
Colt Technology Services Group Limited

Comments on

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

BoR (16) 94

18 July 2016

This is the non-confidential, official response of the Colt Technology Services Group Limited (*henceforth entitled "Colt"*) to BEREC's draft "*BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules*", BoR (16) 94 ("*draft BEREC Guidelines*", or "*draft Guidelines*"), published June 06, 2016 which BEREC drafted following its corresponding obligation set out in Article 5(3) of the Telecoms Single Market Regulation ("*TSM Regulation*").

Colt wishes to thank BEREC for the opportunity to give its views on the draft BEREC Guidelines in the consultation procedure.

Hereafter we outline Colt's major concerns with the draft BEREC Guidelines in the following areas:

1. Specificity of the activities of Business Services Providers, justifies change to draft BEREC Guidelines (*exclusion from scope*)
2. Commercial Practices (*incl. Zero Rating*),
3. Traffic Management,
4. Specialised Services,
5. Transparency.

In doing so, we will be specifically placing emphasis on Colt's role as a Pan-European business services provider and, more generally, on the necessity to distinguish between consumers and business customers in any decisions relating to net neutrality. In this regard, we will furthermore rely on your profound understanding of the business services market, as BEREC has a proven track record of helping sharpening the definition and perception of business (connectivity) services, a development to which Colt regularly contributed.

1. Specificity of the activities of Business Services Providers, justifies change to draft BEREC Guidelines (exclusion from scope)

In its Art. 3 and 4, the TSM Regulation predominantly addresses providers of Internet Access Services ("*IAS*") which have been defined in Para 12, sub-para 2 of the draft BEREC Guidelines 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."

In Para 10, the draft BEREC Guidelines further specify the feature of public availability as follows:

"Electronic communication services or networks that are offered not only to a predetermined group of end-users but in principle to any customer who wants to subscribe to the service or network should be considered to be publicly available. Electronic communication services or networks that are offered only to a predetermined group of end-users could be considered to be not publicly available."

As per the Framework Directive (2009/140/EC), end-users are natural persons or legal entities using or requesting a publicly available electronic communications service.

In accordance with the various legislation preceding the TSM Regulation such as the Universal Service Directive amended by the Citizens' Rights Directive, and repeated

comments by European Commission and BEREC representatives, net neutrality was exclusively related to the protection of (*mass market*) consumers. This is being underpinned by the TSM Regulation, specifically its Explanatory Memorandum outlining its context and elements, as per the following explanation in Rec. 3.4. (“*Fundamental rights*”), p. 10:

“The proposal’s impact on fundamental rights such as the freedom of expression and information, the freedom to conduct a business, non-discrimination, consumer protection and the protection of personal data, has been analysed. In particular, the Regulation will safeguard access to the open internet; it sets a high standard for fully harmonised end-user rights, increases business freedom at European scale and should lead to a reduction in sector-specific regulation over time.”

Furthermore, this view is being supported by various provisions throughout the TSM Regulation’s core, e. g.:

Rec. (6), p. 15:

“[...] Third, in the interests of aligning business conditions and building the digital confidence of citizens, this Regulation should harmonise rules on the protection of end-users, especially consumers.”

Rec. (42), p. 23:

“Where the provisions in Chapters 4 and 5 of this Regulation refer to end-users, such provisions should apply not only to consumers but also to other categories of end-users, primarily micro enterprises. At their individual request, end-users other than consumers should be able to agree, by individual contract, to deviate from certain provisions.”

Art. 1., 2. (e), p. 32:

“[...] the harmonisation of rules related to rights of end-users and the promotion of effective competition in retail markets, thereby creating a European consumer space for electronic communications [...].”

Chapter IV, Art. 21 to 29 (as cited in Rec. 3.6. “Structure of the proposal and main rights and obligations”, sub-section “Rights of end-users”, p. 11/12):

“In Europe, both electronic communications providers and end-users face inconsistent rules regarding rights of end-users, leading to uneven levels of protection and a variety of diverging rules to comply with in different Member States. This fragmentation is costly for operators, unsatisfactory for end-users and eventually hinders the provision of services across borders and negatively impacts end-users’ willingness to consume them. To guarantee an appropriate level of consumer protection across the EU, rules defining the rights of end-users are harmonised [...].”

In Colt’s opinion the draft BEREC Guidelines have failed to specify that the aim of any given net neutrality regulation is to safeguard best effort IAS for consumers and small businesses (which are economically interchangeable) based on preordained, non-negotiable contracts, mostly in the form of General or Service Specific Terms & Conditions (“*GTCs*”/“*SSTCs*”). This stands in contrast to business services, which are subject to individually negotiated contracts,

and in which the customer actually often makes specific requests relating to the services, including internet access, delivered to it, frequently based on the customer's buying power. The distinction between "mass market" and "business" services was acknowledged by the Federal Communications Commission ("FCC") by explicitly and consequently excluding business services from the scope of its "Open Internet Order" by defining the services as follows:

"We continue to define "mass market" as "a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries. [...] The term "mass market" does not include enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements, or special access services."

(FCC Order 15-24 "Protecting and Promoting the Open Internet", adopted February 26, 2015, Recital 189, p. 83/84, https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf).

We would therefore like to reiterate our concern with BEREC failing to distinguish between consumers and business customers, thus resulting in services provided to business customers, i. e. medium to large enterprise customers and public sector organisations being carved-out from the draft BEREC Guidelines. Instead, we would encourage BEREC to only use the term "consumers" within these draft Guidelines or, in the alternative, at least refrain from defining business customers as end-users and avoid regulating CAPs/interconnection partners. Any perceived circumvention of the Regulation must be addressed by NRAs or competition authorities according to their respective Telecoms Act or General Competition Law regulations on abusive behaviour procedures.

In addition, In Para 4. of the draft BEREC Guidelines, BEREC specifies that:

"[...] "user" means a legal entity or natural person using or requesting a publicly available electronic communications service. On that basis, BEREC understands "end-user" to encompass individuals and businesses, including consumers as well as CAPs."

Not only does this definition ignore the crucial distinction between consumers and business customers and thus contradict both, the intention of the various legislative acts as well as previous stakeholder statements in this regard, but also even aggravates the issue: By extending the TSM Regulation's scope ever further, Colt will be regulated indirectly in our contractual relationships with Content and Access Providers ("CAPs") and interconnection partners. The latter are being governed predominantly by civil law except for the regulated parts and may not be subjected to this Regulation. This also contradicts BEREC's assessment of not regarding interconnection between networks as an IAS (*Para 5, Para 47 of the draft BEREC Guidelines*).

As a reason for this, BEREC states that interconnection practices are relevant in so far as they "have the effect of limiting the exercise [of] end-user rights", i. e. if interconnection is "implemented in a way which seeks to circumvent the Regulation." as laid down in Para 6 of the draft BEREC Guidelines.

By contrast, the TSM Regulation has established an even narrower scope by excluding Non-public Providers of Electronic Communication Services or Communication Networks from it (*Art. 2, para 9*). As has been observed above, IAS are in the draft BEREC Guidelines' focus as main addressees of net neutrality obligations as per its central provisions in Art. 3(1) through Art. 3(3) of the TSM Regulation whereas PECPs find mention only in Art. 3(5) and Art. 5 of said Regulation. This might only be justified if PECPs are considered the logical

equivalent which are being defined in the Guidelines as providers of IAS – which are equally only in scope if they are “publicly available” (*Art. 2 (2), TSM Regulation*).

2. Traffic Management

The TSM Regulation specifies that management practices must be applied in a non-discriminatory and a proportional way (*Art. 3(3), 2nd sub-para*).

The ability to implement transparent, non-discriminatory traffic management to enable the provision of differentiated service levels to customers of all types is absolutely essential, especially for business services providers. It should be noted that traffic management does *not* equal blocking access to applications and content.

In that regard, BEREC proposes two tests, the non-discriminatory test (*Para 57*) and the proportionality test (*Para 58*). The tests will be helpful, both to NRAs and ISPs, while administering the traffic management systems. Nonetheless, it has to be kept in mind that those two conditions are not the only ones which are relevant as set out by BEREC throughout the draft Guidelines, above all the “no longer than necessary” requirement (*Para 69/70*) and the permissibility of congestion management (*Para 84 to 89*).

It should be noted that business customer providers respond to the specific demands and needs of their customers in terms of QoS and traffic management in a different way than consumer services providers. Specifically addressing congestion remains the most important goal of a business customer provider’s traffic management. This is being done at specific points in the network, usually when backhauling (*i. e. in the part of the network that carries the user’s data from the access point to the core network*). In doing so, Colt is *not* discriminating against content, services or applications. As Colt is exclusively serving business customers with predominantly individually negotiated SLAs and agreed periodic service reports, Colt would be obliged to pay substantial penalties if it did not deliver committed bandwidth and speed anytime. Therefore, Colt has placed its traffic management equipment between access point and backbone to address congestion as effectively as possible, avoiding any illegitimate form of traffic management.

The draft BEREC Guidelines should allow business services providers to deploy traffic management between access point and backbone as otherwise all end users – businesses and consumers alike – would suffer from reduced QoS, contradicting the TSM Regulation’s intentions. Moreover, the vast majority of business services providers including Colt have started deploying new virtualisation techniques such as NFV (“*Network Functions Virtualisation*”) and SDN (“*Software-defined networking*”), giving customers an increased level of control over traffic management functionalities, thus achieving a greater benefit as envisaged by the TSM regulation.

3. Specialised Services

The TSM Regulation treats services other than internet access services not as an exception of the net neutrality obligation, but as an entirely different kind of service. Indeed, according to Art. 3(5) of the TSM Regulation, such services are not IAS at all.

BEREC, by contrast, proposes that such services are subject to requirements are introduced in case an ISP wants to offer such services. In the draft Guidelines, BEREC uses the term “specialised services” as a short expression for “*services other than internet access services which are optimised for specific content, applications or services, or a combination thereof,*

where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.”

The draft Guidelines provide a list of characteristics BEREC considers as characteristic for specialised services (*Para 97*):

- *“they are services other than IAS services;*
- *they are optimised for specific content, applications or services, or a combination thereof;*
- *the optimisation is objectively necessary in order to meet requirements for a specific level of quality.”*

BEREC proposes that NRAs should assess these requirements by requesting information from the service providers (*Para 104*) and then decide on a case-by-case basis (*Para 108*).

At first, BEREC’s proposed characteristics seem rather abstract. When taking a closer look, the concept of optimisation (*“optimised for specific content, applications or services”*) emerges as the key part. The term and the underlying concept has been perceived by critics as the opposite to net neutrality while in reality it only allows providers to differentiate their offers.

It is notable that in *Para 106* of the draft Guidelines, BEREC clarifies that not every kind of traffic prioritisation has the effect of creating a specialized service. According to the Guidelines, a specialised service only emerges when a “connection is characterised by an extensive use of traffic management in order to ensure adequate service characteristics and strict admission control”. In addition to that, the specialised service must be offered “logically separated from the internet access service” (*Para 106*).

BEREC provides some examples of services it considers as specialised services in *Para 109/111*, e. g. VoLTE, M2M, VPN services based on IAS.

While specialised services are clearly exempted from the net neutrality obligation, IAS providers are only allowed to offer them if they meet some separate requirements as set out in *Art. 5(3) TSM Regulation*, being summarised in the draft BEREC Guidelines (*Para 98*) as follows:

- *“the network capacity is sufficient to provide the specialised service in addition to any IAS provided;*
- *specialised services are not usable or offered as a replacement for IAS;*
- *specialised services are not to the detriment of the availability or general quality of the IAS for end-users.”*

BEREC boils these requirements down to the statement that an internet access provider who wants to offer specialised services “would have to ensure sufficient network capacity” (*Para 114*) both for the specialised service and the “*general quality*” of the IAS (*Para 113*). In *Para 118* however, the Guidelines state that an ISP only has to ensure a “minimum speed” for the internet access while the end user uses a specialised service. Only the internet access service of the individual user of the specialised service may be slowed down, not the internet access of other end users (*Para 118*). All of these three counter-exceptions use very imprecise wording, i. e. opening unanswered questions such as when is a capacity sufficient or what is a replacement for IAS and when do end users or IAS suffer a detriment especially to the general quality? The legal meaning of these provisions remains unclear and bears large potential for legal conflict. The provision will therefore lead to a quasi-ban of specialized

services in particular to business customers with their specific requirements as identified above.

Colt agrees with BEREC that the specialised services must be excluded from the draft Guidelines. Specialised services are designed to provide characteristics which cover the whole range of quality levels as determined in individually negotiated contractual arrangements. However, the obligations laid out on IAS providers should urgently be modified. Colt proposes that BEREC considers to either sharpen the wording in para 113, 114 and 118 of its draft Guidelines in order to resolve the lack of clarity outlined in the paragraph above or to simply refer to Art. 5(3) of the TSM Regulation to avoid creating legal uncertainty which would have to be removed by national regulators or courts, thus creating disparate rules across EU Member States.

4. Transparency

ISPs all over Europe are currently in the process of implementing the TSM Regulation's new transparency obligations (*Art. 4 TSM Regulation*). ISPs have the task to provide all end users with very detailed information on their internet access services, including the way the traffic management works and how specialised services affect the internet access. Most importantly, they have to provide a "clear and comprehensible explanation" of the upload and download capacities of the respective internet access service. This explanation must be given for different categories of up- and download speed, such as "*minimum*", "*maximum*", "*normally available*" and "*estimated maximum*" (*categories depending on the type of access service*).

BEREC's Guidelines will add further to the granularity of the new transparency rules with very detailed requirements (*Para 124 to 156*), e. g. regarding the structure of customer information documents and on the question whether quality parameters such as delay, jitter and packet loss should be mentioned (*Para 134*).

Business services providers such as Colt do not require extensive transparency obligations as the relationship with their customers is already governed by extensive QoS parameters and a rigid service reporting and penalty scheme (see above 3.). Furthermore, it is Colt's opinion that the already extensive transparency obligations which have been transposed in many member states offer business customers and even consumers an adequate level of protection against misleading advertisements.

Please find herein after two examples from EU Member States where Colt is active:

- UK: Sec. 135 through sec. 146 Communications Act (<http://www.legislation.gov.uk/ukpga/2003/21/section/135>)
- Germany: Sec. 45n Telekommunikationsgesetz (<https://dejure.org/gesetze/TKG/45n.html>)

Considering the specificities of business services providers, the transparency provisions envisaged in the draft BEREC Guidelines make little sense and create a substantial risk of harmful effects on innovation and investment if applied to business service providers. Moreover, large business customers can and do exercise substantial buying power. Their contractual provisions differ considerably from those of consumers as multiply outlined above.

Therefore, we ask BEREC to not apply transparency requirements to business services providers. While Colt agrees with the statement as outlined in Rec. 2.3 para 10 (p. 7) of the TSM Regulation that "[...] *strengthened transparency and contractual rights would ensure the consumers' interest in high quality and reliable services and will strengthen the competitive*

dynamics of the market.”, said statement simultaneously exemplifies that business customers should not be in the focus of these requirements.

5. Summary and Conclusion

As stated above, it is crucial to Colt, being a business services provider, to meet its customer requirements for essential key features such as latency, contention, quality of services and enhanced service level agreements (“SLAs”) which are not only fundamental building blocks for business customers that contribute to create the distinctive characters of the business (connectivity) market compared to the consumers market, but even specifically demanded by those customers. It is Colt’s opinion that this requirement is best achieved by outlining fundamental rules while simultaneously allowing discretionary margins for NRAs with respect to their home markets wherever possible to allow for a maximum of flexibility to be enabled to continue offering these services requested by Colt’s customers contributing to the the Single European Market and its citizens. Colt believes this can be achieved without harming consumers by following the recommendations and suggestions outlined above.

Please feel free to contact the two following individuals should you have questions regarding this submission or like to discuss further with Colt:

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We would like to thank BEREC in advance for its kind attention to Colt’s contribution.

Yours sincerely,

Colt Technology Services Group Limited