EU Register ID: 52431421-12 18 July 2016

Telefónica response to the Consultation on the draft BEREC Guidelines on Net Neutrality - BoR (16) 94

EXECUTIVE SUMMARY

Telefónica welcomes this consultation and notes BEREC intention *"to contribute to the consistent application of the Regulation, thereby contributing to regulatory certainty for stakeholder".*

Telefónica believes that EU Open Internet Regulation 2015/2120, as it was finally adopted, struck the right balance between ex ante regulation and the need to ensure sufficient freedom/flexibility for market players to innovate in a highly dynamic and competitive Internet environment, in the interest of consumers and society. The Guidelines should strictly respect that balance, and avoid prescriptive interpretations in those elements which the Regulation left intentionally open and subject to ex-post and case-by-case analysis.

However, BEREC has adopted on this occasion a number of narrow interpretations which may have substantial chilling effects on innovation across the Internet value chain, ultimately to detriment of consumers. We believe that **BEREC has exceeded its mandate** with this proposed Guidelines - which should be circumscribed to "the implementation of the obligations of the National Regulatory Authorities" – in so far as **it interprets in the abstract (and to a large extent in isolation of other policy objectives)** the provisions of the Regulation and propose additional obligations/restrictions not explicitly provided for in the Regulation.

Examples of these are the prohibitions of conducts not prohibited in the Regulation and new definitions and categories of services not defined in the Regulation (e.g. specialised services and sub-Internet services).

Telefónica believes that a number of key BEREC provisions submitted for consultation need to be reconsidered, in particular:

- **Commercial practices should be analysed on its merit on a case by case basis, with no exceptions.** The regime arising from the Regulation should address market situations in light of the relevant facts. Telefónica believes that the burden of proof that a given commercial practice undermines end users' rights should always be on the NRA (or competent authority) and suggests BEREC to leave more room for a pragmatic, ex post and evolutionary implementation of the Regulation. We suggest BEREC should focus the facts, tools and principles to be considered for the NRAs to tackle such case-by-case analyses.
- Consistent with the above, **specific practices such as zero rating once the data cap is reached or sub-internet services should not be banned outright.** Any commercial practices would only be objectionable if they lead to circumstances where *"end-users' choice is materially reduced in practice"*. General presumptions about harm made in the abstract not only exceed the scope of the Regulation but also would damage user welfare, commercial innovation and market competition. The same consideration applies to other practices such as the restriction of tethering, which according to the Guidelines appear to be negative despite they may bring about consumer benefits.
- In a competitive IAS market, as long as end-users are informed, ISP should be able to offer the services they believe would match consumers' needs. An environment that is permissive, which allows innovation and experimentation, will create major long run benefits for Europe and for consumers.
- We note that BEREC concludes that CAPs are protected under the Regulation in so far as they use IAS to reach other end-users. By granting this general "protection" to CAPs, individual end-users rights may be inadvertently eroded (e.g. their right to filter the specific content they do not want to receive) and providers and ISPs be put at an unfair position vis-à-vis other players in the value chain. Since CAPs may adopt several roles, we suggest that BEREC should clarify the application of the principles established in the Regulation depending on the role adopted by them in each case.

- **Traffic management should not preclude the needs of IAS customer segmentation.** Telefónica is concerned that the non-discrimination principle could be interpreted by NRAs in a way that entails that all individual IAS customers or segments should be considered identical. Quality segmentation between business access and residential access is a representative example for which the freedom provided by the Regulation is particularly relevant.
- **The approach adopted by BEREC with regard Services other than Internet (SoIAS) will lead to regulatory uncertainty and chilling effects on European innovation on these services.** The Regulation does not foresee an authorisation regime for SoIAS: NRA should not decide whether a given level of quality is "objectively necessary". It should be for the market to decide whether a specific quality is necessary, driven by user demand. It is of particular concern the statements suggesting that the qualification of a given service as SoIAS may be amended over time and be potentially disallowed.
- **BEREC guidelines should not undermine the advent of SDN/NFV and 5G deployments.** The vision of 5G is to transform internet in a far more attentive and responsive network to each user demands. SDN and NFV architectures are expected to provide ISPs with the flexibility and the responsiveness to configure the 5G network's resources for a large number of classes or service, or even a specific user. The failure of the guidelines to keep pace with technological change at this early stage shows precisely why prescriptive rules need to be avoided at all costs.
- **The Guidelines should support, not undermine, operators' investment decisions.** NRAs involvement in the decisions of ISPs on how to dimension their networks and/or micromanaging traffic management practices would hurt the efficient management of IAS traffic, stifle competition between providers and ultimately harm end-users. NRAs should instead focus on the outcomes rather than intervening on the specific technical decisions and details which should be left to service providers. Telefónica is especially concerned that the Guidelines appear to be tilted in favour of capacity vs traffic management. It should be noted that not all issues can be solved by adding capacity (e.g. jitter). Moreover, adding capacity is not always a recourse at the hand of operators, e.g. in cases of capacity spectrum constraints.
- **ISPs should be able to propose content filters to end-users.** Telefónica believes that BEREC should support the ability of ISP to block content under the end-user control (opt-in), e.g. filter spam if users want to avoid such unsolicited communications, allow parents to set up filters, and provide opt-in services on top of IAS that allow end-users to exercise its choices of not receiving specific contents, including end-users voluntarily ask for advertising blocking. Telefónica believes that if an ISP provides an option to the end-users on top of IAS by which end-users may choose to ban specific types of applications or contents, it should not be considered incompatible with the Regulation.
- **A retrospective application of contractual obligations is not prescribed in the Regulation.** BEREC interpretation that Art. 4 should apply to all contracts in the market goes beyond the provisions of the Regulation specially taking into account the new requirements specified by BEREC. New contractual information parameters arising as a result of new BEREC directions should not be considered as contractual modification at all and should not trigger an exceptional right of termination as included in Art. 20 (2) Universal Service Directive.
- On a different note, **we believe that BEREC should reconsider its approach to performance parameters transparency** which is over prescriptive, inefficiently costly and not fit for purpose. The benefits of a competitive market for end-users should not only address the comparability in terms of price and speed but also choice and variety. Over-prescriptive, predefined static transparency obligations distort the flexibility to deliver this competitive choice.

Finally, Telefónica suggest BEREC to consider a **reasonable period of time for implementation** - especially for implementing the new transparency provisions - after the date that Guidelines will be published.

EU Register ID: 52431421-12 18 July 2016

Telefónica response to the Consultation on the draft BEREC Guidelines on Net Neutrality - BoR (16) 94

1. INTRODUCTORY REMARKS

Telefónica believes that EU Open Internet Regulation 2015/2120 hereafter "the Regulation", as it was finally adopted, struck the right balance between the desire for ex ante regulation and the need to ensure sufficient freedom/flexibility for market players to innovate in a highly dynamic and competitive Internet environment, all in the interest of consumers and society.

The Guidelines should strictly respect that balance, and avoid prescriptive interpretations in those elements which the Regulation left intentionally open and subject to ex-post and case-by-case analysis. However, Telefónica believes that BEREC has adopted on this occasion a number of overly restrictive and prescriptive interpretations of the Regulation which may have substantial chilling effects on innovation across the Internet value chain and ultimately create a substantial detriment to consumers.

In this context, **Telefónica welcomes this consultation** and notes BEREC intention *"to contribute to the consistent application of the Regulation, thereby contributing to regulatory certainty for stakeholder".*

That said, we note that BEREC mandate is about *"the implementation of the obligations of the National Regulatory Authorities"* under the Regulation, not a blanket mandate to develop, arguably for the sake of consistency, any sort of secondary legislation or to re-interpret the regulation, even less in ways that goes beyond its provisions. It is only over time that Europe will discover whether divergent interpretations of the Regulation or these Guidelines leads to differing levels of innovation across Member States.

2. GENERAL COMMENTS

Telefónica understands that end-users´ choice is the key subject matter to be protected with the Regulation and the one than should govern the entire decision-making framework for market players and regulators when it comes to assessing the compatibility of commercial and technical practices with the provisions of the Regulation.

We believe that, as long as there is effective competition providing choice in the market and end-users are clearly informed, such practices should generally be allowed. An environment that is permissive, which allows innovation and experimentation, will create major long run benefits for Europe. The regime arising from the Regulation should address issues in light of the facts as they arise, rather than require approval of service innovations in the network, approvals that are not required at any other point in the value chain. The burden of proof should in any case be on NRA side not the other way around. This ex post permissive approach must be common to all national implementations, to allow harmonised cross-border services to be delivered.

In our opinion, Art 3.1 fully supports this approach when it states that *"End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service".*

This is extraordinarily important since innovation can take, and should remain being able to take, place anywhere across the whole value chain (not only at the edges). Issuing prescriptive regulations on the local connectivity or more generally the "network" side of the market not only would stifle innovation by ISPs but also would leave operators in a commercial/technical disadvantage vis-à-vis other main players, namely OTTs and device vendors, leading to distorted competition and to less incentives for network operators to invest and to innovate. This is particularly acute in, although not limited to, the section of the Guidelines dealing with so-called "services other than Internet".

Rather than over-prescriptive Guidelines, Telefónica suggests BEREC to leave more room for a more pragmatic, ex post and evolutionary implementation of the Regulation than what is described in the current draft Guidelines. This approach will certainly lead to a more positive outcome for competition and innovation across the Internet ecosystem and be more aligned with the provisions of the Regulation.

With that in mind, BEREC should avoid using these Guidelines to restrict ex ante commercial/technical practices that, in the context of a particular market situation and considering the specific circumstances, may indeed be fully beneficial for end-users (see examples below) in terms of choice and protection of the open Internet principles covered in the Regulation.

Finally, BEREC should also not underestimate within their Guidelines the need for relying more on the provisions of General Competition Law to assess the competitive impact of a certain value proposition in the market. For example, when it comes to dealing with issues related to potential discrimination, Competition law has established clear criteria to assess whether a particular practice or agreement could be discriminatory and are based on the principle that different treatment is justified when an objective justification does exist. The Regulation, which to a large extent seek the same kind of outcomes, left undefined what should be those justifications, and provided a number of safeguard to be considered, e.g. whether consumer choice is impacted or under which conditions traffic management can be deemed "reasonable" and therefore allowed. This "rule of reason" applied to the rules established in the Regulation make us think that a case-by-case analysis should be done and that it was not in the spirit of the Regulation that BEREC establishes any general prohibitions without such a case-by-case analysis.

We suggest that BEREC should rather focus just on providing Guidelines about how NRAs could tackle such case-by-case analysis and the facts, tools and principles to be considered therein rather than establishing general prohibitions "in the abstract" which go beyond what is stated in the Regulation.

3. SUBJECT MATTER, SCOPE AND DEFINITIONS

3.1. Scope of the BEREC mandate

For the reasons considered below, it is in our view that **BEREC is exceeding its mandate by assuming the role of a legislator**. This way of conducting finds no legal basis neither in BEREC´s Regulation 1211/2009 nor the TSM Regulation.

In our understanding, and in accordance with article 5.3, the TSM Regulation[1] empowers BEREC to provide Guidelines on the **implementation of the obligations of NRAs, which basically consist of supervision and enforcement.** But this empowerment, by no means, includes the right of BEREC to provide Guidelines on the obligations applicable to ISPs (mainly article 3 and 4 of the TSM Regulation) and/or reinvent them.

Moreover, not only BEREC (1) gives Guidelines about the obligations on ISPs established in article 3 and 4, but, in some cases even, (2) adopts the role of the European Parliament and the Council, prohibiting outright to ISPs practices which were not prohibited by the European Legislator or introduces new definitions and categories of services which were not contemplated previously, with severe consequences. Hence, BEREC is contravening not only the TSM Regulation mandate, but also the spirit of the political agreement reached within the European Institutions, to create a balanced regulatory environment in the net neutrality field and leaving a reduced space, for the case by case approach recognized in the TSM Regulation.

At this point, is also worth to mention that Open Internet rules have been adopted under the legal instrument of a Regulation and not under a Directive. EU Regulations are designed to ensure the uniform application of Union law in all Member States. Regulations must be of general application and binding in their entirety and must have a direct effect. To leave BEREC develop Guidelines on the entire TSM Regulation (that is, about the whole legal text), in order to make more coherent the implementation of its content, would be like admitting that the real nature of the TSM legal instrument is not a Regulation but a Directive.

Furthermore, taking into account other precedents where BEREC has been empowered to adopt Guidelines, e.g. the Regulation (UE) 531/2012 on roaming, the mandate has never been on the entirety of the Regulation but on a very specific and particular subject. Therefore, in determining the scope of BEREC´s mandate, we believe a strict and narrow approach should be always taken, and based on the proportionality principle.

This would mean that BEREC is only entitled to develop Guidelines relating to the procedures to be followed by NRAs for the implementation of the powers attributed to them under the Regulation,., as it is clarified in the Regulation, Recitals 18 and 19 which refer to "*the power to impose requirements **concerning technical characteristics, minimum quality of service requirements and other appropriate measures** on all or individual providers of electronic communications to the public if this is necessary to ensure compliance with the provisions of this Regulation on the safeguarding of open internet access or to prevent degradation of the general quality of service of internet access services for end-users*.

However, and even if the Guidelines constitute "recommendations to NRAs" which they should be taken into utmost account, a number of these recommendations submitted by BEREC to public consultation go beyond this mandate in so far as it interprets **in the abstract (and to a large extent in isolation of other policy objectives)** the provisions of the Regulation and/or introduces additional obligations not explicitly provided for in the Regulation.

In our view, by doing so, BEREC goes beyond the task assigned to it by the Regulation (namely to establish Guidelines on the implementation of obligations of NRAs rather than on the implementation of obligations of ISPs). Examples of this are the provisions prohibiting conducts that are not prohibited in the Regulation, adding additional prescriptions related to transparency and/or introducing new definitions and categories of services that were not defined on the Regulation (e.g. specialised services or sub-Internet services).

In particular, we are concerned with the following list of points (non-exhaustive) in which we find that BEREC has gone beyond its mandate:

- §38 and §39. The general prohibition to launch zero-rating offers where all applications are blocked (or slowed down) once the data cap is reached except the zero-rated application – this is not supported by the Regulation as there could be cases in which an objective justification could make such practice allowable (see below).

[1] *Regulation(EU) 2015/2120, Article 5(3) establishes that "By 30 August 2016, in order to contribute to the consistent application of this Regulation, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines for the implementation of the obligations of national regulatory authorities under this Article".*

- §52. The examples given by BEREC in bullets second and third – restriction of a limited set of applications and blocking all but zero-rating applications when cap is reached – which are described as practices which involves technical discrimination, and hence constitute unequal treatment which would not be compatible with Article 3 (3). This is not provided in the Regulation and its legitimacy will depend on a case-by-case analysis. A general prohibition would be unlawful.
- §2 and 95-123. Recourse to a concept of "specialised services", not defined in the Regulation, and when the Regulation define the relevant term in a much broader manner ("electronic communication services other than internet access services").
- §130, 185 and 186. The abolition of certain contractual relations retroactively despite no such policy imperative being clear on the face of the Regulation, and contrary to the approach taken in other EU legislation.
- §106 and 108. The application of strict control by NRAs not only on IAS but also on every specialised service which involves new measures not prescribed in the Regulation.
- §75. Prohibiting ISPs from ad-blocking, irrespective of whether it may be in the express interests of consumers to do so, which constitutes a significant erosion of consumer rights. This prohibition is particularly difficult to understand and justify, given that ad-blocking appears to be permissible at the terminal level.

3.2. Inclusion of Content and Application Providers within the concept of "end-user"

We note that §4 include Content and Application Providers (CAPs hereafter) as part of the concept of "end-user". We also note that according to §5 BEREC concludes that "CAPs are protected under the Regulation in so far as they use IAS to reach other end-users". This conclusion is based on definitions made at a time when the Internet was at a different stage of development and which has been challenged, including by BEREC in its recent report on OTT services.

This said, we believe that the spirit of the Regulation differentiates between individual end-users and CAPs. Indeed, we note that Recital 3 in the Regulation makes explicit the difference between end-users (understood as individuals) and CAPs as it states: "*The internet has developed over the past decades as an open platform for innovation with low access barriers for end-users, providers of content, applications and services and providers of internet access services*"). Recitals 7 and 11 make similar type of distinctions between end-users as individuals and as CAPs.

We believe that, for the sake of clarity, BEREC should take this opportunity to elaborate further on how the distinctions made in the Recitals between "end-users" and "CAPs" have an impact on the way end-users rights are to be understood. More specifically, since CAPs may adopt several roles, we suggest that BEREC should clarify the application of the principles established in the Regulation depending on the role adopted by them in each case.

In fact, Internet ecosystem has evolved considerably in the past years, and it has been turned upside down with the emergence of some CAPs imposing de-facto standards as a result of the power they have acquired in the market. Some examples are web browsers (i.e. proxies), web searchers, etc. Any discriminatory treatment to ISPs vs CAPs providing services that may be considered core services into Internet just as necessary as bare connectivity provided by ISP should be avoided.

We also note that he Guidelines states in §5 that "some CAPs may also operate their own networks…". Unfair situations could result as a result of the regulatory imbalance created when ISPs are not allowed to block or throttle content, whereas CAPs could do so and at the same time benefit from the protection given to them under current BEREC interpretation of the scope of the Regulation.

We are concerned that, by granting this general "protection" to CAPs, the Guidelines may inadvertently be eroding individual end-users rights (e.g. their right to filter the specific content they do not want to receive) and/or putting e-communication providers and ISPs at an unfair position vis-à-vis other players in the value chain. We provide an example of the section dealing with congestion management (see point 5.6 below).

4. COMMERCIAL PRACTICES

4.1. General Approach

The Regulation, in its provisions as well as in its key recitals, establishes an ex post standard of analysis. In fact, the Regulation does not provide clear-cut prohibitions or prescriptive obligations. Instead, it is inspired by a "rule of reason" which obliges competent Authorities to assess specific practices (individual ones and agreements) on a case-by-case basis, namely commercial agreements and practices which are to be allowed to the extent they do not materially reduce or undermine the essence of end-users' rights in practice (Recital 7). This can only be done ex post, with knowledge of the services concerned and the implications of their usage in practice.

However, the Guidelines proposed by BEREC go beyond those principles and establish prohibitions on the network operators that do not exist under the Regulation. Such prohibitions would be unlawful, as they go beyond "guidelines" as prescribed in the Regulation and presume some law making authority has been devolved to BEREC. The Regulation provides no such powers and any blanket prohibition is unenforceable. In any event, in a dynamic sector blanket prohibitions should always be avoided in order not to chill innovation going forward. We suggest that BEREC revisits the scope of its authority in this matter and substitutes guidance on the method and tools which could be used in any ex post analysis based to a large extent on the principles and precedents of Competition Law.

Indeed, we believe that there are contextual reasons which make a more balanced approach needed, in particular because the current commercial activity at the internet value chain takes place in a context which requires more finely balanced policy trade-offs.

For example, and central to most concerns related to Net Neutrality is the relationship enjoyed between network providers and content/app/site providers rather than simply those concerns relating to an ISP's unilateral behaviour. Again, this is a new reason to rely on an ex post flexible approach rather than on rigid ex ante prohibitions. In this scenario, the type of flexibility afforded by EU competition rules ensues that consumer welfare can be maximised.

Indeed, competition-style approach –balancing consumers' welfare and efficiencies against losses of competition- can better address the possible anti-competitive effects from agreements involving market players other than ISPs while traditional regulatory approach raises the risk of artificially conducting theories of market failure solely by reference to the responsibilities of ISPs.

If the institutions which will apply those principles are the competition or the regulatory ones is not yet clear to us -as the Regulation not only refers to NRAs but also to "other competent authorities"- and should maybe be decided at a national level.

4.2. Commercial practices should be analysed on its merit on a case by case basis, with no exceptions

As said before, Telefónica is concerned that the Guidelines restricts specific commercial practices in the abstract, in particular zero rating when data cap is run out, without (a) clearly explaining the reasons why this is the case, (b) the reasons why an objective justification could not make such practices acceptable if other policy objectives are also taken into account (see below) and (c) without taking in due consideration any previous impact assessment.

On the other hand, in our view it fails to provide clarity about the conditions under which a material reduction of customer choice would take place. This element appears to be to some extent overestimated across the Guidelines, which at the end creates uncertainty for commercial innovation and to potential benefits for end-users.

Moreover, we believe this is an example of the Guidelines going beyond the provisions of the Regulation. We consider that the mandate given to BEREC in the Regulation does not involve giving BEREC the competence to limit from the outset a given commercial practice. Rather than curtailing the freedoms given in the Regulation to ISPs, BEREC starting point should have been the promotion of the freedom to innovate and to provide services.

Since art. 3.1 regulates end-users right and includes an explicit reference to "their choice" we suggest that as along as end-users are informed, by default they should have the ability to agree to particular conditions and services. The Regulation should not be interpreted in a way which limits end-users´ choice. Indeed, in the current environment public bodies must be mindful of the boundary between the well-meaning social function of the State to protect consumers and the ability of citizens to exercise informed freedom of choice. Competent authorities should avoid the temptation to tell consumers that "the State knows best", especially in a dynamic and fast moving environment like the Internet.

To this end, Telefónica believes that the burden of proof that a given commercial practice undermines end users' rights should always be on the NRA or competent authority which, only after reaching a detailed analysis and the potential implications of any agreement or practice in the market, may thoroughly argue and justify that any such commercial agreement limits end-users choice.

The Guidelines should make clear that the burden of proof that specific commercial practices undermine end-users' rights should always rely on the NRA – we suggest that this should be explicitly included in §42.

4.3. Sub-internet services and zero rating once the data cap is reached should not be banned outright

Telefónica is concerned with the assertion that (1) sub-internet services (§52) and (2) zero rating IAS once the data cap has been reached (§38) would not be allowed from the outset. We believe that the rationale, analysis and impact assessment for such affirmation is missing in the Guidelines and such a general prohibition in the context of a competitive market is not aligned with the principles of the Regulation.

The Regulation does not mention sub-internet services either. We believe that this type of service may actually bring the potential of consumers' benefits, depending on the service conditions. However, the guidelines give a definition of these services and establish that these services are not compliant with the Regulation (§17).

BEREC should acknowledge that in a highly competitive environment, ISPs will always have the incentive to provide products and services that are of interest for end-users in order to remain competitive and such incentive should not be underestimated when assessing these zero-rated content or sub-Internet offers that aim at making more attractive a particular IAS offer over the rest in the market.

In fact, both prohibitions would be problematic. For example, in the case of Zero Rating, to allow the customer to purchase more data when they hit their cap; to access specific websites such as online-support, child abuse help websites, victim support sites, domestic abuse, even when his data allowance has run out; watch a advertising video to get extra data; get a zero-rated traffic to access a bank´s App or website, or enjoy an entertainment App of value for customers, etc.

We believe that any commercial practices and sub-internet services or zero rating in particular would only be objectionable if they lead to circumstances where "end-users' choice is materially reduced in practice" (as indicated in Recital 7 of the Regulation). In such circumstances, NRAs assessment should remain always ex-post on case-by-case. Narrow ex-ante supervision based on static criteria not only would exceed the Regulation but also would damage user welfare, commercial innovation and market competition.

We believe that zero-rating is just a form of price differentiation practice and not so much a net neutrality/traffic management issue. We believe that any concern about these practices regarding choice could be solved by the application of competition law. Indeed, it is difficult to support that the regime proposed by BEREC in §43 could deliver a better outcome for consumers since applying the same price by regulatory obligation to all applications could impact on the consumers' preferences as well and there is no assurance that this outcome could be better for consumers.

On top of that, with regard to the specific criteria to be assessed under the methodology described in §43 we believe that in a digital ecosystem which is very dynamic, with continuous entries and exits, tracking clear cause and effect relationships will be increasingly difficult to make, thus increasing the likelihood of errors in the assessments and leading to more unpredictable results. Telefónica suggests that if the goals of the Regulation is to avoid commercial practices

which materially reduce end-users' choice this would be better served by general competition law standards instead of by the proposed regulatory regime, which is full of uncertainties.

Based on the above considerations, we suggest that BEREC should (1) explicitly specify that IAS commercial practices are in general authorized; (2) make clear that any exception have to be the outcome of a sound ex-post assessment on case-by-case basis using competition law approach and clear justification, including impact on consumers' welfare and costs and benefit for society.

Telefónica suggests that the Guidelines should also make clear in §37 that any zero-rating and sub-internet service are not objectionable if they lead to circumstances where "end-users' choice is not materially reduced in practice. Any exception has to be the outcome of a sound case-by-case ex-post impact assessment using competition law approach. Accordingly, §38 and §52- 3rd bullet should be deleted.

On the other hand, Telefónica understands that zero-rating is essentially a purely commercial practice as long as there is no difference on how Internet traffic is managed, similar to a bundle of access to an App/service (e.g. Spotify) or to providing other goods/services in exchange for using the IAS service (e.g. tickets for sports). However, BEREC shows some sort of inconsistency in terms of how BEREC views zero-rating: on one hand considers zero-rating as a "commercial practice" (§37 – first sentence) whilst, on the other, §38 refers to infringement of art. 3.3., which essentially deals with "technical" traffic differentiation and traffic management.

Telefónica believes that a zero-rated content on top of such IAS offer out of the established cap should not be considered a technical discrimination of traffic but a commercial practice based on the price differentiation of traffic.

Consequently, we suggest that references to "technical conditions" have to be deleted in §42 and §43

4.4. Provisions related to bundles of the IAS with an application needs to be clarified

The Guidelines give in §33 an example for the commercial practice of bundling the provision of the IAS with an application. This practice is deemed not to limit the exercise of the end-users' rights granted under article 3(1): "*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)*". From the text it seems unclear if BEREC is suggesting that the described practice shall be allowed only for limited periods of time or only to new users.

The Guidelines also indicates in §33 that "*Where the traffic associated with this application is not subject to any preferential traffic management practice, and is not priced differently than the transmission of the rest of the traffic, such commercial practices are deemed not to limit the exercise of the end-users' rights*". It remains unclear if it implies that bundles with opposite characteristics would always be banned even when the exercise of the end-users' rights is not limited (i.e. the traffic associated with this application is subject to a preferential traffic management practice and/or it is priced differently than the transmission of the rest of the traffic).

BEREC should reformulate §33 to make clear that the Guidelines (1) do not limit the practice for limited periods of time or only for new users and (2) establish that any restriction to the bundling the provision of the IAS with an application should be justified by the NRA on a case-by-case basis.

4.5. Tethering does not necessarily undermine end-user's rights

In Telefónica view, BEREC suggestion in §25 that restricting tethering is *"likely to constitute a restriction of choice"* does not follow directly from the Regulation, and is an example where BEREC deviates from the principle of ex-post based approach of the Regulation towards a more ex-ante restrictive approach.

Tethering may have sound rationale, not being bad per se, if considered not in isolation of other consumer interests. The analysis should be, again, on a case-by-case basis. For example, it may help users not to spend their data allowance inadvertently and to minimise the likelihood of billshock in roaming.

We believe that as long as this restriction is well known by the end-users and that there are alternative products offered by ISPs that do allow tethering, i.e. provide consumers with a choice, then ISPs should be able to also offer products that do not allow tethering.

BEREC should delete in §25 the reference to tethering as an example where user's choice is commercially limited by the ISP.

5. TRAFFIC MANAGEMENT PRACTICES

5.1. Traffic management should not preclude the needs of IAS customer segmentation

The need for customer segmentation is particularly relevant to deliver business grade access to corporates and Small Medium Enterprises (SMEs). Telefónica is concerned that the non-discrimination principle could be interpreted by NRAs in a way that entails that all individual IAS customers or segments should be considered identical. Quality segmentation between business access and residential access is a representative example for which the freedom provided by the Regulation is particularly relevant.

The Regulation explicitly supports the ability for ISP to segment IAS ("*Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices…",* art. 3.2).

A rigid guidance on how networks resources should be allocated, in particular between different end-users using IAS services of different quality characteristics would exceed the provisions of the Regulation and lead to inefficient and arbitrary outcome for the market[2].

Telefónica asks BEREC to explicitly indicate in the Guidelines (§60) that such technical segmentation of QoS requirements also comprises the differentiation in a specific categories of traffic between IAS offers designed to different segments of customers and in particular business grade.

On top of that, Telefónica also believes that NRAs should also clearly include in their analysis of non-discrimination the freedom for ISP to segment the quality of IAS offers provided to different end-users.

Telefónica asks BEREC to be modify §63 to include in NRA analysis of non-discrimination the freedom for ISP to segment the quality of IAS offers.

5.2. Prohibiting prioritisation between traffics of different IAS customers would be disproportionate

Telefónica understands that the prioritisation between traffic concerning different IAS contributes to the efficient network architecture for the provision of high quality IAS[3]. On top of that, we understand that there are situations where the prioritisation between traffics of different IAS customers on a regular basis – i.e., apart from congestion and failures of the network indicated in §64 – can be objectively necessary to serve specific needs; for instance, those of

[2] The Guidelines states in §60 that "*if ISPs implement different technical QoS requirements of specific categories of traffic, this should be done objectively by basing them on the characteristics of the applications transmitting the packets*".

[3] In fact, §64 recognises that "*ISPs may prioritise network management traffic over the rest of their traffic … aimed at properly configuring and securing the network and its equipment by efficiently balancing load, e.g. by reacting as fast as possible in case of congestion, failures, outages, etc.*".

emergency services such as the police, firemen, or hospitals with the urgent need to access information only available on the Internet or to forward information of general interest to citizens through the Internet.

The Guidelines should include a reference to exceptions that would objectively justify a prioritization between traffics of different IAS customers (§57, 2nd bullet).

5.3. BEREC guidelines should not chill the advent of SDN/NFV deployments

The vision of 5G is to transform internet in a far more attentive and responsive network to each user demands (being individuals or millions of IoT devices). SDN and NFV architectures are expected to provide ISPs with the flexibility and the responsiveness to configure the 5G network's resources for a large number of classes or service, or even a specific user. One important outcome will be a quick and efficient response of providers when and where required in benefit of individual and/or all IAS users of the ISP.

The Guidelines, however, requires ISPs that "… packets can normally be considered to be treated equally as long as all packets are processed agnostic to sender and receiver, to the content accessed or distributed, and to the application or service used or provided" (§50).

Telefónica is concerned that the obligation of an agnostic processing of packets could be in future a requirement that will contradict 5G capabilities and will thereby limit network and service innovation.

Telefónica suggests BEREC to frame such condition (i.e. an agnostic processing of packets) in §50 to an example of fair traffic management practice in order to ensure the required flexibility in future. Telefónica would also ask BEREC not to limit (in §51) ISPs use of endpoint-based agnostic congestion control mechanisms.

In the same perspective, it is of utmost importance for Telefónica that business grade access to software and virtualised networks located within the Internet will not to be impeded in future by regulatory restrictions or short term considerations. In fact:

- Under SDN and NFV architectures, existing dedicated private network resources will be replaced by software defined routers connected by virtual leased lines over the internet.
- The notion of "VPN" that is divided in the Guidelines between "VPN applications" (over IAS) and "VPN leased line services" (over a specialised access service) is not future proof as it ignores the upcoming trends towards SDN and NFV to address business needs.

Telefónica asks BEREC to reconsider, for the reasons indicated above, the taxonomy of VPN services described in §111 as an example.

The failure of the guidelines to keep pace with technological change, even at this early stage, shows precisely why prescriptive rules need to be avoided at all costs.

5.4. On the freedom to implement particular traffic management practices

The Regulation provides that ISPs are free to technically optimise the IAS service they provide to their customers, as long as they use reasonable traffic management as defined by the Regulation itself.

Telefónica believes that NRAs should not pre-empt by default any traffic management practices nor should NRAs judge which techniques are the most adequate (§67). Optimization of different traffic categories can be implemented in many distinct and equally fair ways than those indicated in the Guidelines. Some examples are indicated below:

- In certain network architectures, the only way to identify some types of control/management of packets may be by inspection;

- The prioritization of control-plane traffic (e.g. routing protocols) which should also be allowed, not only the prioritization of network management traffic, as mentioned in (§64).

NRAs monitoring should address the outcomes of traffic management, not the technical options chosen by each ISP to achieve these outcomes. In this respect, the Guidelines (§66) should permit monitoring specific content when the objective is to identify patterns that clearly determine the matching of packets to one of those two categories. Also, it should be prevented that some CAPs take advantage of well-known traffic management practices to provide their services in a prioritized way. In summary, this paragraph should permit a case-by-case analysis.

According to that, BEREC should delete or keep as examples the references to generic monitoring techniques in §67.

More generally, traffic management and the quality of service delivery should remain elements for competitive differentiation that should not be clipped *de facto* by the NRA strict supervision of traffic management that the Guidelines indicate in §167.

Virtualization and in particular network slicing in 5G networks open the door to new innovative services provided from the network. Reuse of common network infrastructure and resources management based on QoS requirements is at the core of the network slicing, since it is perceived that the use of separate infrastructure would lead to over provision and a misuse of resources which would make the deployment of new services unaffordable. Therefore, NRAs effort should focus in monitoring and ensuring that KPIs for IAS are met ex-post, allowing a dynamic, holistic QoS management of the infrastructure by network providers.

Finally, it is also worth mentioning §70 of the Guidelines which state that "where traffic management measures are permanent or recurring, their necessity might be questionable…". It should be noted that some issues cannot be solved by adding capacity (e.g. jitter). Moreover, always adding capacity may not be recourse at the hand of operators under certain circumstances, e.g. in cases of capacity spectrum constraints.

5.5. The Guidelines should not interfere on operators' investment decisions

Excessive regulatory interference in traffic management practices would hurt the efficient management of IAS traffic, impede competition between providers and ultimately harm end-users. Specifically, provision §89 indicates that "*NRAs should monitor that ISPs properly dimension their network, and take into account … that application-specific congestion management should not be applied or accepted as a substitute for more structural solutions, such as expansion of network capacity*".

According to it, NRAs will get involved in the decisions of ISPs on how to dimension their networks. It does not seem proportionate being rather intrusive into ISP operations.

Telefónica suggests BEREC to delete §89, 2nd bullet.

5.6. ISPs are not responsible for all IAS congestion situations in their network

Telefónica is concerned because the fact that not all congestion situations are controlled by ISPs is not sufficiently considered in the Guidelines when assessing congestion cases (§5, §86, §87) or to allow traffic management only when a security attack is detected (§81).

IAS quality of service depends not only of ISPs but also on other parties of the Internet. Some examples are described hereafter where Telefónica considers that ISP liability should be limited:

- When CAPs refuse to correctly dimension their access to the internet or their interconnection. CAPs that operate their own networks or have agreements with transit providers, and transit providers which can influence the routing of the internet traffic. It may happen that the choices or policies made by these third parties can limit end-users rights to benefit from the right level of quality of service for IAS.

- When CAPs make use of proprietary end to end protocols (e.g. Google "Quick UDP Internet Connection[4]") that impede standard flow control mechanism (e.g. TCP/IP) that would otherwise contribute to a stable and efficient operation of network resources. Such protocols allow OTTs to circumvent ISP capabilities of managing and allocating resources to both IAS and specialised services in their network.

  In fact, in this case, an OTT can emulate end-to-end a specialised services taking the advantage of an IAS bearer capability protected by open internet regulation. This is a clear and unfair lack of level playing field since the Guidelines:

  - On the one hand, obliges ISPs to avoid the impairment of IAS caused by specialised services, thus limiting the latter.
  - While protecting CAPs ("*CAP are protected under the Regulation in so far as they use an IAS to reach other end-users",* §5) who can inefficiently consume resources set aside for IAS, managing their own quality of service within an over specified IAS bearer.

- Since network resources are always limited, these clearly penalises ISPs vis-à-vis OTTs in so far as "It is the general quality of the IAS which is protected from degradation by the Regulation, rather than specialised services." (§113). When CAPs encrypt massive Internet flows making impossible an adequate traffic management in detriment of the general quality of the ISP users. Furthermore, the Guidelines imposes on ISPs contradicting obligations when it states that:
  - *"Encrypted traffic should not be treated less favourably by reason of its encryption"* (§61)
  - *"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"* (§57).

Telefónica suggests BEREC to take in due consideration the limitations described above when assessing congestion cases in §61, §57 and §113 and QoS requirements as well as the ability of the ISP to use traffic management practices in §61 and §57.

5.7. ISPs should be able to propose content filters to end-users

Telefónica believes that if an ISP provides an option (i.e. opt-in) to the end-users on top of IAS by which end-users may choose for whatever reason to ban types of applications or specific content, it should not be considered as a restriction of the freedom of choice of end users. On the contrary, it is end-user choice that it is enhanced by favouring a more efficient outcome of the highly competitive Internet market in search and satisfaction of their needs and preferences.

In this context, the Guidelines (§75) indicates that *"… ISPs should not block, slow down, alter, restrict, interfere with, degrade or discriminate advertising when providing an IAS, unless the conditions of the exceptions a), b) or c) are met in a specific case. In contrast to network-internal blocking put in place by the ISP, terminal equipment-based restrictions put in place by the end-user are not targeted by the Regulation*".

We believe that this statement should be understood absent opt-in end-user request to filter advertising. Otherwise, it would contradict (1) the exercise of end-user rights to access (or to limit access to) and distribute information and content of his choice and (2) opposes to the technology neutrality principle.

Rather than being a restriction of end-user's choice, Telefónica believes that such add-on services to IAS enhance end-users choices and freedoms, on the condition that it is previously demanded by the end-user (opt-in). Therefore BEREC should in such cases not prevent end-users to make personal and informed choices.

[4] http://techcrunch.com/2015/04/18/google-wants-to-speed-up-the-web-with-its-quic-protocol/

Similar considerations apply to other types of opt-in based content filters (e.g. network-based control parental solutions).

Telefónica asks BEREC to implement clear guidance that support the ability of ISP to:

1. Block content recognised as illegal under Union law on a voluntary and self-regulatory basis for the specific case of child sexual abuse content (for example in §78);

2. Filter spam, if users want to avoid such unsolicited communications, as well as to allow parents to set up parental filters that for example block pornography or gratuitous violence, with the prior request or consent of end-users and the possibility to withdraw the consent, and thus such filters, at any time.

3. Provide opt-in services on top of IAS that allow end-users to exercise its choices and freedom not to receive specific contents, including when end-users voluntarily ask for the blocking of advertising (§75).

6. SERVICES OTHER THAN IAS (SoIAS)

6.1. Necessity criterion that backs-up SoIAS

Telefónica wants to show its strongest concerns on the approach adopted by BEREC with regard SoIAS. The Guidelines should not be more restrictive than the Regulation is. In particular, (1) BEREC should not define SoIAS (also referred in the Guidelines as "specialised service") and (2) the monitoring role of NRAs on SoIAS providers should only be executed ex post on a case-by-case basis.

Telefónica asks BEREC to drop in §2 the term "specialised service" and to use in the Guidelines the same name than the Regulation, i.e. "services other than internet access services" or its acronym SoIAS.

The correct legal interpretation is that, neither art.3.5 nor Recital 16 of the Regulation grant an authorisation regime. Telefónica believes that the NRA should not be empowered ex-ante to assess whether a given quality optimisation is "objectively necessary".

The regulatory scheme envisaged by the Regulation is that NRAs have to proceed (a) ex-post, (b) case-by-case and (c) driven in response to an individual and significant situation, when assessing whether the practices used to implement a SoIAS are compliant with Article 3(5).

Telefónica would ask BEREC to clearly indicate in §104 that the request for information from the NRA will be accomplished ex-post and case-by-case in response to a relevant situation.

Moreover, it is the market - not NRAs - that should judge whether SoIAS quality optimisation is (a) necessary or (b.1) driven by user demand for quality differentiation and/or (b.2) quality guarantees and/or (b.3) other specific features that the service intends to fulfil. The market driven principle was critical for the success of Internet as an engine of innovation, the Regulation should not be interpreted in such a strict way that contradicts such principle.

In particular, §104 also rise important questions to SoIAS providers, for example: whether inform to the NRA only upon request before/after the launch of the service, how to specify a "specific level of quality", how should it be demonstrated that this specific level of quality cannot be assured over the IAS, etc. Such uncertainties could damage SoIAS innovation, time to market and ISP competition.

Telefónica also remarks that the valuation of the required QoS level for a given service should be a decision and the sole responsibility of the ISPs. Therefore, it should not be subject to administrative control of the NRA as indicated in §104.

Telefónica asks BEREC to delete in §104 the statement "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".

According to §107 the NRAs will have to "*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*". In Telefónica view, it should be left solely to SoIAS providers to decide if a given optimization is necessary according to technical and/or commercial criteria and to demonstrate it "objectively" ex-post and case-by-case to the NRA.

Telefónica asks BEREC to modify §107.

Some provisions which have been explicitly rejected from the Regulation during the legislative debates have been reintroduced in the Guidelines. For instance, §106 prescribes the use of "*strict admission control*" and "*logically separated from the IAS*" mechanism if the assurance of a specific level of quality is objectively necessary but cannot be provided by granting general priority over comparable content. It is the responsibility of SoIAS providers to decide in each particular case the technical solutions to be adopted.

Telefónica would ask BEREC to delete §106.

Also particularly concerning is the room of arbitrariness that allows §108 to NRAs: "*… A service that is deemed to be a specialised service today may not necessarily qualify as a specialised service in the future due to the fact that the optimisation of the service may not be required, as the general standard of IAS may have improved*". According to our understanding it emphasizes that the qualification of a given service as SoIAS may be amended over time.

Telefónica would ask BEREC to make clear in the Guidelines that once an optimisation of a given SoIAS is deemed necessary, this service will not be re-evaluated after a period of time. Telefónica asks BEREC to remove this statement in §108.

6.2. The impact of SoIAS on IAS availability and general quality of service

According to §117 it is the obligation of the NRAs to assess if the provision of SoIAS is not to the detriment of the availability and general quality of the IAS. In order to do so, NRAs 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)*". The implementation of such procedure would require an intricate or even unmanageable procedure that goes far beyond the goal of the Regulation.

Telefónica believes that it should be left to the NRA the methodology to analyse case-by-case each SoIAS.

Telefónica asks BEREC to delete in §117 such measurement procedure. Telefónica asks BEREC to take in due consideration in §121 the feasibility of performance measurements achieved by the NRA in case of persistent decreases in performance ("*difference between measurement results before and after the specialised service is introduced*").

The guidelines should not prescribe the means that the operator have to adopt in order to deliver the quality of the specialised service. In fact, §114 states 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.*" In §115 BEREC states that "*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*").

Telefónica believes that it should be the responsibility of the network provider to choose the combination of technical means adequate to provide specialised services in addition to any IAS provided.

Telefónica asks BEREC to delete in §114 and §115 the references to the role given to NRA in order to assess how ISPs estimate the required network capacity as indicated above.

7. TRANSPARENCY

7.1. On the retrospective application of contractual obligations and its implications on legal uncertainty

We do not share BEREC's interpretation that Art. 4 (1), (2) and (3) should apply to any contract in the market, both new and existing ones, particularly taking into account the new requirements specified by BEREC, and expanding the provisions included on Article 4. First, this would require adjustment of contractual documents not only for new but also for already existing customers. Second, this may lead to customers' confusion and also to a loss of trust. Moreover, if new contractual parameters (following BEREC directions) diverge from previously agreed provisions it could also lead to contractual consequences, as consumer may be tempted to demand for termination rights based on Art. 20 (2) of the Universal Service Directive.

In fact a retrospective application is not prescribed in the Regulation and we see no room for such an interpretation. Article 10 establishes that all the obligations will enter into force at 30th April 2016 if not listed as an exception. As the listed exceptions do not refer to Article 4(1)-(3) thus, no variation from this general deadline should be prescribed.

Telefónica asks BEREC to adopt this interpretation and make it clear by reforming § 130 and 186

Notwithstanding the above, if the aim of BEREC Guidelines is to enable customers to control the contractual performance of the service, while not modifying its essential features going beyond the TSM regulation, providing that **enhanced information should not be considered as contractual modification** at all. Accordingly, **this should not trigger an exceptional right of termination as included in Art. 20 (2) Universal Service Directive**.

BEREC should make this clear, rather than introducing confusing references, such as § 133

7.2. Compliance requirements in relation to contractual information.

Telefónica believes that the benefits of a competitive market for end-users should not only address the comparability in terms of price and speed for a standardised product but also its choice and variety. Parameters by which customers may receive transparent information should also be able to reflect the variety of offers resulting from the market.

Over-prescriptive, predefined static transparency obligations could distort the flexibility to deliver this competitive choice. This would be less meaningful for the end user and it could result to a commoditization of the offer.

Against this background, Telefónica believes that BEREC's prescriptive recommendations on Art. 4, establishing in fact new requirements not specified in the TSM regulation, clearly overstretch its mandate. In particular we have the concerns indicated below.

The guidelines include a Recommendation that ISPs include in the contract and publish the **information referred to in Article 4(1) letters (a) to (e), preferably presented in two parts** - There is no such requirement in the Regulation that would justify a further restriction on how the detailed public and contractual information have to be presented and, more importantly, that beyond general information also more detailed explanations are required.

Telefónica asks BEREC to delete § 127

The guidelines unreasonably restrict the regulatory provisions **with regard to the information regarding art 4 (1) letter (a)**. Information on traffic management measures has to be general in order to allow some flexibility for network operators. Otherwise, any minor change in future traffic management will lead to a requirement to amend contractual

information and, thus, would appear as contractual modification. BEREC should avoid imposing such an excessive burden on providers, which would restrict their capability and incentives to innovate.

Telefónica asks BEREC to reconsider §131 - 132 towards a more balanced and flexible approach

BEREC recommends the provisioning detailed explanations and information more suited for experts when it comes to the **Information regarding art 4 (1) letter (b)**. We believe that it is unlikely that average customers understand the degree of details that BEREC considers as useful. Contractual documents would be further inflated with technical information on e.g. jitter, delay and packet loss that are of no practical use for most end-users. Moreover, some of the information depends of factors going beyond ISP's control, such as CAP's infrastructure, the private network of the customer, user device, etc. which are examples of factors beyond ISP influence that affect parameters like delay, jitter and packet loss.

Telefónica suggests BEREC to reconsider whether the recommended information are good indicators the IAS' performance but highly depend on factors beyond ISPs' influence (e.g. the kind of downstream in higher network topologies) and redraft § 134 and 135 accordingly

Information regarding art 4 (1) Letter (d) BEREC's recommendations go particularly beyond the obligations laid down in the TSM Regulation, and follows in our view an over prescriptive and counterproductive approach:

- ✓ In the case of **Fixed networks:**

  Minimum speed: The reference to its proportionality to maximum speeds is not necessary, but simply over-regulated and counterproductive. BEREC's far going very prescriptive recommendations on speed ranges are impractical will not improve transparency on individual performance and will likely negatively impact national broadband targets. ISPs cannot contractually agree a single speed parameter but have to agree speed ranges. A possibly strict limitation of maximum speed by NRAs such as recommended in BEREC's proportionality criteria in § 141 risks that de-facto providers will only indicate lower maximum speed in the contract. This may apply even if the available speed for customers is much higher.

Telefónica asks BEREC to delete § 141.

  Maximum speed: BEREC recommends that the maximum speed of fixed IAS indicated in the contract according to Art. 4 (1) letter (d) has to be achieved by the end-user at least some of the time. This recommendation does not reflect the requirements for commercial offerings in mass markets. This would lead to individual information for each customer or information of the worst figure for all customers.

We believe § 142 this should be deleted.

  Normally available speed: It is not feasible to provide the information stated by BEREC. Additionally BEREC's proposed definition focuses mainly in time windows when networks tend to have bottlenecks: normally available speed shall reflect the performance measured 90% of time over peak hours. Such "normally" available speed will not reflect the experience of users during most times of the day. Also, BEREC's suggestion that the normally available speed should be in reasonable proportion to the maximum speed would unreasonably limit the indication of maximum speed. Additionally to the proposed proportionality of minimum speed and maximum

speed, the normally available speed will further limit the indication of maximum speed. Again, this limitation applies even if the speed is available to customers.

We believe § 144 and 145 should be deleted.

Advertised speed: According to BEREC interpretation NRAs could set requirements such as "the advertised speed should not exceed the maximum speed defined in the contract". This would mean no provider will be able to use "up to … MBit/s" in the future, as the maximum speed will be an individual information for each customer.

We believe that §148 should be deleted.

- ✓ In the case of **Mobile networks,** we believe that the provisions foreseen in these Guidelines are unworkable and highly complicated to do in practice, in particular the specifying of speeds of an IAS in mobile networks as indicated in §149 onwards. Clearly providing information on the speed for mobile services is extremely difficult due to the many and varied technical variations and/or limitations, geography, terrain, conditions etc. This is the same reason why many mobile products are not advertised using headline speeds. ISPs should not have to state likely speed unless they advertise headline speeds, for instance, saying that an ISP provides 0.5-12Mbit/s to a consumer would be meaningless.

Telefónica suggests BEREC to reconsider its current approach in order to make the system workable in practice. Information on "maximum speeds" in a mobile context should be understood a as "maximum speed realistically achievable under optimal conditions"

Information regarding art 4 (1) Letter (e). In our view the remedies in accordance to national law (examples according to § 155: price reduction, early termination of the contract, damages, or rectification of the non-conformity of performance, or a combination thereof) cannot be included into the contracts because the rights are very specific for each constellation and customer.

7.3. Non-conformity of contract

Regarding monitoring systems, we believe that, (a) measurements of network parameters, if they are going to be used as transparency measures require to be clearly defined and (b) in order to ensure consistent and reliable monitoring results, all providers of monitoring mechanisms that are officially recognised to measure contractual compliance (NRAs included) shall be required to certify and ensure reliable measurement results that fully reflect ISPs' performance. We do not believe that any monitoring mechanism provided by the NRA can be considered "certified" without further technical assessment.

Telefónica suggests BEREC to reconsider its current approach and recommends that certification should be done by an independent and official body

8. ENTRY INTO FORCE AND TRANSITIONAL PROVISIONS

The Guidelines will be published at the end of August 2016. The final provisions of the Guidelines will not be clear before this date.

Telefónica asks BEREC to assign NRAs and providers a certain period for implementation after the date that Guidelines will be published, especially for implementing the transparency provisions of Article 4.