Contributions to the public consultation on the draft BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules

NOS

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1. Introduction

NOS Comunicações S.A., NOS Açores Comunicações, S.A. and NOS Madeira Comunicações, S.A. (NOS) welcome the opportunity to contribute to the public consultation on the implementation by national regulators of the European net neutrality rules promoted by BEREC.

NOS is a Portuguese provider of Internet Access Services (IAS), by means of a wide range of technologies, fixed (including cable and fibre) and mobile (including satellite microwaves and 2G, 3G and 4G), to both consumers and businesses.

Our IAS are provided together with a wide range of additional electronic communications services and our strategy is strongly focused on developing innovative convergent services, expanding network capacity, and continuously deploying new solutions with added data and content.

The Portuguese electronic communications markets, with a particular highlight in IAS, are characterized by strong competition, supported by significant investments on the development of own next generation networks and translated by the provision of a broad set of offers, typically with very high broadband speeds and comparatively low prices, containing a rich set of contents and applications which significantly add value to the end-users' experience.

In this context of high network based competitive pressure, where access speeds and usage caps are permanently evolving - in the case of fixed access broadband, usage caps in most offers don't even exist anymore - services are analyzed, evaluated and compared mainly through QoS and content diversification and price.

The Portuguese competitive environment has also been promoted by a regulatory framework and intervention with a strong focus on (1) transparency and information to the consumer, (2) removal of barriers to change providers and in (3) facilitating network deployment.

Hence, it was with concern that NOS received the Regulation 2015/2120 that laid down measures regarding open Internet access, since this is an issue that has never been raised in Portugal and any additional rules and increased regulatory burden applicable to this subject would automatically be deemed as disproportional to our reality.

Also, regarding its content, the regulation is an ambiguous document, comprising terminology with unclear and at times equivocal reach.

Notwithstanding, its vague writing appears to have a purpose, and this is to equip the Regulation with sufficient broadness so it may embrace the diversity of contexts that characterize the different EU countries and empower regulators to adapt and optimize the intervention to their individual reality, which is understandable and positive.

However, and with considerable surprise, the draft guidelines in consultation appear to ignore this concern and present an interpretation that not only appears to give much

less flexibility to regulators in their intervention, by presenting a somewhat strict and overly prescriptive regulatory script, but also appears to go beyond the scope and mandate, drawing conclusions and defining rules that overreach the spirit of the regulation.

BEREC's mandate has been conferred under the terms of Regulation 1211/2009, which assigned, for instance, the responsibilities of "developing cooperation among NRAs, and between NRAs and the Commission, so as to ensure the consistent application in all Member States of the EU regulatory framework for electronic communications networks and services, and thereby contributing to the development of the internal market" and to "develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework".

In accordance, its proposed Guidelines, drafted under Article 5(3) of the Regulation 2015/2120, should pursue the "consistent application" of the TSM Regulation, contributing for the "implementation of the obligations of national regulatory authorities".

Therefore, BEREC's role needs to be confined to that of an advisory body which adds detail to the principles set forth in the Regulation 2015/2120, clarifying principles, rather than imposing obligations which do not exist under the Regulation or acting as a legislative body (prescribing rules that run counter to the Regulation).

Taking all this into account, BEREC must not fall into the temptation of going beyond its mandate, for example by issuing off-scope guidelines that will most likely face the risk of being void and non-applicable.

Other major concerns raised by the document include:

- The ex-ante prohibition of specific commercial practices, that isn't prescribed in regulation;
- A strict and over prescriptive stance in traffic management practices;
- Services other than IAS are object of an ambit reduction – vis a vis the regulation- and are not framed in a future proof context.
- The guidelines make indirect associations between transparency and enforcement dispositions of the regulation to present a very closed and prescriptive framework for regulatory intervention that risks overburdening providers and NRAs and launch all kinds of confusion regarding consumers' contractual rights.

In the remaining sections of the document additional detail is added to the specific concerns raised by the document.

2. Agreeements and commercial practices

Article 3(2) of the regulation states that *"[…] agreements between providers of IAS and end-users on commercial and technical conditions and the characteristics of the […] service […] shall not limit the exercise of the rights of end-users laid down in paragraph 1[…]"* which are *"[…] to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice […] via their Internet service […]".*

This should be interpreted in the sense that the conformity of any agreements between internet access services and end users, or any commercial practices, must be evaluated as a result of the analysis of whether consumer choice is materially and effectively limited.

Zero-rating practices are objet of specific attention in document in consultation and the draft guidelines go as far as prohibiting offers that block all applications except the zero rating applicaton(s) once the data cap is reached.

Moreover, Zero-rating practices, as a whole appear to be treated in a rather unflattering light across the draft guidelines, in what appears to be a very restricted conception of the objectives of these practices. This stance eventually contaminates all the guidelines and where these practices aren't explicitly forbidden, they are almost treated, by default, as suspicious.

In fact, this establishes a framework that goes beyond the scope of intervention in what regards commercial practices and goes farther than the basic regulatory objective, which is, as stated above, to infer if consumer choice is limited.

Also, this framework foregoes one basic notion that typically zero-rating is a practice that envisages to adequately and optimally address end users' needs, through innovative and diverse offers, bundling access services with applications and content, which consequently tends to lead to consumer choice enhancement and Internet usage maximization.

This is particularly true in contexts such as the Portuguese, where there is fierce access competition and these practices are used as a tool to differentiate offers and address specific niches of users. Indeed, these practices increase the value of specific offers, in alternative to more straightforward access services, which are also available.

Zero rating may also be an important tool to promote Internet usage and give access to public interest services (health services, e-government, educational services).

Thus, by overzealously restricting or overmonitoring specific commercial practices, regulatory intervention may even end up restricting consumer choice, which is the exact opposite of its purpose.

More so, by elevating too many barriers on commercial practices and raising uncertainty on specific commercial practices, regulation will also harm investment and

will certainly diminish IAS providers' incentives for further innovation and network development.

Surely, if providers become restricted in differentiating their offers to the extent that is prescribed in these guidelines, mechanisms for maintaining market dynamics will be too limited. In time, this will slow down technological evolution and all stakeholders will end up being harmed in process, both in short and longer terms.

Bearing all this in mind, NOS considers that guidelines should be profoundly reviewed in order:

- To remove any explicit prohibition of *ex-ante* specific commercial practices without proper analysis on whether consumer choice is effectively limited – in particular, if there is no reasonable and competitive alternative available in the market and on whether there is any breach of EU competition law. Therefore, § 38 and the third bullet of § 52 should be excluded from the final text.

- § 39 and § 45 should also be removed as they only hint at possible negative effects of specific commercial practices without adding any real objective value – or criteria - to the analysis to be carried by NRAs and without taking into account their positive effects, thus undermining the deployment of innovative offers, by creating an *ex-ante* framework of "suspicion".

- It should be clarified in § 43 that any comprehensive assessment of commercial and technical conditions should only be developed in an *ex-post* case by case basis.

- § 44 should be changed, to promote a holistic approach to the different dimensions of analysis raised in § 43, rather than promoting the prohibition of a specific practice judged solely in one dimension of analysis.

3. Services other than IAS

In the case of services other than IAS (SoIAS), NOS considers that the draft guidelines go considerably beyond the dispositions of the regulation, introducing not only further uncertainty and ambiguity but, more worryingly, adding limitations that aren't discernable from the regulation.

From the outset, the proposed guidelines define in § 106 that specialized services are offered through a connection that is logically separated from the IAS to assure specific levels of quality. The regulation doesn't require this and the final guidelines should refrain from doing so.

For instance, some specialized services, such as specific IPTV applications accessed by mobile equipment, may not be provided through separate logic channels, and in many cases this happens because of the limitations of the terminal device.

The draft guidelines also go in the way of defining which types of services may or may not be considered specialized services – e.g. as defined in § 111. This is a path that shouldn't be taken by the guidelines, as:

(1) it is not future proof, as technology development regarding VPNs – that integrate VPN applications and network services – are evolving in combinations of those exemplified in the draft document, this blurring the definition in this paragraph– and
(2) ignores the prerogative of end-users, especially – but not exclusively – corporate clients, of deciding and negotiating the quality requirements of services they need.

Hence, the final guidelines should refrain to define ex-ante any examples of what is understood as being a specialized service, starting by eliminating § 111.

In fact, a context where businesses don't have the flexibility to decide and require which types of services should be subject of specific treatment regarding QoS, fundamental aspect to address their organizational requirements, is simply inconceivable and goes against what the regulation stands for, namely in what regards freedom of choice and the assurance of keeping the Internet as an ecosystem of innovation.

To guarantee that the UE has an adequate and competitive regulatory framework to meet the challenges posed by the deployment of innovative and ever more QoS demanding services, the focus of regulatory intervention regarding SoIAS should instead be focused on addressing, on a case by case basis:

(1) if the practice is transparent, specifically whether these services and the IAS are delivered in accordance with agreements carried between providers and their clients,
(2) if the same services could be offered as an IAS, adequately framed in the clients' specific requirements, and
(3) if clients' choice is effectively reduced by the existence and provisioning of services that include specialized services and whether the EU Law is in any way breached with the provision of these services.

4. Traffic management

The regulation allows for reasonable traffic management and, in recital 9, is explicit in that its objective is to contribute to the efficient use of network resources and to an optimization of overall transmission quality, responding to the technical requirements of different traffic categories.

However, when interpreting § 74 the reader is faced with a list of seven banned activities that apparently eliminates any kind of traffic management policy activity, which is somewhat paradoxical.

In fact, it should be clear that to apply any kind of reasonable differentiation, there must exist some kind of discrimination and or traffic slowing down.

In this context, the guidelines shouldn't strictly prohibit these activities, but instead only limit them to contexts going beyond the principle of reasonability laid down in article 3(2).

Notwithstanding, one additional situation should be added to the principle of reasonability: the blocking of traffic at user's request. Indeed, users' should be able to exercise their right of freedom to access information and shouldn't be obligated to be exposed to content that they explicitly identified and chose as not wanting to have access. This is particularly relevant in what relates to ad-blocking or blocking content that is deemed inappropriate to minors.

This freedom should not be limited at the terminal equipment, as stated in §75, as it would not be technologically neutral.

NOS also considers that § 89 should be left out of the final version of the document since it is disproportionate and goes clearly beyond the dispositions of the regulation.

Finally, it should be noted regulatory intervention should not be focused on intensively evaluating the characteristics of the traffic management policies that are applied but on their practical result in light of the Regulation's objectives. That is, traffic management policies analysis should be triggered when there are objective indications that the goals of the Regulation are not being met and rights of end-users are conditioned. Any other kind of intervention risks being disproportional and will consequently have negative impacts on all stakeholders.

5. Transparency and Enforcement

As a first remark, it should be stressed that the provisions regarding article 4(1) to article 4(3) must not have a retroactive application, as it is not envisaged in the regulation and its application would be unreasonable, unfeasible considering the multitude of existing different contracts, and could lead to unpredictable consequences in what regards with termination of contracts based on art. 20 (2) of the Universal Service Directive

The Regulation lays down transparency measures that aim at enabling end-users to make informed choices. The guidelines are excessively detailed regarding the necessary transparency measures that must be included in the contract and published by the ISP. This excessiveness is particularly harmful when it comes to internet access

speeds, given the amount of variables that ISPs must take into account when creating their commercial offers.

As an example, if ISPs were to include all the detailed information recommended by the guidelines in the contracts, not only would the volume of information prove to be unfeasible, but greater uncertainty would be generated: because standard terms are a widespread practice in the telecom sector, all information would be included in all contracts. End-users would be overwhelmed by the quantity of information and would most likely be unable to make an informed decision, leading to higher uncertainty than in the current situation.

As such, NRAs should be able to limit the type and quantity of information that must be given to end-users (particularly on the contracts). The level of information should be the necessary and effective to allow for (i) understanding the characteristics of the subscribed service and (ii) being able to cross-check the agreement between the subscribed and delivered service.

Regarding the handling of complains, the Regulation states, in Article 4 (2), that "Providers of internet access services shall put in place transparent, simple and efficient procedures to address complaints of end-users relating to the rights and obligations laid down in Article 3 and paragraph 1 of this Article.".

Vis-à-vis this requirement, it should be noted that several good practices regarding procedures for addressing complaints have already been implemented in the Portuguese context, namely:

- end-users have the possibility to easily file a complaint online (e.g. a web-form or email), at a point of sale, by post or by telephone.
- end-users are informed, in the contract as well as on the website, about the in force procedures, namely the duty to clearly state the terms of the complaint, as well as the information that correctly submitted complaints will be ruled upon before the maximum applicable deadline counting from its reception day.
- end-users can, at any moment in time, enquire the ISP about the status of their complaint, expecting a timely and accurate response.
- in cases where end-users believe a complaint has not been successfully handled, the ISPs inform about the possibility of going to court or an alternative dispute resolution entity. This information is clearly stated in the contract, online (website) and at the points of sale, in full respect of the national law.

From these examples, it maybe concluded that reality shows these procedures are both necessary and sufficient not only to ensure end-users can easily file complaints, but also to guarantee that all complaints are handled in an adequate manner.

The addition of a single point of contact for complaints related to the safeguarding of open internet access is deemed, thus, unnecessary.

Taking this reality as an example, the guidelines should specifically recommend that NRAs have the ability to analyze and decide upon the specific conditions of their local

market. If, as in the stated example, comprehensive measures are already enforced to handle complaints, NRAs can determine that no further additional measures are necessary to comply with the Regulation…

Regarding the monitoring mechanisms available to analyze IAS performance, there appears to some inconsistency in what regards certification in § 158. In fact, it is reasonably puzzling why any third party monitoring should be required to be certified, while NRA monitoring tools may be exempted from such certification.

NOS considers, that to provide reasonable consistency and harmonization in measurements of QoS compliance, all tools should be certified, based on common principles and criteria, including those provided by the NRA.

Regarding the specific criteria to be met in terms download and upload speed of IAS, the draft guidelines appear to go significantly beyond the provisions of the Regulation.

Firstly, it takes a stance in advertisement rules (§ 139) when it is not in the NRAs mandate to regulate the content of advertisement.

Secondly, it should not be inferred that the regulator may define minimum speeds in proportion of maximum speeds, as it is suggested in § 141. In practice, and in order to meet the requirements of the Regulation, this could lead to providers to lower contractual maximum speeds and detach this information from the real maximum speeds of the service, to meet the minimum speeds derived from the proportionality rule.

§ 142 would also impact on contractual maximum speed due to the fact that the guidelines once again go beyond the regulation, by defining that it must be reached at least once every day.

This is particularly concerning in mass market offers - which are inflexible to tailoring needs - where in some particular cases, and due to specific technical constrains, a minority of users may not be able to reach the contractual maximum speeds. In practice, this might lead to lowering these speeds in order to universally guarantee the availability criteria defined in § 142 (or other similar rule).

§144 to 146 present guidelines on the definition of normally available speed, providing examples. Here also, the guidelines are over prescriptive, by suggesting dependences between normally available speed and maximum speed. This may also lead to reducing contractual maximum speed in order to cope with any specific fluctuations of the service performance.

Regarding applicable remedies for noncompliance, in § 155 the guidelines once again take a particularly interventive stance, by describing the possible remedies and imposing their detail in the contractual dispositions. In our view, this goes beyond the dispositions of the regulation and is superfluous, as it ignores that presently contracts are already in line with rigorous and detailed contractual transparency rules laid down by NRAs.

It must be noted one additional major concern regarding individual versus market remedies applicable to non-conformity of speed performance and in particular the lack of a clear identification of the specific performance parameters that are eligible to trigger the different remedies available to consumers: it should be clear that, at the individual consumer level, the only download/upload speed parameter that IAS providers may commit to is minimum speed (safeguarding the exceptions contemplated in the regulation), except when specific requirements beyond those that are enshrined in the regulation are agreed between provider and end-user.

6. Concluding Remarks

NOS considers that the guidelines are too prescriptive and in many matters extrapolate the dispositions of the Regulation, which risks: (1) overburdening all stakeholders with requirements that weren't originally envisaged and (2) raising a strong sense of uncertainty that will limit market dynamics and ultimately future investments and further innovation.

This will be particularly harming in highly competitive contexts where product differentiation and innovation are nuclear tools to address the market.

NOS therefore urges BEREC to carry out a profound revision of the document bearing in mind the following principles:

- The guidelines should be bound by the mandate given by the regulation;
- Limiting commercial and technical solutions that aren't explicitly stated in the regulation should be avoided;
- The guidelines must be future proof. Hence, examples that risk becoming outdated following technical developments should not be included.
- Enforcement should be proportional and information requirements should be limited to situations where there are clear indications that regulatory intervention may be needed.