blocking content and applications effectively deprives consumers from *accessing* the open internet; on the contrary, zero-rating does not restrict access whatsoever, since both zero rated and non-zero rated content are equally accessible to end consumers. The problem does not lie in the fact that content is zero-rated, but in that, in some instances, content could be blocked and/or be discriminated against content that is not blocked. Hence, the hard-core prohibition the guidelines are setting with respect to zero-rating practices set out in paragraph 38 would in fact limit the consumers right to access content and services of their choice, a fundamental tenet of safeguarding open internet access[8].

We believe that Traffic management and discriminatory practises are already addressed in other parts of the guidelines and we don't see why zero-rating should be mixed in these guidelines with a blocking or throttling traffic management technique. These guidelines should not mix and confuse economical agreements (such as zero-rating) with technical traffic management techniques.

We therefore believe that Paragraph 38 should be deleted. In addition to the above, Paragraph 38 does not take into account Article 3(2) and Recital 7 which refers to the possibility for end users to enter into agreements with ISPs on tariffs for specific data volumes/speeds/caps. The key question at all times should be whether the zero rating results in a material reduction in end user choice. We give examples of the benefits of zero rating in this document. As drafted, BEREC would be prohibiting ISPs from zero rating access to content such as children's charity helplines, suicide helplines, emergency services and customer care and top up websites. Such an absolute prohibition is surely not BEREC's intention or in the best interests of end users.

Para 39: *"The ISP could either apply or offer zero-rating to an entire category of applications (e.g. all video or all music streaming applications) or only to certain applications thereof (e.g. its own services, one specific social media application, the most popular video or music applications). In the latter case, an end-user is not prevented from using other music applications. However, the zero price applied to the data traffic of the zero-rated music application (and the fact that the data traffic of the zero-rated music application does not count towards any data cap in place on the IAS)* ***creates an economic incentive to use that music application instead of competing ones. 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."***

Comments Para 39: It would be simplistic to attribute the success or failure of a CAP merely to a zero-rating practice of an ISP. As described above, in our view consumers have the final say in determining the success of a CAP. The fact that zero-rating may create an economic incentive to use the zero-rated content is rather uninformative, considering there are plenty of other ways to create similar economic incentives (for instance, through advertising, discounting, bringing original ideas etc.) Even if zero rating does create an economic incentive, this does not automatically mean end user choice is materially reduced in practice. It is also worth noting that pricing differentiation is a common feature of a healthy, competitive marketplace.

Para 41: *"Recital 7 also indicates that NRAs and other competent authorities should take into account the "respective market positions of those providers of internet access services, and of the providers of content, applications and services, that are involved".*

Comments Para 41: As described above, we are of the opinion that the only competent authority to perform such an "effects-based" competitive assessment is the relevant competition authority of each Member State.

[8] Article 3(1). 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

Para. 42: *"When assessing whether an ISP limits the exercise of rights of end-users, NRAs should consider to what extent end-users' choice is restricted by the agreed commercial and technical conditions or the commercial practices of the ISP. It is not the case that every factor affecting end-users' choices should be considered to limit the exercise of end- users' rights under Article 3(1). Such restrictions would need to result in choice being materially reduced for this to qualify as a limitation of the exercise of the end-users' rights."*

Comments Para 41: It is our firm belief that simply zero-rating a particular CAP cannot materially reduce end-users choice. As described above, zero-rating does not confer ISPs the ability to exclude CAPs from reaching end consumers. Non-zero rated CAPs will always have alternative ways to gain exposure and brand their offers, and end users will always be able to access non-zero-rated content if they want to. Secondly, we believe BEREC is exaggerating the degree to which zero-rating will influence consumer choice and preferences. Whether content and applications prove successful or not is a multidimensional question that touches not only upon pricing factors, but also originality, practicality and user friendliness.

Para 43: "*In light of the aforementioned considerations, BEREC considers that a comprehensive assessment of such commercial and technical conditions may be required, taking into account in particular:*

- *the goals of the Regulation and whether the relevant agreements and/or commercial practices circumvent these general aims*
- *the market positions of the ISPs and CAPs involved - a limitation of the exercise of end-user rights is more likely to arise where an ISP or a CAP has a '**strong' market position** (all else being equal) compared to a situation where the ISP or CAP has a '**weak' market position**. The market positions should be analysed **in line with competition law** principles.*
- *the effects on consumer and business customer end-user rights, which encompasses an assessment of inter alia:*
  - *whether there is an effect on the range and diversity of content and applications which consumer end-users may use and, if so, whether the range and diversity of applications which end-users can choose from is reduced in practice;*
  - ***whether the end-user is incentivised to use, for example, certain applications;***
  - *whether the IAS subscription contains characteristics which materially reduce end-user choice (see in more detail in paragraph 45).*
- *the effects on CAP end-user rights, which encompasses an assessment of, inter alia:*
  - *whether there is an effect on the range and diversity of content and applications which CAPs provide, and to what extent the range and diversity of applications may not be effectively accessed;*
  - *whether CAPs are materially discouraged from entering the market or forced to leave the market, or whether there are other material harms to competition in the market concerned (see in more detail in the fourth bullet of paragraph 45 with regard to offers);*
  - *whether the continued functioning of the internet ecosystem as an engine of innovation is impacted, for example, **whether it is the ISP that picks winners and losers**, and on the administrative and/or technical barriers for CAPs to enter into agreements with ISPs.*
- *the scale of the practice and the presence of alternatives - a practice is more likely to limit the exercise of end-user rights in a situation where, for example, many end-users are concerned and/or there are few alternative offers and/or competing ISPs for the end-users to choose from;*
- *the effect on freedom of expression and media pluralism (ref. Recital 13)."*

Comments Para 43:

- *"the market positions of the ISPs and CAPs involved - a limitation of the exercise of end-user rights is more likely to arise where an ISP or a CAP has a '**strong' market position** (all else being equal) compared to a situation where the ISP or CAP has a '**weak' market position**. The market positions should be analysed **in line with competition law** principles."*

BEREC should avoid blurring the lines in competition law theory. The terms "strong" and "weak" market position are ambiguous and are not part of existing competition law practice and precedent. As such they are an inappropriate means to assess possible intervention on potential anti-competitive practices. Such

terminology could create uncertainty with respect to whether BEREC is devising a different dominance threshold / standard of proof for anti-competitive zero-rating.

- *whether the continued functioning of the internet ecosystem as an engine of innovation is impacted, for example, **whether it is the ISP that picks winners and losers**, and on the administrative and/or technical barriers for CAPs to enter into agreements with ISPs.*

As per our comments above, an ISP is incapable of picking winners and losers out of the CAPs market as consumers have the final say for the success of a CAP, as what constitutes popular content today is surpassed by more innovative content tomorrow; disruptive business models, original ideas, intuitive user interfaces and practicality are only a few parts in the equation of a CAPs' success.

Para 45: *"In applying such a comprehensive assessment, NRAs and other competent authorities may also take into account the following considerations:*

- *Any agreements or practices which have an **effect similar to technical blocking of access** (see paragraph 52) are likely to infringe Articles 3(1) and 3(2), given their strong impact on end-user rights."*
- *Commercial practices which apply a higher price to the data associated with a specific application or class of applications are likely to limit the exercise of end- users' rights because of the **potentially strong disincentive** created to the use of the application(s) affected, and consequent restriction of choice. Also, the possibility that higher prices may be applied to an application or category of application may discourage the development of new applications.*
- *End-users of an IAS whose conditions include a lower (or zero) price for the data associated with a specific application or class of applications **will be incentivised** to use the zero-rated application or category of applications and not others.*
- *Furthermore, the lower the data cap, the stronger such influence is likely to be. **Price differentiation** between individual applications within a category has an impact on competition between providers in that class. It may therefore be more likely to impact the "continued functioning of the internet ecosystem as an engine of innovation" and thereby undermine the goals of the Regulation than would price differentiation between classes of application."*

Comments Para 45:

- "Any agreements or practices which have an **effect similar to technical blocking of access** (see paragraph 52) are likely to infringe Articles 3(1) and 3(2), given their strong impact on end-user rights."

We understand this to imply that instead of blocking the non-zero rated content / application when a user reaches their data cap, the ISP may charge a higher 'out of bundle' price to access the non-zero rated content /applications, while continuing to zero rate other CAPs. BEREC should be careful not to render national authorities price setters, allowing NRAs to determine which prices are "too high", "have an effect similar to blocking", and in the process becoming price setters themselves. Answering such questions is rife with legal uncertainty as to the threshold for intervention and involves a high risk of mistaken interventions that can have a chilling effect on commercial practices that would benefit consumers and CAPs.

- *"Commercial practices which apply a higher price to the data associated with a specific application or class of applications are likely to limit the exercise of end- users' rights because of the **potentially strong disincentive** created to the use of the application(s) affected, and consequent restriction of choice. Also, the possibility that higher prices may be applied to an application or category of application may discourage the development of new applications.*
- *End-users of an IAS whose conditions include a lower (or zero) price for the data associated with a specific application or class of applications **will be incentivised** to use the zero-rated application or category of applications and not others."*

The fact that end-users of an IAS zero-rating (specific or a category of) content will be incentivised to use that content and not others is not indicative of the harmful effects of zero-rating to the "continued functioning of the

internet ecosystem as an engine of innovation". In other words, it is not telling of the degree of *material* reduction in choice.

- *"Furthermore, the lower the data cap, the stronger such influence is likely to be.* ***Price differentiation*** *between individual applications within a category has an impact on competition between providers in that class. It may therefore be more likely to impact the "continued functioning of the internet ecosystem as an engine of innovation" and thereby undermine the goals of the Regulation than would price differentiation between classes of application."*

It is rare to have uniform prices for the same good in the market. Price discrimination[9] is ubiquitous in all effectively competitive markets and is usually pro-competitive. EU and national competition law determines under which conditions price discrimination could have anti-competitive effects (e.g. anti-competitive loyalty rebates).

The Regulation does not attempt to rewrite competition laws but set out that competition laws should be applied to zero rating and similar practices. We believe that BEREC is in danger of legislating beyond the scope of the Regulation and rewriting competition law analysis in respect of zero rating and related practices.

Specialised services

General remarks

Liberty Global welcomes the recognition in the regulation and BEREC guidelines of the need for additional high quality broadband internet services (termed, specialised services), other than Internet Access Services which are optimised for specific content, applications or services, and which require a specific level of Quality.

However, the BEREC guidelines appear to conclude that the preferred way to deliver any kind of services (including specialised services) is via best effort Internet access service and only under **extraordinary circumstances**, providers of electronic communications to the public (such as ISPs and CAPs) are allowed to use other, 'logically separate', means to deliver their services. In our view, this approach runs counter to the principle of technology neutrality and imposes on service providers (of any kind) a regulatory mandate to deliver broadband services via best effort Internet (or at least consider it as first priority) for the delivery of applications and services and if specialised services as offered, they must be logically separate.

The guidelines also recommend that NRAs undertake a thorough ex-ante analysis of ISP's service delivery strategy, in order to justify and prove why specific services cannot be delivered via the best effort Internet.

Technology neutrality (including delivery methods and protocols) and presumption of innocence shall prevail and we believe these are key principles that set the basis for innovation.

As an Internet provider, we of course believe in the evolution and innovation of the Internet and we continue to invest to ensure our customers get 'best in class' service. On the other hand, we believe that an overly restrictive and stringent interpretation of the regulation which dictates technological solutions will inhibit innovation and the development of key future specialised services and networks/delivery methods to meet end user needs. There may be genuine reasons why end users may wish to have certain services optimised and/or guaranteed rather than offered via best effort IAS. This could include voice services which include access to emergency services, home health or home security services, or possibly online gaming services.

In our view, the regulation establishes a clear framework to ensure ISPs are transparent and committed towards the end-users (by means of detailed explanations in contracts and websites). As a result any changes made to the way in which services are delivered shall be transparently reflected and updated in contracts and websites.

We fully support a close and pragmatic cooperation between NRAs and ISPs but this should not be seen as a pre-requisite for the deployment of services (in some form of ex-ante pre-certification by NRAs). If all specialised services had to receive prior approval it would have a chilling effect on development and innovation to the

[9] With the term price discrimination, we mean that a product is sold to different consumers at different prices not reflecting differences in the supply cost.

detriment of end users. The principle of transparency towards end-users should prevail and guarantees the IAS will not be impacted, and if it is, then it must be transparently communicated to the end-users.

In addition, we understand that the notion of 'logical separation' for specialised services was debated by the co-legislators and rejected. We do not therefore believe it is appropriate to re-introduce it in the BEREC guidelines. It would introduce a much higher threshold for allowing specialised services beyond that envisaged by the Regulation and should be removed from the guidelines.

Specific remarks – assessment per paragraph

Article 3(5) first subparagraph:

"Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services 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."

Para. 95: *"**Beyond the delivery of a relatively high quality application through the IAS**, there can be demand for a category of electronic communication services that need to be carried at a specific level of quality that cannot be assured by the standard best effort delivery."*

> **Comments Para. 95:** It is unclear what the intention of the statement "***Beyond the delivery of a relatively high quality application through the IAS"*** is. Is the intention to imply that only high quality applications are delivered via the IAS? Also, why focussing only on applications and not on content and services? We think that this introductory sentence adds no value and could give rise to confusion so we propose to word it as "***Beyond the delivery of content, applications and services through the IAS**, there can be demand for a category of electronic communication services that need to be carried at a specific level of quality that cannot be assured by the standard best effort delivery."*

Para. 101: *"NRAs **should "verify"** whether the application could be provided over IAS at the agreed and committed level of quality, and whether the requirements are plausible in relation to the application, or whether they are instead set up in order to circumvent the provisions regarding traffic management measures applicable to IAS, which would not be allowed"*

> **Comments Para. 101:** As mentioned in our general comments, the regulation does not require content, applications and/or services that by their nature are not IAS to be delivered over the IAS therefore we don't see why NRAs should scrutinise and ultimately require service providers to always use the IAS for the delivery of this kind of services. We also believe that the responsibility of defining the quality of the service to be delivered should be up to the provider of the service and ultimately the end-user according to his needs.

Para. 103: *"When assessing whether the practices used to provide specialised services comply with Article 3(5) first subparagraph, NRAs should apply the approach set out in paragraphs 104-111)."*

> **Comments Para. 103: The guidelines should make explicit that** such an assessment should be done on an ex-post basis. As currently drafted, the guidelines give the impression that an ex-ante assessment is the recommended approach but in our view this is not practical or appropriate the presumption of innocence shall always prevail. In addition NRAs have at their disposal the tools and means to intervene if there are concerns and/or complains.

Para. 104: ***"**NRAs could request from the provider relevant information about their specialised services, using powers conferred by Article 5(2). In their responses, the provider should give information about their specialised services, including what the relevant QoS requirements are (e.g. latency, jitter and packet loss), and any*

contractual requirements. Furthermore, the "specific level of quality" should be specified, and ***it should be demonstrated that this specific level of quality cannot be assured over the IAS****"*

Comments Para. 104: As stated previously, the regulation doesn't state anywhere that the preferred way to deliver specialised services shall always be the IAS, so the final sentence of the guidelines should be deleted. Even if a given specialised service could be delivered via the IAS there may be good reasons why it would be in the end users best interest for it not to be delivered via the IAS, there is no mandate in the regulation that this service must be delivered via the IAS. In our view, this should be under the decision and responsibility of the provider of the specialised service acting to meet the needs of end-users.

Para. 106: ***"****If assurance of a specific level of quality is objectively necessary, this cannot be provided by simply granting general priority over comparable content.*[21] ***It is understood that specialised services are offered through a connection that is logically separated from the IAS to assure these levels of quality****. The connection is characterised by an extensive use of traffic management in order to ensure adequate service characteristics and strict admission control."*

Comments Para. 106: The guidelines should not conclude that specialised services can only be offered logically separated from the IAS, as there can be situations where both service share the same infrastructure, and priority is given to the specialised service and there is sufficient capacity so the IAS is not impacted. There is no reason to conclude that being logically separated is the only way. We believe a technology neutral approach is important to maintain and the Regulations themselves make no mention of any requirement for 'logical separation'.

Para. 107: ***"****NRAs should verify whether, and to what extent, optimised delivery is objectively necessary to ensure one or more specific and key features of the applications, and to enable a corresponding quality assurance to be given to end-users. To do this, the NRA should assess whether an electronic communication service, other than IAS, requires a level of quality that cannot be assured over an IAS. If not, these electronic communication services are likely to circumvent the provisions of the Regulation and are therefore not allowed."*

Comments Para. 107: Consistent with our comments on para 104, the guidelines are wrong to conclude that the only way to deliver specialised services is through the IAS. This statement should be removed. There are legitimate technical and commercial reasons why a given service provider chooses to offer specialised services by means other than IAS and this will be driven by demand from consumers.

Article 3(5) second subparagraph:

"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."

Para. 112: ***"****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."*

Comments Para. 112: The guidelines overlook the fact that according to Article 4 ISP have an obligation to be transparent toward the end-users by means of proper explanations in contracts and websites. There may be circumstances and legitimate commercial reasons why a given ISP could decide to lower their commitment to the provision of IAS and Article 4(1e) provides transparency remedies exactly for this purpose through its requirement for a contractual change where IAS services are modified.

Liberty Global is investing significant sums of money into expanding and improving IAS services, and in order to gain and retain customers we are strongly incentivised to ensure sufficient capacity is available. However, the internet has not developed on the basis of providing a guaranteed quality of service at all times. Services are provided on a best efforts basis and therefore it may be necessary to develop specialised services to meet end user demand for greater certainty and guarantees of service quality at all times, regardless of levels of investment. Some services will demand this, for example voice services with access to emergency services.

Para. 114: ***"****This implies that, in order to ensure the quality of specialised services, ISPs would have to ensure sufficient network capacity for both any IAS offers provided over the infrastructure and for specialised services. If not, provision of specialised services would not be allowed under the Regulation."*

Comments Para. 114: Same as above in para 112, guidelines should contemplate the option as stipulated in Article 4, full transparency in contracts and websites and remedies in case of discrepancies.

Para. 115: ***"****NRAs could request information from ISPs regarding how sufficient capacity is ensured, and at which scale the service is offered (e.g. networks, coverage and end-users). NRAs could then assess how ISPs have estimated the additional capacity required for their specialised services and how they have ensured that network elements and connections have sufficient capacity available to provide specialised services in addition to any IAS provided."*

Comments Para. 115: We fully support an ongoing dialogue with NRAs with respect to the deployment and capacity planning of network resources. However, and in light of our general comments, we believe it is inappropriate for NRAs to enter into a form of ex-ante certification and conformance regime with ISPs before they deploy new broadband services. Our comments in relation to paragraph 112 in respect of Article 4 also apply here. ISPs should provide the service they are contractually obliged to provide and ensure those terms are transparent. The obligation under the Regulation is not to put in place unlimited capacity, which would not be realistic or achievable.

Para. 116: ***"****NRAs should assess whether or not there is sufficient capacity for IAS when specialised services are provided, for example, by performing measurements of IAS.*[23] *Methodologies for such measurements have been relatively well developed during BEREC's Net Neutrality QoS workstreams in recent years and will continue to be improved"*

Comments Para. 116: Any proposed methodology seeking to prove compliance should be provided and endorsed by a SDO (standards development organization endorsed by the EU Commission; e.g. ETSI) with input from ISPs.

Para. 117: ***"****Specialised services are not permissible if they are to the detriment of the availability and general quality of the IAS. There is a correlation between the performance of the IAS offer (i.e. its availability and general quality) and whether there is sufficient capacity to provide specialised services in addition to IAS. IAS quality measurements could be performed with and without specialised services, both in the short term (measuring with specialised services on and off respectively) and in the long term (which would include measurements before the specialised services are introduced in the market as well as after). As Recital 17 clarifies, NRAs should "assess the impact on the availability and general quality of IAS by analysing, inter alia, QoS parameters (such as latency, jitter and packet loss), the levels and effects of congestion in the network, actual versus advertised speeds and the performance of IAS as compared with services other than IAS."*

Comments Para. 117: Same comments as previously, following an ex-post principle and never ex-ante principle and if conformity assessment is needed this shall be standardized by one SDO recognised by the EU Commission. ISPs should provide the service they are contractually obliged to provide and ensure those terms are transparent. The obligation under the Regulation is not to put in place unlimited capacity

Para. 118: ***"****While IAS and specialised services directly compete for the dedicated part of an end-user's capacity, the end-user himself may determine how to use it. Therefore, NRAs should not consider this an infringement of*

Article 3(5) second subparagraph, as long as the end-user is informed pursuant to Article 4(1)(c) of the likely or possible impact on his IAS and can still obtain a minimum speed[24] for any IAS subscribed to in parallel. NRAs should not consider it to be to the detriment of the general quality of IAS when activation of the specialised service by the individual end-user only affects his own IAS. However, detrimental effects should not occur in those parts of the network where capacity is shared between different end-users"

Comments Para. 118:

- In general, we support this statement as is in line and refers to Article 4, the rest of the paragraphs regarding specialised service should keep referring to Article 4(1)(a) and (c).
- Regarding "detrimental effects should not occur in those parts of the network where capacity is shared between different end-users": this seems to advocate for logical separation, which we do not agree is necessary or desirable. Some detrimental effect is inevitable – the obligation should be to ensure continue compliance with Art 4.

Para. 120: ***"****NRAs should assess whether the provision of specialised services reduces general IAS quality* ***by lowering measured download or upload speeds or, for example, by increasing delay, delay variation or packet loss****. Normal small-scale temporal network fluctuation should not be considered to be to the detriment of the general quality. Network outages and other temporary problems caused by network faults, for example, should be treated separately"*

Comments Para. 120:

- Following an ex-post principle and never ex-ante; presumption of innocence should prevail.
- *"by lowering measured download or upload speeds*": This does not necessarily result in a failure to meet the contractual commitments which shall be according to the rules stipulated in Article 4. Commitments stipulated in contracts and websites (as per Article 4) shall be the reference for assessing whether the IAS is being impacted. A lowered measured speed could still remain within the contractual commitment.
- "or, for example, by increasing delay, delay variation or packet loss". This example may be misleading, specific QoS requirements are only optional and subject to commitments given as per Article 4. Deployment of best effort Internet and committing to a min QoS (for certain parameters) is somewhat contradictory. In this respect we recommend to replace this part of the sentence with "or any other parameters committed in contracts (as per Article 4)"

Para. 121: ***"***NRAs should intervene if persistent decreases in performance are detected for IAS. This could be detected if the measured performance is consistently above (for metrics such as latency, jitter or packet loss) or below (for metrics such as speed) a previously detected average level for a relatively long period of time such as hours or days), or if the difference between measurement results before and after the specialised service is introduced is statistically significant. In the case of short-term assessments, the difference between measurement results with and without the specialised service should be assessed similarly.*"*

Comments Para. 121: Same as in Para. 120, the only required commitment as per the regulation is Internet speeds, any other parameters are optional and should only be used for comparison when there is a clear commitment by the ISP given in the contract as per Article 4. We also recommend to have a standardized approach for measurements supported by a SDO (recognised by the EU Commission; e.g. ETSI).

Traffic Management

General remarks

Liberty Global was heartened that the regulation defines Traffic Management as engineering practises necessary to manage network resources and guarantee the delivery of the services committed to the end-users by ISPs. The distinction between “reasonable” and “exceptional” traffic management is well balanced.

In general whilst the guidelines respect the spirit of the regulation, NRAs are encouraged to view traffic management practices as something to be carefully monitored ex-ante. They also give the reader and NRAs the impression that Traffic Management techniques are unnecessary and bad practises per se.

In effect, Traffic Management is seen as a remedy of last resort in case network expansion and investments are not undertaken by an ISP.

We encourage BEREC in the guidelines to more clearly emphasize the fundamental role that Traffic Management plays in the delivery of services and utilization and maintenance of the network and its resources.

Also, we are concerned about the stated intention to prohibit Traffic Management in case of “commercial considerations”, given the negative implications this would have on our ability to manage and invest in our prime resource, our networks.

Specific remarks – assessment per paragraph

***Para. 57**: **“**When considering whether a traffic management measure is non-discriminatory, NRAs should consider the following:*

- *The requirement for traffic management measures to be non-discriminatory does not preclude ISPs from implementing - in order to optimise the overall transmission quality and user experience - traffic management measures which differentiate between objectively different categories of traffic (ref. Recital 9 and paragraphs 59-64 below).*
- *Similar situations in terms of similar technical QoS requirements should receive similar treatment.*
- *Different situations in terms of objectively different technical QoS requirements can be treated in different ways if such treatment is objectively justified.*
- *In particular, **the mere fact that network traffic is encrypted should not be deemed by NRAs to be an objective justification for different treatment by ISPs**.”*

Comments Para. 57: It would be difficult to treat unencrypted traffic in the same way as encrypted traffic, since by definition the ISP would not know what the encrypted traffic is. So if all unencrypted video traffic is treated in a certain way, we could not be sure we are treating encrypted video traffic in the same way because we may not be able to identify that it is video traffic. In cases where Traffic Management is proven to be necessary (read “reasonable” or “exceptional” in regulation terms) then encrypted traffic may need to be treated differently but this not implying a discriminatory practise. We recommend BEREC to remove this statement or elaborate accordingly.

***Para. 58**: **“**When considering whether a traffic management measure is proportionate, NRAs should consider the following:*

- *There has to be a legitimate aim for this measure, as specified in the first sentence of Recital 9, namely contributing to an efficient use of network resources and to an optimisation of overall transmission quality.*
- *The traffic management measure has to be suitable to achieve the aim (with a requirement of evidence to show it will have that effect and that it is not manifestly inappropriate).*
- *The traffic management measure has to be necessary to achieve the aim.*
- *There is not a less interfering and equally effective alternative way of achieving this aim (e.g. equal treatment without categories of traffic) with the available network resources.*

- *The traffic management measure has to be appropriate, e.g. to balance the competing requirements of different traffic categories or competing interests of different groups."*

Comments Para. 58: There needs to be a clear statement that this evaluation is recommended to made on an ex-post rather than ex-ante basis

Transparency Rules (Article 4)

General remarks

Transparency towards end-users is one of the key pillars of the regulation, this is where NRAs and ISPs would benefit if clear guidelines where given to ensure a harmonised implementation across Member States. Instead, we believe that BEREC guidelines are not providing any explicit guidance nor processes.

BEREC refers to BEREC's 2011 Net Neutrality Transparency guidelines but we also believe these are too high level and never specific.

Specific remarks – assessment per paragraph

***Para. 145**: "The normally available speed should be available during the specified daily period. NRAs could set requirements on defining normally available speeds under Article 5(1). **Examples include**:*

- *specifying that normally available speeds should be available at least during off-peak hours and 90% of time over peak hours, or 95% over the whole day;*
- *requiring that the normally available speed should be in reasonable proportion to the maximum speed."*

Comments Para. 145: As these are mere examples then we recommend to add, "Examples include, but not limited to (this is not exhaustive list)". Otherwise this could read as these are the only two options.
Furthermore, and more importantly, these examples do not address nor take into account the characteristics of shared media in fixed networks, where especially in peak hours, parts of a network can be more affected than others.

Any other specific remarks

Para. 4: **"***According to the Framework Directive, "**end-user**" means a user not providing public communications networks or publicly available electronic communications services. In turn, "user" means a legal entity or natural person using or requesting a publicly available electronic communications service. On that basis, BEREC understands "end-user" to encompass individuals and businesses, including consumers as well as CAPs."*

Comments Para. 4: While we understand and support the intended aim to ensure that CAPs are protected under the Regulation, we believe BEREC's proposed definition is not in line with the Regulation itself which outlines that CAPs are considered end-users only as far as they use their IAS to reach other end-users. The wording in paragraph 5 of the Guidelines seems to suggest a wider definition of end users than the Regulation intended. It currently says "in so far as they use an IAS". This should be amended to "in so far as they use their IAS"

***Para. 11**: "Regarding virtual private networks (VPN) network services, these are typically provided by the ISP to anyone that wishes to enter a contract about the provision of such a service, and these would therefore typically be considered to be publicly available. The term 'private' describes the use of such a service which is usually limited to endpoints of the business entering the contract and is secured for internal communications. In accordance with Recital 17, to the extent that VPNs provide access to the internet, they are not a closed user group and should therefore be considered as publicly available ECS and are subject to Articles 3(1)-(4). VPNs are further discussed in paragraph 111."*

Comments Para. 11: We don't understand how BEREC concludes that VPN services are to be considered to be publicly available. There are many instances where VPN services are offered only for private networks, these guidelines should make this point more clear. Para. 111 seems to intend to clarify this distinction but them Para. 11 is potentially misleading.

***Para. 12**: **"The following examples** could be considered as services or networks not being made publicly available, subject to an assessment of the facts of the case by NRAs as well as national practices:*

- ***access to the internet provided by cafés and restaurants (e.g. Wi-Fi hotspots), since they typically are limited to customers of an enterprise rather than the general public**;*
- *Internal corporate networks, since they are typically limited to employees and other people connected with the business or organisation concerned."*

Comments Para. 12:

- It shall be made clear that this list is not exhaustive.
- It is strange to read that only cafes and restaurants are excepted, there are much more examples of Wi-Fi hotspots that are not cafes or restaurants, we encourage BEREC to clarify

Para. 17 and 52**: **"sub-internet services"

Comments Para. 17 and 52: It strange to see that BEREC intend NRAs to prohibit "sub-internet services" while in our opinion the regulation doesn't address this. The consequence of this is that a service which is not a "specialized service" shall be then an internet service and so subject to the full range of rules. The regulation doesn't exclude "sub internet access" in the way that BEREC claims in the guidelines. Take as an example "walled garden" services where only a couple of services or content (potentially also available on the Internet) are offered to end-users and never marketed as "internet access". As the regulation doesn't address nor prohibits this kind of services then we encourage BEREC to remove this new definition from the guidelines. We believe the guidelines go beyond the scope of the Regulation in this regard.

Para. 25: **"***Moreover, NRAs should consider whether there is an objective technological necessity for the obligatory equipment to be considered as part of the ISP network. If there is not, and if the choice of terminal equipment is limited, the practice would be in conflict with the Regulation. For example**, the practice of restricting tethering**[9] is likely to constitute a restriction on choice of terminal equipment because ISPs "should not impose restrictions on the use of terminal equipment connecting to the network in addition to those imposed by manufacturers or distributors of terminal equipment in accordance with Union law" (Recital 5)."*

Comments Para. 25.: This seeks to prohibit restrictions to tethering because tethering "is likely to constitute a restriction on choice of terminal equipment". We believe the reference to tethering as a potential violation of Article 3(1) and Recital 5 and should be deleted from the guidelines. End-users are free to use the terminal equipment of their choice, one that would connect them to the interface of the public communications network (as stated in paragraph 23). As end-users are free to conclude agreements on commercial and technical conditions (pricing, data volumes and speed as described in paragraph 30), they are also free to choose the terminal equipment and commercial offer best suited to their needs. This may include the choice to use a device with the option of tethering with restrictions. Internet Service Providers need to continue to be able to offer tariffs which exclude elements that users do not need in order to benefit from lower pricing. Prohibiting restricted tethering would therefore reduce users' choice.