

# BEREC GUIDELINES ON THE IMPLEMENTATION BY NATIONAL REGULATORS OF EUROPEAN NET NEUTRALITY RULES

Contribution to the public consultation of June 2016

Bouygues Telecom welcomes the possibility to comment the draft of BEREC guidelines but regrets the timing and lack of exchanges with the industry to further discuss on them.

Bouygues Telecom understands that the aim of the Regulation (Regulation on Open Internet 2015/2120) is to ensure an open internet for end users while at the same time allowing reasonable traffic management and not hampering innovation in a dynamic sector that is now moving towards 5G and fiber networks.

From a general point of view, Bouygues Telecom understands that NRAs have been empowered to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights, but that *per se*, specific treatment, being technical or commercial, was not prohibited. For that reason, NRAs' assessment should be conducted ex-post and on a case by case approach.

Bouygues Telecom considers that BEREC goes beyond what is necessary to implement the Regulation with, at the end of the day, a risk to hamper innovation by adopting a too static interpretation of network's evolution and of markets functioning or a risk to impose contractual obligations leading to high burdens on ISPs at the detriment of end-users.

In particular, Bouygues Telecom stresses out the following points, developed below.

## 1. Scope of the Guidelines, BEREC mandate and definitions

BEREC was supposed to *"issue guidelines for the implementation of the obligations of national regulatory authorities"* also taking into account the scope of the Regulation itself (*"laying down measures concerning open internet access"* and establishing *"common rules [...] in the provision of internet access services"*).

However the current draft of the guidelines goes far beyond BEREC's task by specifying what would be legal or not on the operators' side, thereby even extending the material scope and rules of the Regulation. BEREC should only provide guidance, but not prohibit de facto some practices, without having gone through the proposed in depth assessment.

For Bouygues Telecom, the Regulation only concerns end users rights on the retail market. Therefore, the right to provide a specific service or a limited number of services over an IAS at the customer demand should be available for all undertakings in the digital value chain without discrimination (paragraph 18 of the guidelines).

Bouygues Telecom estimates that BEREC should not introduce new concepts in its guidelines, and should rather stick to the Regulation's definitions. For example the terms 'specialized services' or the use of criteria that were disregarded or even never discussed during the TSM discussion (such as sub-internet services), should be avoided. There is no need to insert confusion and terms that are not present in the Regulation should be deleted (paragraph 2 of the guidelines).

BEREC's guidelines (paragraphs 23, 24, 25) should have indicated that the expression "use terminal equipment of their choice" refers mainly to mobile networks. "NTP" in the framework Directive article 2, as mentioned by BEREC, is related to fixed network access. This paragraph lacks consistency and clarity since residential customers can hardly provide their own box which constitutes network equipment. As for business customers, the terminal equipment provided should not be considered as an "obligatory equipment", for which a assessment from NRAs

is needed. ISP are indeed providing to these customers adequate solutions according to their situation, meaning that there is always an objective technological necessity.

BEREC draft of the guidelines considers that the practice of restricting tethering is likely to constitute a restriction in breach of the Regulation but this is not explicit in the Regulation and a more proportionate approach should be adopted since as such prohibition could jeopardize the capacity of IAS providers to innovate. The benefits that such a general "non-restriction" on tethering would provide to end-users or what it would deprive them off, should be assessed on the larger scale. Bouygues Telecom considers that such restriction could be compatible with the Regulation only if proportionate, reasonable, non-discriminatory and transparent.

## 2. Commercial practices freedom and ex post assessment (Articles 3(1) and 3(2))

According to the Regulation, NRAs' monitoring should only be done on an *ex post* basis, either on commercial offers or on services other than IAS. Yet, the draft does not only create great uncertainties on this point but is also unacceptably intrusive in the monitoring measures foreseen, including commercial agreements. Overall intervention into highly competitive retail markets will ultimately result in harming consumers through stifled innovation and lack of choice. When trying to regulate commercial practices, BEREC and NRA should deeply rely on well-established EU competition law principles rather than adding new rules and criteria's for assessment.

BEREC guidelines should remain in line with the criteria of the Regulation and with general principles of the EU when dealing with the assessment of commercial practices. Indeed, the Regulation is not a law designed to regulate marketing, pricing and product issues – it was not its purpose, neither shall it become one. Going beyond what was intended and intervening *ex-ante* on commercial practices, which would mean pre-defining how companies shall develop their offers, set their prices and sell their services, would have a devastating effect on the free market economy.

For example, the Regulation does not prohibit *per se* zero rated offers, but the draft of the Guidelines adopts a negative stance in relation to differential pricing based on the content or services being accessed to. It goes even further by prohibiting zero rating once the end user reaches their data cap. The providers must be free to provide a variety of services linked to differentiated prices in respect to the offers' value. The Regulation gives this freedom to the providers and the scope of the Guidelines does not allow BEREC to alter this situation. For these reasons, paragraphs 38, 39 and 45 should be deleted.

For NRA's assessment of commercial practices, Bouygues Telecom mainly agrees with paragraph 43 of the guidelines, as long as an ex-post approach is used and that the non-discriminatory character of the considered commercial practices is considered.

## 3. Traffic management and investment decision (Article 3(3))

As acknowledged by the Regulation, reasonable traffic management is necessary and cannot be replaced by increasing network capacity. Besides, the prerogative of dimensioning the network belongs to the operator, who wants to offer the best possible services to its customers in a competitive environment. This should never be a

mandate of the NRAs, as it seems to be the intention of the guidelines. In addition, it is wrong to consider that more investments in capacity would always be the best answer to address traffic management issues.

Traffic management is allowed under certain conditions and needed. It should not be confused with operators' investment decisions. In practice, traffic management is a critical part of network functioning and it is essential in order to increase the overall network quality and to provide a better performance and usage experience to the customers. Indeed, the Regulation clearly acknowledges the need and right for operators to manage their networks. BEREC should strictly take that into account in its guidelines (paragraphs 50, 54, 58).

#### 4. Business offers & network evolutions (Article 3(3))

The draft does not really take into account the specificities of business needs notably in terms of customized requirements, e.g. traffic types' allowances/barring, nor does it take into account network evolutions (5G, network virtualization ...). It is essential that the final Guidelines do not prevent EU operators from remaining competitive on such business markets, and from being technologically future proof. Businesses need to have an all-time access to the network, even in case of network congestion.

Bouygues Telecom reminds that the Regulation does not entail that all individual IAS should be identical. Article 3.2 of the Regulation indeed explicitly supports the possibility for ISPs to segment IAS according to characteristics such as speeds and volumes. This segmentation may involve quality differentiation between individual accesses. The need for segmentation is particularly relevant in order to provide business grade access. Therefore, NRAs should include in their analysis of non-discrimination the freedom for ISP to segment the quality between IAS offers provided to different end-users and answering different needs (paragraph 60, 111 of the guidelines).

BEREC guidelines should not prevent or hamper the emergence of network evolutions based on future networks (5G, fibre ...) or future solutions (cloud, virtualization ...). They should not adopt a too static approach that would lock in today's technologies and limit networks and services innovation, as it is the case in the current draft.

#### 5. Innovation with services other than IAS (SoIAS) (Article 3(5))

It is of the utmost importance to take into account the fact that innovation also happens in the ISPs industry. It has been decided not to define and not to regulate these services but the draft opts for an opposite approach. Also the draft should not reverse the burden of proof: according to the Regulation, SoIAS are allowed under certain conditions and it is for the NRAs to demonstrate when a given practice would not be in line with the Regulation. Finally, the concept of "sub internet offer" is also questionable since it is not part of the Regulation.

BEREC guidelines should not adopt a more restrictive approach on SoIAS than the Regulation; those services are not to be defined and NRAs monitoring can only intervene *ex post*.

The key principle of the Regulation, as written in Article 3(5), is that providers "*shall be free to offer services other than internet services*" under specific conditions. This acknowledgment of ISPs freedom to provide SoIAS should be the starting point of BEREC analysis. Any suggestion of a procedure of ex-ante authorization for SoIAS provision would be in full contradiction with the freedom of service innovation guaranteed by the Regulation to ISPs.

Any provision in BEREC guidelines which would prohibit priority access to network resources for SoIAS (of course subject to the non-impairment of the availability and general quality of IAS) would betray the text and the spirit of the Regulation and would have tremendously high damaging effects on EU citizens and businesses.

The BEREC draft (§ 112) states that *"Specialised services shall only be offered when the network capacity is sufficient such that the IAS is not degraded (e.g. due to increased latency or jitter or lack of bandwidth) by the addition of specialised services"*. But the Regulation says that the provisioning of a SoIAS *"shall not be to the detriment of the availability and general quality of the IAS"* which is substantially different. The approach stated in §112 is not possible, as this would mean that at any given point in the time, all things being equal, the introduction of new SoIAS would always lead to the 'degradation' of the IAS (meaning a loss of capacity for IAS). What NRAs should verify is that the minimum required quality of IAS is still available. Lowering measured speeds and increased delays as mentioned in the BEREC guidelines (§120) are not an adequate way to measure of general internet quality. Indeed, internet speeds, delay, etc. are not static, but do improve with an increase of capacity and on the contrary are degraded as network usage increases. The general quality of the Internet is a function of both and is therefore not static, nor evolving in only one (increasing) direction, as it seems to be wrongly assumed in paragraph 120 of the guidelines.

Therefore any assessment of those types of services can only be done *ex post* and on a case by case basis by NRAs that would have to prove that the specific conditions for freely provided services are not met. BEREC's final guidelines should explicitly mention that this assessment is "ex post" as the current proposed wording reverses the burden of proof (paragraphs 98, 101, 103, 103, 105, 107, 108, 112, 120 of the guideline).

## 6. Transparency and contractual performance (Articles 4 and 5)

Bouygues Telecom believes that consumers are already largely informed through commercial and contractual supports, especially with the implementation of the directive 2002/22, and that any new obligations on operators would increase the regulatory costs and red tape (paragraph 127 of the guidelines)

BEREC shall not go beyond the regulatory provisions. If the Regulation clearly stipulates that new obligations in Art. 4(4) are not applicable to contracts concluded before November 29, 2015, no specific prescription is introduced for new obligation in Art. 4(1), (2), (3). Thus, it should only be applicable to contracts concluded after April 30, 2016. Paragraph 130 of the guidelines needs to be deleted accordingly. If not deleted, BEREC's reference to contractual modifications and national legislation linked to Art. 4(1) letter (a) should clarify that providing these information shall not be considered as contractual modifications (paragraph 133 of the guidelines).

Bouygues Telecom agrees with the fact that NRAs can monitor traffic management practices and assess IAS performance as a comparison tool between ISP, in order to ensure non-discrimination and transparency in the respect of the rules (paragraphs 167, 170, and 173 of the guidelines).

As a conclusion and following the above mentioned concerns, Bouygues Telecom considers that the guidelines, as currently drafted, presents the risk of reducing consumer choice, of stifling further opportunities for businesses and of creating legal uncertainty.