



Digicel

Digicel Response to the Consultation on
Draft BEREC Guidelines on the Implementation by National Regulators of
European Net Neutrality Rules

18th July 2016



We thank you for providing this opportunity for Digicel to share its views on the draft BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules. Digicel is of course available, and would be happy, to discuss our submission further.

The comments as provided herein are not exhaustive and Digicel's decision not to respond to any particular issue(s) raised in the draft Regulations or any particular issue(s) raised by any party relating to the subject matter generally does not necessarily represent agreement, in whole or in part nor does any position taken by Digicel in this document represent a waiver or concession of any sort of Digicel's rights in any way. Digicel expressly reserves all its rights in this matter generally.

Please do not hesitate to refer any questions or remarks that may arise as a result of these comments by Digicel to: -

Kieran Meskill
Head of Regulatory Affairs
Tel: +1 876 470 8471
Email: kieran.meskill@digicelgroup.com



Introduction

Digicel is a leading global communications provider with operations in 32 markets in the Caribbean, Central America and Asia Pacific. After more than 14 years of operation, total investment to date stands at over US\$5 billion worldwide. The company is renowned for delivering best value, best service and best network.

Digicel is the lead sponsor of Caribbean, Central American and Pacific sports teams, including the Special Olympics teams throughout these regions. Digicel sponsors the West Indies cricket team and is also the title sponsor of the Caribbean Premier League. In the Pacific, Digicel is the proud sponsor of several national rugby teams and also sponsors the Vanuatu cricket team.

Digicel also runs a host of community-based initiatives across its markets and has set up Digicel Foundations in Haiti, Jamaica, Papua New Guinea and Trinidad and Tobago which focus on educational, cultural and social development programmes.

We are active in the French Overseas Departments and Territories of Martinique, Guadeloupe, St Martin and French Guiana directly investing the local economies, employing local staff and providing state of the art services to our customers. As such we have a direct interest in the proposed Guidelines on the Implementation by National Regulators of European Net Neutrality Rules.



Summary

The BEREC Guidelines will in practice create a commercial envelope for network investment and the ability of those who build and operate networks to recover their investment. In small, geographically isolated island economies regulatory frameworks which act as disincentives to invest in the very technologies which can ease this isolation cannot be considered to be successful policy outcomes.

Digicel considers that BEREC has in some areas adopted positions which in fact seek to impose regulatory constraints not contemplated by the Regulations in a form of regulatory scope creep while in other areas providing inadequate guidance thus creating regulatory uncertainty.

Both of these aspects of the draft Guidelines act as disincentives to invest and inhibit innovation in the evolution of future Consumer and business services.



Regulatory Scope Creep

Applicability of Rights and Obligations

We note that in the initial part of its draft guidelines BEREC references the term “users”. This term does not appear in the Regulations in the sense contemplated by BEREC and has no relevance to the application of the Regulations. Similarly the term “Content and Application Provider” (CAP) does not appear in the Regulations. The Regulations themselves refer only to the rights for End-Users and the rights and obligations of Internet Access Service Providers. BEREC through its guidelines cannot confer rights or impose obligations on parties which do not otherwise exist in law.

In this regard CAPs only have rights under the Regulations to the extent to which they are End-Users of an IAS. A distinction must be made between a CAP whose service or platform is part of the Internet as opposed to it being an End-User accessing the Internet. A case in point might be Facebook. Facebook is a multisided platform which allows different End-Users connect with each other across the Internet via their individual IAS and also allows advertisers to serve ads to these End-Users. In this context the Facebook servers and data centres are not End-Users, they are a connected network which falls within BEREC’s own definition of the Internet.

Even if these servers were to be considered End-User terminal equipment a question arises as to whether the rights of the End-User and the obligations of the IAS are crystallised:

- 1) where the connection connecting these servers to the ISP is not for the purpose of connection to virtually every end point of the Internet but only to the individual End-Users of the CAPs service and
- 2) where the CAP End-User and its associated IAS are outside the territory of the EU.

This distinction in the various roles that a CAP may play as either an End-User of an IAS or as part of the Internet itself is particularly relevant as BEREC proposes that there is some separate category of “CAP end-user rights¹” which merits separate assessment and protection.

The CAP has no different or additional rights as compared to any other End-User. For BEREC to provide guidance to NRAs that such different or additional rights might exist gives rise to the very discrimination considerations which Regulations are intended to prevent.

Sub-Internet service offers

The Regulation defines ‘Internet access service’ (IAS) as “a publicly available electronic communications service that provides access to the Internet, and thereby connectivity to virtually all end points of the Internet, irrespective of the network technology and terminal equipment used.”

¹ Paragraph 43 of the draft guidelines



BEREC in its guidelines at paragraph 17 purports to extend the applicability of the Regulations to all such services even where they do not meet the definition requirements to be considered an IAS and are not designed to evade the provisions of the Regulation.

At Paragraph 52 BEREC sets out its position that *“IAS offers where access to the Internet is restricted to a limited set of applications or endpoints by the end-user’s ISP (sub-Internet service offers) infringe upon Article 3(3) first subparagraph, as such offers entail blocking of applications and / or discrimination, restriction or interference related to the origin or destination of the information.”*

However there is an inherent flaw in this reasoning as services which do not provide access to virtually all end points of the Internet are by definition not IAS. BEREC argues that the very essence of what excludes such services from being considered an IAS makes them subject to enforcement as a non-compliant IAS.

The extension of BEREC’s reasoning is that all publicly available packet based data services must either be IAS or Specialised Services.

The recitals in respect of Specialised Services² make it clear that the concern is that services other than IAS which require higher levels of network resource than IAS are permissible provided that they do not impact on the quality of IAS. However the provisions of both the recitals and the Regulations themselves do not preclude the offering of services which are neither IAS or Specialised Services. For example a so called sub-net service which offered only access to websites with the suffix or “.eu” would, based on definitions within the Regulations, be neither an IAS nor a specialised service. Similarly a service which offered only access to a curated list of educational or other limited Internet end points would not be an IAS. Neither would it meet the requirements to be considered a specialised service. It is our submission that BEREC is wrong in law to consider that the Regulations apply to all sub-net services. To bring such services within the purview of the Regulations NRAs would have to assess and demonstrate that they are an attempt to evade the Regulation and are not a legitimate standalone service. Such sub-net services may deliberately exclude access to services or sites which are data intensive or contain certain categories of content and for example could be designed to ensure that where the End-User is a minor they are not exposed to inappropriate content or could inadvertently incur large usage bills.

We would urge BEREC to review its guidance so that it is sufficiently granular to identify the different rights and obligations and to whom they attach in a way which does not inadvertently lead NRAs to implement the Regulations in a manner which foreseeably will lead to legal challenge.

² Recitals 16 and 17 of Regulation 2015/2120.



Requirement for further specification of guidelines

Caching and IXPs

In respect of the requirements of Article 3(3) that ISPs treat all traffic equally BEREC has failed to address practical issues such as caching and Internet Exchange Points (IXPs).

In small geographically isolated markets, such as the ones in which Digicel operates, large sources or sinks of traffic may offer ISPs (who are usually also network operators) the option of a cache server to locally host traffic content and traffic associated with the CAP's application(s). Examples of such devices, include but are not limited to the Google Global Cache (GGC), the Netflix Open Connect Appliance (OCA) and the Facebook Network Appliance (FNA). It by-passes capacity limitations that the network operator might have in connecting to the wider Internet and potentially provides a better quality experience to end-users who access the locally cached services in terms of responsiveness, latency etc. it may also result in direct savings to the ISP. Based on BEREC's approach to traffic management this activity is not traffic management but is in fact capacity management. In the absence of guidance from BEREC it has the potential to be considered an unequal treatment of the cached and uncached traffic and in breach of the Regulations as large existing CAPs will have the scale to widely deploy such servers while new entrants will not have the scale to justify widespread cache deployment resulting in differential quality experiences for End-Users accessing equivalent CAP services via the same IAS.

The provision of a cache by a large CAP to an ISP could be characterised as paid for prioritisation where the payment is a consideration in the form of server equipment and the ISP's avoided costs of connectivity to remotely hosted content. The draft BEREC guidelines fail to consider or offer any practical guidance to NRAs or the market on this issue.

Similar questions arise in respect of Internet Exchange Points (IXPs). A number of Caribbean countries have launched IXPs. In many cases the expected benefits are explicitly stated to be a differential and preferential quality of service for local websites.³

BEREC's failure to provide any guidance on this matter creates a degree of uncertainty over these practices notwithstanding their undoubted practical, economic and consumer welfare benefits.

The more general use of caching by larger ISPs within their own networks gives rise to questions as to how the unequal treatment of cached and uncached applications (which may be equivalent in all other respects) is to be squared with the Regulation. Digicel believes that the position of this practice vis-a-vis the Regulations merits clarification within the Guidelines.

³ <http://www.guardian.co.tt/business/2015-05-26/french-caribbean-moves-establish-stronger-Internet>



Differentiated IAS pricing and functionality

Not all End-Users want to access all content on equal terms. Only a minority of End Users may have a need for specific technical functionality when access certain websites. An example might be on-line gamers who would require low latency packet transfer which is not relevant or necessary for most other End-Users who do not use their IAS for service requiring this level of network functionality. This low latency IAS does not fall within the category of a Specialised Service because apart from the low latency aspect it is in all other respects usable as a replacement for the standard IAS.⁴ The network impact of enabling low latency for all end-users is likely to be uneconomic for ISPs whose overall customer bases do not have high demand for such services and their standard IAS may fully meet the requirements of the vast majority of the End-Users in the market. Therefore end-users who require such services may be willing to pay a premium for the enhanced network capability that is not generally available. As with BEREC's approach to zero rating, where it confirms that differentiated commercial and potentially technical arrangements as contemplated by Article 3(2) are permitted by the Regulations, such premium services would be permitted by the same reasoning. BEREC has adopted a position that *“Commercial practices which apply a higher price to the data associated with a specific application or class of applications are likely to limit the exercise of end-users' rights because of the potentially strong disincentive created to the use of the application(s) affected”*.

This blanket advice to NRAs that the starting position for assessing differentiated higher prices is that they are likely to be problematic is too broad, skews any such assessment and still leaves scope for individual NRAs to arrive at different conclusions in respect to the same service offering.

This guidance must be more balanced and neutral. Further it must set out in more detail that where such higher pricing is market led and results in overall consumer welfare benefit then the starting position may be the opposite to that set out in the current draft.

Zero rating

In its proposed approach to zero-rating BEREC itself recognises that IAS might involve a commercially differentiated treatment of traffic which not would conflict with either Article 3(1), Article 3(2) or Article 3(3).

As a set of Guidelines in relation to zero rating BEREC's approach is limited. It fails to canvass the form of zero rating where the data associated with traffic is paid for indirectly by the End-User. This payment type can arise for example where the End-User subscribes to an on-line service directly with a CAP and out of revenues associated with the subscription the CAP pays the ISP for the data use associated with the service. The End-User may “pay” the CAP by way of a monetary

⁴ Article 3(5) second subparagraph



consideration or may “pay” by allowing the use of their personal data or by agreeing to receive advertising. From the point of view of the End-User the data associated with on-line service is zero rated with in its IAS subscription. Provided the IAS has open, non-discriminatory and transparent terms on which it will allow such “wholesale” arrangements with CAPs then this commercial practice would appear to be permitted by the Regulations. It is not discriminatory as any CAP can avail of it, does not limit End-User rights and provides access to virtually all end-points of the Internet. Such an arrangement is in fact between the End-User and the CAP as to who pays for the data use and is merely facilitated by the ISP. In this scenario the proposed restriction that once an End-User’s retail data bundle had been exhausted that zero rated traffic must cease would not be applicable as the data continues to be paid for by the End-User, just not directly. In fact it might be the essence of the on-line subscription that the content could still be accessed even if the End-User had no retail credit with the ISP (for example parents buying a “safety net” access service for children).

Having decided to offer guidance on the issue of zero rating the Guidelines’ failure to fully consider the breadth of the topic means that NRAs, ISPs, CAPs and End-Users are no better informed on these other aspects of zero rating than if BEREC did not consider the issue at all.

End-User controlled network level services

In all cases where the ISP has a standard IAS service which conforms fully to the requirements of Articles 3(1) and 3(3) and the End-User requests and/or consents to the ISP modifying content delivered over the IAS Digicel believes that does not abridge the End-User rights set out in Article 3(1) and are permitted by law notwithstanding the provisions of Article 3(3). Examples may include the offering of network level virus checking, network level filtering of adult content, network level filtering of advertisements, network level spam control.

Provided that the End-User has, within the terms of its standard IAS agreement with the ISP, the ability to turn this functionality on or off and use the IAS without the functionality active then it is no different to the End-User downloading an application to carry out the same function and this functionality does not fall within the scope of the IAS itself but is a distinct and separate service or facility. Because the operation of the functionality is within the control of the End-User any modification or restriction on the operation of the IAS is not a breach of the Regulation by the ISP.

This approach is entirely in keeping with the thrust of the Regulation which explicitly sets out End-User rights “to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice...” Provided it is possible for the End-User to exercise choice over which content to access the End-User’s rights have been vindicated. They can choose not to visit particular websites or they can choose not to access entire classes or sources of content.



For those who would argue that the individual End-User exercising this right in some way infringes on the right to distribution information and content should note that the right to distribute does not confer a right to force others to access or consume it. You can make content available but the right to choose is only valid if you can exercise an effect choice not to access content.

In this context provided it is the End-User exercising their choice then the fact that they have asked the ISP to give effect to that choice cannot abridge their right to choose.

The BEREC guidelines do not address this point and we believe that this gap is likely to lead to unnecessary and inconsistent interactions between ISPs and NRAs and needs to be clarified



Conclusion

If properly framed and constructed BEREC's finalised Guidelines have the potential to give regulatory certainty and comfort to ISPs (who in the main are network operators). This certainty would mean that they are confident that they will have the flexibility and scope to bring innovative, differentiated and market driven offerings to the market in a form which allows them to operate their broadband networks and obtain an adequate return on their infrastructure investment going into the future.

Poorly framed and unduly or unjustifiably restrictive Guidelines would have the opposite effect. They will dampen innovation, limit End-User choice and act as a disincentive to investment.

Specifically we believe that the Guidelines require amendment as follows:

- BEREC must review its view of CAPs and carefully distinguish the various roles that (perhaps even the same) CAP may have as an End-User of an IAS and as part of the Internet.
- The sweeping characterisation that all sub-networks are in essence non-complaint IAS must be reviewed.
- In all cases where the ISP has a standard IAS service which conforms fully to the requirements of Article 3(1) Digicel believes that the offering of differentiated IAS as contemplated by Article 3(2) and/or non-IAS services (examples of both of which given above) do not abridge the End-User rights set out in Article 3(1) and are permitted by law and there is a right for the ISP to offer them. The assessment of whether End-User's rights are abridged must be balanced against the ISPs rights to offer services. BEREC's guidelines to NRAs should explicitly set this out.
- An examination of caching and IXPs would provide regulatory certainty as regards these practices.
- An expanded set of guidance on current and foreseeable practices should be also be incorporated including some assessment of the other forms of zero rating and a review of the generalised advice to NRAs regarding higher priced IAS.
- BEREC should provide guidance on End-User controlled network level services explicitly setting out that they are compliant with the Regulation.

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