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## **BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules**

Dear Ladies and Gentlemen!

With reference to the Public Consultation on the BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, the Austrian Association of Alternative Telecommunications Operators (VAT) welcomes the opportunity to provide a statement.

The association represents the interests of all major alternative telecommunication operators in Austria, providing fixed and mobile services.

Regarding the future of the internet, of innovation, competition, consumer choice and of the players in the internet value chain, it is important to regulate the open internet in a balanced way. Unfortunately the BEREC Guidelines are overly restrictive and threaten to harm innovation, competition and consumer choice, without taking into consideration the needs of telecom operators. Furthermore, there are many suggestions, published by BEREC which are far more restrictive than the underlying Regulation. It is important to point out that the draft would prevent prospective innovations and competition. Unfortunately, the BEREC Guidelines do not support the development of the industrial location in Europe but do restrict important innovation, competition and consumer choice. BEREC has to find more balance between safeguarding the open internet and restricting Europe's industry.

Furthermore, BEREC must be aware that infrastructure and services are a symbiosis in which one needs the other. The BEREC Guidelines restrict a network operator's revenue opportunities and pushes them to the service providers – especially to the Oversea-OTTs like Netflix, Google and Facebook. Consequently network operators cannot invest in a fast and modern infrastructure. That will be the reason why Europe will not establish innovative services in the future.

In addition, there is a critical view regarding legal force of the BEREC Guidelines. There is a need of information how the Guidelines will be used in future and if they are more than only a recommendation for national regulatory authority. Legal uncertainty must be eliminated and companies have to know how they can move in the legal framework without waiting for prospective judgments.

Please find enclosed our comments to specific articles of the Guidelines.

## Article 3: Safeguarding of open internet access

### Article 3 (2)

This Article says that all agreements between providers of internet access services and end-users shall not limit the exercise of the rights of end-users laid down in paragraph 1. In view of the Guidelines, BEREC's suggestions are particularly restrictive and based on a flawed understanding of the Regulation when it comes to commercial practices. As a matter of principle, operators should be allowed to make commercial offers, especially since the Regulation permits commercial practices that do not limit end-users' rights under Article 3(2). The Regulation strikes a balance that allows providers to develop innovative services while requiring national regulators to undertake an assessment of whether end-users' rights are materially reduced taking account of their scale and the market positions of the entities involved. These Guidelines risk upsetting that balance.

### Zero Rating

In our view BEREC tries to regulate more than the underlying Regulation gave them authority to do. The essential aim of the Regulation is to ensure an equal and non-discriminatory treatment of internet traffic and the associated end-user rights. This means that access to free internet must not be restricted. In the Guidelines the application of zero rating is seen critically, because it does not guarantee access to free internet, impairs to the rights of end-users and is seen as an obstacle for young start-ups which are hindered to enter into competition. However, zero rating does not restrict access to a free internet - the end customer does not get free access to internet by this paid application. It must be pointed out that the Regulation aims to establish conditions for net neutrality rather than contributing to the creation of future competition. There is no upfront presumption in the Regulation that practices such as a zero-rating, infringe the aforementioned rights and there should not be in the Guidelines either.

### Article 3 (3)

According to this Article, providers of internet access services are not allowed to block traffic. However, in practice there are several services or applications whose sole purpose is to infringe Article 3 (3) in the interest of the end-user (i.e. SPAM-filters, anti-virus filters, content control for minors, etc.). These services do not restrict end-user rights on the contrary they amplify them. Although some of these services or applications might to some extent also be provided endpoint-based, any such service or application would always be less efficient, more cost intensive and often impossible (i.e. every device from mobile phones, to smart watches, wearables and any other "less intelligent" device would still need the full spectrum of endpoint-based protection).

### Restricting consumer choice

The Guidelines of BEREC would deny consumers' choice over the services they receive. This runs counter to the Regulation, which in recital 7 and Article 3 (1) emphasizes that the fundamental end-user right is, that end-users be provided with applications and services of their choice. According to the Guidelines there is no possibility for consumers to decide if they want to receive certain content such as adult content or irrelevant and intrusive advertising (which customers pay for through their data allowance). These functions are only used when end users desire it actively and if it will be set up by the network operator. However the BEREC Guidelines say that such applications cannot be implemented because it violates the

principles of the Regulation. Consequently, it is a substantial restriction of the decision-making power of end users – they should be able to opt for or against an application. BEREC's restrictive interpretation of the Regulation risks a poorer customer experience and more limited propositions overall.

### Article 3 (5)

With regard to the future fields of 5G, connected cars and digital roadmap, BEREC must be aware that they will prevent further innovation with its Guidelines. According to BEREC Guidelines, specialized services can only be provided if the quality of internet services will not be impaired. However, the Regulation states that specialized services may only be provided if they do not lead to disadvantages in the availability or the overall quality of internet access services for end-users. As you can see, the Guidelines foresee a much more rigorous determination. Additionally, the Guidelines see internet more worthy of protection than specialized services, which is an obstacle to development and will have critical implications for the future. It must be pointed out that the BEREC Guidelines to a certain degree will prevent future developments.

### Ex-post regulatory approach

The establishment and functionality of 5G is very important for the development of Europe's industry. 5G will rely heavily on differentiation of certain technical parameters and depend on the necessity of each particular service. If 5G development is to happen in Europe, a flexible ex post regulatory approach will be needed in order not to hinder valuable business models.

However, the BEREC Guidelines suggest ex ante application for each specialized service. As a result, this requirement would significantly slow down development of specialized services and therefore the development of 5G. From our point of view BEREC should reconsider this ex ante approach, as it is not required by the Regulation.

## Article 4: Transparency measures for ensuring open internet access

### Article 4 (1)

The BEREC Guidelines recommend how national regulation authorities should ensure that internet service providers include the transparency measures – but there is nothing in the Regulation that requires this. It is inappropriate to include the level of technical detail described in the second level within a customer's contract. The vast majority of customers will not be interested in the more detailed technical parameters and their values. Directing customers to the relevant page containing this technical information on a website should suffice. As long as internet access service providers include in their contracts and publish the information required in Articles 4 (1) letter (a) to (e) they will be compliant with the Regulation.

### Article 4 (1) letter (a)

Regarding Article 4 (1) letter (a) the BEREC Guidelines say that modifications to contracts are subject to Article 20(2) of the Universal Service Directive, which gives subscribers a right to withdraw from their contract without penalty upon modification of the contractual conditions. In practice operators need to change their traffic management practices from time to time, to respond to changing traffic and congestion patterns. Therefore BEREC should clarify that such changes do not trigger the right to withdraw from the contract.

### Article 4 (1) letter (d)

Regarding the Regulation, mobile networks have to publish “the estimated maximum and advertised download and upload speed of the internet access services”. BEREC interprets this requirement to that effect that MNOs should provide end-users a “realistically achievable maximum speed for their subscription in different locations in realistic usage conditions.” However, BEREC must be aware that predicting speeds for particular end-users in particular locations is technically not feasible with adequate certainty. Any prediction would rely on too many uncertain variables and is non-serious per definition. MNOs would be forced to agree on values that cannot be calculated with sufficient accuracy, leading to enormous legal uncertainty in the contractual relationship between MNOs and their end-users. Therefore BEREC has definitely to reconsider its position and to adjust the requirement to average speeds over the entire ISP’s network.

### Article 4 (2)

According to Article 4 (2) providers of internet access services shall put in place transparent, simple and efficient procedures to address complaints of end-users relating to the rights and obligations laid down in Article 3 and paragraph 1 of this Article. The Guidelines suggest that national regulations authorities shall ensure a single point of contact for complaints related to the provisions set out in Article 2 and Article 4(1). From our point of view it does not make sense because all operators have customer service processes with dedicated points of contact. To add an additional point of contact for net neutrality is more likely to harm these processes than to bring additional advantages for end-customers.

## Conclusion

We would be grateful if BEREC considers our comments and thinks about the importance of a further development of the digitalization in Europe.

It is essential not to prevent new sustainable business models by a too stringent interpretation of the Regulation. The establishment of 5G will start in the near future and will be a great chance for Europe’s industry to reclaim its position, thus creating new working places. Clinging to such strict Guidelines would be a major deal breaker, making it hard or even impossible to introduce a working 5G network in Europe, thus also eliminating the possible R&D and thereby weakening Europe as an industrial location.

With kind regards

**VAT - AUSTRIAN ASSOCIATION OF ALTERNATIVE TELECOMMUNICATIONS OPERATORS**



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