BEREC Public Consultation

"Guidelines on the Implementation by National Regulators of European Net Neutrality Rules"

Proximus Contribution

18 July 2016

0. Key messages

1. BEREC must stick to the Regulation terminology and definitions.
2. BEREC may not go beyond its mandate as defined in Article 5 of the Regulation.
3. BEREC may not distort the Regulation established balance between end-users protection and proper functioning of the internet ecosystem as an engine of innovation.
4. BEREC approach towards transparency puts DSL operator in a disadvantageous position towards cable operators and proposed complaint procedure is disproportionate.

BEREC also seems to forget or overlook that mobile and fixed operators have been an important contributor to the flourishing internet ecosystem, bringing new technologies to life with the aim to continuously improve broadband QoE and develop new innovative services.
BEREC also forgets that operators are competing between each other for internet subscribers and so do not have any a priori incentive to deteriorate the quality of their customer IAS. We believe there would be much more added-value in maintaining and fostering a competitive environment on the broadband market instead of developing heavy burdensome regulatory rules and processes in relation to open internet access.
Finally, if we want the EU to become world leader in 5G, operators will need a flexible environment allowing them to react swiftly and efficiently to technological evolution and develop new services in a very short time frame. By adopting an extremely stringent approach towards the Open Internet Regulation, BEREC will not provide such favourable environment.

1. Regulation terminology and definitions

BEREC guidelines should not be reviewing the Regulation terminology or introducing new concepts and conditions.

New terminology

- 'Net Neutrality' instead of 'Open Internet'
- 'Specialised services' instead of 'Services other than Internet Access Services' (SoIAS)

New concepts (not covered in the Regulation)

- Zero-rating
- Interconnection agreements
- Sub-internet services

New conditions

- Condition for 'specialised services' to be provided through a connection that is logically separated from IAS was explicitly deleted and so should not be reintroduced now in the Guidelines.

Reviewing terminology or introducing new concepts and conditions is confusing and creates legal uncertainty. Instead, BEREC's guidelines should aim at bringing more clarity and certainty. By reintroducing new terminology or concepts the guidelines reaches the opposite objective. Moreover a concept such as Net Neutrality was explicitly rejected in the Trilogue final agreement. BEREC is not empowered to reintroduce them back.

2. BEREC mandate

BEREC may not go beyond its mandate as defined in Article 5 of the Regulation.

Article 5 - Supervision and enforcement
By 30 August 2016, in order to contribute to the consistent application of the Regulation, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines for the implementation of following NRAs obligations:

- *Closely monitor and ensure compliance with Articles 3 and 4, and promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. For those purposes, national regulatory authorities may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services.*
- *Publish reports on an annual basis regarding their monitoring and findings, and provide those reports to the Commission and to BEREC.*
- *Request providers of electronic communications to the public, including providers of internet access services to provide information relevant to the obligations set out in Articles 3 and 4, in particular information concerning the management of their network capacity and traffic, as well as justifications for any traffic management measures applied. Define time-limits and the level of detail for the provision of the requested information.*

BEREC's mandate is to provide guidelines for the implementation of the obligations of national authorities and not to introduce new legal definitions, impose new obligations, restrict the legal freedom to provide services other than IAS, prohibit certain types of services or commercial practices, etc.

2.1. Sub-internet

BEREC is not empowered to forbid 'sub-internet services'.
In §§16-17 BEREC defines those services as services which restrict access to services or applications or enable access to a pre-defined part of the internet.

- Firstly, as already explained before, BEREC is not empowered to introduce and define new concepts and so as such the notion of 'sub-internet services' should be removed from the guidelines.
- Secondly, BEREC is not empowered to forbid the kind of services it aims to cover with the term sub-internet services which are not explicitly forbidden by the Regulation itself.

All sections related to sub-internet services must be removed from the Guidelines.

Furthermore, in a secondary order, in order not to prohibit services such as e-books or smart meters, which allow a limited access to internet, BEREC mentions that services where the number of reachable end-points is limited by nature of the terminal equipment used with the service are considered to be outside the scope of the Regulation. However such condition does

not cover services such as e-Government or e-health which are not to be reached via specific terminal equipment and which we suppose BEREC would not like to see being forbidden either. In such cases, referring to the fact that those services may not be a substitute to IAS but should be provided besides an IAS or be used in complement with an IAS, would be more appropriate.

2.2. Commercial practices

BEREC is not empowered to forbid certain types of commercial practices.

The Regulation does not forbid any specific type of commercial practice. It only refers to the fact that NRAs and other competent authorities are empowered to intervene, as part of their monitoring and enforcement function, against practices which would undermine the essence of end-users rights and which, by reason of their scale, lead to situations where the end-users' choice is materially reduced in practice. The regulation also defines how the assessment must be performed i.e. should take into account the respective market positions of ISPs and CAPs involved.

By forbidding zero-rating offers where all applications are blocked or slowed down once the data cap is reached except for the zero-rated application(s), BEREC is clearly going beyond its mandate. Moreover, BEREC does not provide any evidence or demonstration that such a practice would indeed constitute an infringement. The Regulation clearly stipulates that an assessment needs to be performed taking into account the respective market positions of the ISPs and CAPs. It is to the NRA to demonstrate that a commercial practice materially reduces end-users' choice before taking any action against such practice.

Moreover, we do not understand the purpose of allowing an ISP to offer an application for free (e.g. in a bundle) while not allowing it to provide the associated traffic for free. What could justify such a distinction and to what extend offering the traffic for free would be considered to undermine open internet whereas offering the service for free would not?

All sections referring to zero-rating and a fortiori the fact that such a practice would constitute an infringement must be removed from the Guidelines.

2.3. Interconnection agreements

BEREC is not empowered to define rules in relation with interconnection agreements.

The Open Internet Regulation does not say anything about interconnection agreements.

Recital 7 stipulates that in order to exercise their open internet rights, end-users should be free to agree with their ISP on tariffs for specific data volumes and speeds of the IAS. So when the recital refers to 'agreements and commercial practices' it is to be understood in the particular context of the provisioning of an IAS and so at retail level. This has thus nothing to do with interconnection agreements which are concluded at wholesale level. End-users can be residential or business customers and all of these could request IASs.

All sections referring to interconnection agreements and to the fact that NRAs intervention could be justified must be removed for the Guidelines.

3. Distortion of the Regulation well-balanced approach

BEREC may not distort the Regulation established balance between end-users protection & proper functioning of the internet ecosystem as an engine of innovation.

By adopting a too stringent view and imposing a burdensome regulatory process, BEREC completely distorts the Regulation well-balanced approach and does not provide network operators with a framework which allows them to manage efficiently their network and develop innovative services. In such respect BEREC goes beyond the mandate it received by virtue of the Regulation.

3.1. Services other than IAS

BEREC adopts an approach towards SoIAS which is too stringent and which is not in line with the Regulation

The Regulation section on SoIAS starts by recognizing explicitly the freedom of ISPs to offer such services. This is important and demonstrates the desire to preserve an equilibrium between guaranteeing on one hand an open internet access and preserving on the other hand operator ability to innovate and provide services with specific levels of quality. The importance of allowing such services in a flexible way will increase over time as networks will evolve to an all-IP environment.

The guidelines mention that the provision of SoIAS should not lead to a degradation of the IAS. Such an absolute rule is not the right interpretation of the Regulation. Indeed at one point in the time the introduction of a new SoIAS could by definition, all things being equal, always impact the IAS as both services share the same network. What NRAs should verify is that the minimum required quality of IAS is still available.

> Let's take the example of an operator investing and upgrading its network and by doing so allowing an overall increase in quality for its customers. After having upgraded its network this operator could then decide to introduce a new SoIAS. This new service could maybe decrease the quality of IAS but this cannot be considered as being a problem if the specified minimal IAS quality is still available and could even end-up being higher as before the upgrade.

It is also to be noted that the introduction of new services might always have an impact on the IAS quality however these services would be provided: at best effort over the internet or as optimised services with higher QoS. This is particularly true for bandwidth hungry OTT-services such as video streaming services. It is worth noting such impact can find its origin both in changes in customer behaviour (demand) as in new service offerings by ISPs and/or other providers (e.g. OTT-services, CAPs, …).

Last but not least, we feel that the guidelines imposes almost a systematic ex-ante authorization process for SoIAS, by obliging ISPs to provide all information and the requirement to demonstrate that the specific level of quality cannot be assured over the IAS. Such approach reverses the burden of proof towards ISPs whereas the Regulation clearly places the burden of proof on NRAs.

3.2. Business services

BEREC shall not prevent ISPs to provide business services

ISPs need to remain able to offer business services with a higher QoS, including IAS with a higher QoS. Those services are widely offered by all ISPs over the world and provide corporate customers with the quality guarantee they need to run efficiently their business activities.

The non-discrimination principle should apply only between different types of traffic within an IAS. On the other hand, differentiation between IAS based on QoS must be allowed in the same way as differentiation is allowed based on pricing, data volume and speed. After all, the Regulation does not provide a limited or restrictive list of elements on which differentiation can be based.

VPNs and other similar private networks must remain out of scope of the Regulation

Concerning VPNs, the approach of BEREC is confusing and does not provide the necessary security (§11). The Regulation (recital 17) stipulates that the mere fact, that corporate services such as virtual private networks might also provide access to the internet, shall not result in them being considered to be a replacement of IAS, provided access to the internet complies with the Regulation and so do not circumvent it. By introducing new considerations about services being publicly or not publicly available, BEREC creates a lot of confusion. According to the BEREC VPN services would have to be considered as being publicly available whereas services such as Wi-Fi hotspots in pubs or restaurants would not be considered as publicly available. First of all we do not understand what would justify such differentiated approaches between VPNs and Wi-Fi hotspots. Moreover as VPNs would be considered as being publicly available and to the extent that such VPNs would provide access to the internet, they would then be subject to Regulation. This is not how the Regulation and its recital 17 should be understood. Under the Regulation operators are free to offer VPNs and the fact that a VPN also offers access to the Internet is not an issue per se under the Regulation, in as far as the VPN is not made or used to circumvent the Regulation. It is as simple as that and bringing any other consideration only provides confusion and creates uncertainty.

At last, the distinction that BEREC operates between VPN applications and VPN network services (§111) does not provide any added-value and also creates unnecessary complexity and confusion. The only thing that should be mentioned is that VPNs are out of scope of the regulation. However, if a connection to a VPN occurs through an IAS (what BEREC calls a "VPN application" for example for homeworking or teleworking applications), then the IAS is indeed subject to Regulation. On the other hand if a VPN includes also a gateway towards internet (for example to provide internet access to the company employees) such an internet access shall not be subject to the Regulation. Indeed, taking into account specific corporate internal rules and policies, certain access rights could be blocked by the company (for example no access to facebook, adult sites, etc.). ISPs do not intervene in customer choices, it is only the customer who decides how his internet connectivity may or may not be used by its employees in the same way as parents would decide to block the access to certain sites to protect their children (see also next point below).

3.3. Reasonable traffic management measures

BEREC shall not prevent an ISP to block certain types of traffic at request of its end-users.

At §75, BEREC mentions that in contrast to network-internal blockings put in place by the ISP, terminal equipment-based restrictions put in place by the end-user are not targeted by the Regulation. Blocking certain types of traffic (e.g. child protection measures or ad-blocking) at explicit request of end-users shall not be considered as an infringement of the Regulation regardless how the blocking is actually implemented (at network level or equipment level).

BEREC wrongly interprets the fact that reasonable traffic management measures may not be maintained for longer than necessary.

§70 refers to the fact that reasonable traffic management should not be maintained for longer than necessary. BEREC seems to link this condition, which is indeed to be found in the Regulation, to the fact that such reasonable traffic management measures should not be implemented in a permanent or recurring way. Such interpretation cannot be correct.

As explained in recital 9, the objective of reasonable traffic management measures is to contribute to an efficient use of network resources and to an optimisation of overall transmission quality responding to objectively different technical quality of service requirements (e.g. latency, jitter, packet loss, and bandwidth) of specific categories of traffic. It would not make sense for an ISP to implement such measures on a temporary not recurring way. Such measures allow ISPs to optimise overall quality and user experience and such optimisation needs to be possible on a permanent basis.

Our understanding about the condition related to the fact that such measures may not be maintained for longer than necessary is that possible technical evolutions should be taken into account and that an optimisation which is necessary today to provide the necessary quality could no longer be necessary in the future thanks to technological evolutions.

Bringing a hierarchy in the possible traffic management measures by imposing operators to choose for the less intrusive mechanism without taking into account efficiency technical parameters is new and shall be avoided as it interferes with the network operator duty to manage its network as efficiently as possible.

3.4. Exceptional traffic management measures

Non-discrimination and proportionality criteria are too vague and will not provide sufficient legal certainty

The criteria are set (§§ 57-58) in a very vague and theoretical style that opens the way to future harmful decisions at NRA level (what does e.g. 'necessity' or 'appropriateness' of the measure mean?) and do not create the minimum legal security that operators deserve when NRAs would intervene.

Allowing ISPs to implement traffic management measures only when attacks are detected is too late.

In §81, BEREC seems to defend a two-step approach allowing ISPs to use first security monitoring systems to detect security threats and thereafter only to implement traffic management measures when security attacks are detected. Such an approach does not allow ISPs to react to such attacks sufficiently on time. Indeed if we would only be allowed to implement traffic management measures when the attack is detected and occurs, it will already be too late. ISPs must be allowed to implement traffic management measures before the attack actually occurs and so at the moment when possible security threats are detected.

Exceptional traffic management measures in case of congestion

BEREC must make sure to use the appropriate formulation when drafting its guidelines. At several places in the text, BEREC refers to exceptional **and** temporary network congestion (§§ 84-85) whereas the Regulation always refers to exceptional **or** temporary network congestion. This is important as the Regulation does not prevent operators for example from taking measures to manage congestion which is exceptional but not temporary or if the congestion occurs regularly but is of short duration.

4. Transparency

§ 139, 147, 148, 153, 154 – BEREC's recommendations on Art. 4(1) letter (d) on advertisement appear to go beyond the obligations laid down in the Regulation. First of all, Art. 4(1) imposes obligations on ISPs to ensure that contracts include certain mandatory information. Art. 4(1) does not impose any obligations in terms of public advertisement practices, nor does it aim at empowering NRAs to regulate the content of public advertisement. Accordingly, we consider that BEREC has to clarify that NRAs should solely ensure that advertised speeds are part of the contractual information.

§ 142 – Beyond the provisions of the Regulation, 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 criterion that speed should be achievable at least "some of the

time (e.g. at least once a day) is very well suited for cable networks, which have strongly fluctuating performance during a day, due to peak-times. However, this criterion does not reflect the more stable performance of DSL networks, where the maximum available speed does not alter over 1 single day but could increase over a somewhat longer time depending on the implementation certain technical measures (like digital line management, vectoring, etc.) to increase the speed. As a consequence, the internet speed of a DSL line cannot be predicted with certainty at the moment of activation.

If BEREC maintains its proposed description of the maximum speed, cable networks will be able to indicate higher maximum speeds than DSL networks, who may be obliged to even indicate speeds below the technically available maximum of the line. The proposed definition is in our view thus not "technologically neutral". We therefore propose to delete this criterion, or at least to distinguish between cable and DSL networks. The max. speed indicated in the contract for the DSL network should correspond to the technically available maximum speed of an individual line (after implementation of the technical speed measures as described above. We refer in this respect to the practice of the BIPT which until now has imposed distinct communication method for one the one hand DSL operators and cable operators on the other as regards maximum speeds, precisely because of the inherent technological differences of both types of networks.

This brings us to a more general remark: we believe that the guidelines should explicitly highlight that NRAs may disregard the guidelines as benchmark to assess compliance of business practice that were established before final adoption of the guidelines. A different view would not lead to efficient regulation. Also, the guidelines should in our view explicitly grant NRAs flexibility about the point in time when to consider the guidelines as a possible benchmark for providers' compliance with the regulatory provisions included in Art. 4 and 5, e.g. not earlier than 12 months after final adoption of the guidelines.

§136. of the guidelines (" NRAs should ensure that ISPs include in the contract and publish clear and comprehensible information about how specialised services included in the end-user's subscription might impact the IAS.") refers to information that is not available to ISPs. ISP's do not have the tools to measure such impact and there is to our understanding no standardised way to do so either. This would lead to cumbersome and costly developments of which the feasibility is not certain today. This is hence an unreasonable interpretation of the general rule of the Regulation.

Complaint procedures are disproportionate

Complaint procedures: obliging operators to allow complaints in their points of sale is disproportionate as it does not allow ISPs to implement processes which do not distort their business practices and operational administrative organisation. There are other effective ways and tools to capture complaints. The complaints procedure is extremely detailed and quite compelling, notably with regard to the information obligation/online checks towards the customer. At the very least, one should foresee a transition period for the operators.