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OTE S.A. answer to the BEREC Consultation for the Evaluation of the Application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines

EXECUTIVE SUMMARY

OTE S.A. welcomes the opportunity to contribute to the ongoing evaluation process of the application of Regulation (EU) 2015/2120 and the BEREC net Neutrality Guidelines. We hope our answers to the specific questions will contribute to a revision of the Guidelines along the following key points:

- There is a clear need for revisions to bring the current version of the Guidelines back in line with the Regulation.
- Terms and concepts that were deliberately not specified by the legislator, such as 'zero rating', 'specialised services', 'sub-internet services', need to be removed from the Guidelines.
- In order to facilitate the development and deployment of 5G technology it is important to refrain from installing an "innovation by permission" regime.
- NRA decisions and prescriptions need to account for their effects on the end-user. In the context of article 4, this means considering the practical relevance to the individual customer.

A. General experience with the application of the Regulation and BEREC NN Guidelines

1. In your view – have the Guidelines helped NRA´s apply the Regulation in a consistent, coherent and correct way? Please explain.

As regards Article 3 Regulation (EU) 2015/2120, experience has shown that, when ordering ISPs to modify products, NRAs refer mostly to the Guidelines instead of the Regulation itself, as if the Guidelines had the status of EU law. This should not happen. As for coherence and consistency, it is too early to make a substantial estimation. First decisions appear to be quite heterogeneous.

Concerning Art. 4 and 5, the Guidelines suggestions of criteria that ensure reliable results of measurement systems remain vague and do NOT propose consistent application. On the contrary, NRAs are not supposed to ensure minimum quality criteria in order to be "certified" and NRAs do not need to ensure reliable measurement systems, but only do so "to the extent possible" (§ 164). This flexibility is not appropriate when considering the legal implications if the measured speed is lower than the agreed speed.

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2. Did the Guidelines provide additional clarity regarding how to apply the Regulation? Please explain.

   The Guidelines have created significant legal uncertainties by introducing terms and concepts that were deliberately not specified by the legislator, such as ‘zero rating’, ‘specialised services’, ‘sub-internet services’.

   Concerning Art. 4 and 5, the Guidelines remain vague and do not ensure a reasonable and practical application of the regulatory obligations, especially the prescriptive specification of contractual information (e.g. “normally available bandwidths”).

3. On which subjects would you expect the Guidelines to be more explicit or elaborated? How should the text of the Guidelines be adapted on these points, in your view. Please explain.

   There is an imperative need for a revision of the Guidelines. However, not in the proposed manner. Instead of being “more explicit”, the Guidelines should be focused on facilitating the implementation of the Regulation for the NRAs. Consequently, there is no room for an introduction of concepts that are not featured in the Regulation. When revising the Guidelines, BEREC should consider the following modifications:

   - Definition of “sub-internet services” exceeds scope of regulation and requires deletion of § 17, § 38, § 55. The term “sub-internet services” has been created by BEREC and its enforcement leads to significant market distortions. As long as unrestricted IAS remains the basic product it is not necessary to interdict restricted offers, especially given that such restrictions are explicitly allowed on other parts of the value chain, i.e. in the case of e-readers on the device level.
   - Deletion of § 35 to remove overly restrictive rules on “zero rating”. The Regulation asks for evidence based case by case decisions, i.e. an ex post control. But the Guidelines specify restrictive per se rules that effectively install an ex ante approach.
   - Deletion of § 55 to avoid weakening the ex post approach
   - Second sentence of § 53 must be deleted in order to sustain possibility treating different categories of traffic differently.
   - Deletion of § 68 sentence 3 as the interpretation of “not based on commercial considerations” is too simplistic and effectively creates a reversal of the burden of proof, i.e. is not in line with the Regulation.
   - The last bullet point in § 60 must be deleted to allow differentiation of treatment also for encrypted traffic. This is necessary to allow network operators to treat traffic of the same category equally, whether it is

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encrypted or not, as asked for by the Regulation.
- Deletion of § 134 as this paragraph significantly diverges from the provisions in the Regulation.
- Deletion of random specification in § 155 which states that information on broadband should be indicated on a map.
- Deletion of last sentence in § 161 as the fiction of the certification for monitoring mechanisms is not acceptable.
- Delete arbitrary suggestions in § 145 that the maximum bandwidth in fixed networks may only be available once a day, which favours unilaterally cable network operators, because only shared medium technologies show significant fluctuations.
- Assumption in §§ 147, 148 that performance fluctuates over the course of the day is misleading and favours cable network operators. Other fixed-line IAS do not equally fluctuate.

4. For ISPs: Did you discontinue certain products or services following the adoption of the Regulation and/or the Guidelines?

   There was no need to discontinue any products or services in accordance with the Regulation provisions and/or the Guidelines.

5. Did the application of the Regulation, or the implementation of the Regulation by the Guidelines, prevent you from launching certain products or services?

   We do monitor product development in order to assure compliance with the Regulation. In this process a number of original design ideas had to be abandoned or significantly modified.

6. Do you have any additional comments on the application of the Regulation and Guidelines?

   It is with great concern that we see NRAs and BEREC show an increased tendency to not balance overarching goals of sector specific regulation, such as protecting the interests of consumers and fostering competition, innovation and investment, with the outcomes of enforcing the TSM Regulation. This is evident when NRA decisions do not take account of the effects they will have on consumers.

B. Definitions (article 2 of the Regulation)

7. Do you think that the Guidelines should provide further clarification in relation to the definitions in the Regulation? If yes, please provide concrete suggestions.

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On the contrary, the Guidelines in their current state clearly go beyond what has been specified by the legislator. This being so, the definitions of 'zero rating' and 'sub-internet services' need to be removed.

C. Commercial practices such as zero-rating (articles 3(1) and 3(2))

8. Does the current assessment of zero-rating as recommended in the Guidelines, offer sufficient protection of end-users' rights as referred to in article 3(1) of the Regulation? Please explain.

As previously mentioned in our answer to question 6, BEREC fails to protect the interests of consumers in this context. In the case of zero rating, the Guidelines introduce limitations on commercial practices and impose prerequisites that go beyond the Regulation. It is well established that commercial practices have to be analysed on a case-by-case basis and include considerations on their effect on end-users rights as defined under Article 3 (1). But the Guidelines present examples of commercial practices that are to be forbidden, without presenting any such analysis or actual empirical evidence.

In the context of zero rating, BEREC often refers to the 'equal treatment' principle of Article 3 (3), erroneously linking this with Article 3 (2):

The Regulation in Article. 3 (2) stipulates that ISP are allowed to define commercial and technical conditions as far as it does not limit the exercise of the rights of end-users to access and distribute information, irrespective of the location, via the IAS. In this article there is no reference to Article 3 (3). Article 3 (3) only relates to technical traffic management practices and does not forbid the application of different commercial and technical conditions (differentiation in terms of pricing, data volumes, speed, etc.) otherwise it would effectively be in contradiction with Article 3 (2). Instead Article 3 (2) refers rightly to art. 3 (1), i.e. end user rights on an open Internet.

Moreover the Guidelines' reference to Article 3 (3) also suffers from an erroneous interpretation of the first sub paragraph of that article. Article 3 (3) contains a qualified ban on discriminating between different types of internet traffic. The structure of Article 3 (3) is that an ISP acts lawfully if either it brings itself within the second subparagraph ("reasonable traffic management measures") or it brings itself within one of the specific exceptions. As confirmed by Recital (12) of the Regulation, these are alternative, not

cumulative, requirements.

9. How could the assessment methodology for commercial practices in the Guidelines (ref. in particular to paras 46-48) be improved? Is there a need for more simplification, flexibility and/or more specification? Please provide concrete suggestions.

   There is a clear need to base decisions on empiric evidence that is collected in an objective and scientific way. Concretely, this can be achieved by systematically monitoring the economic activities of all relevant players in the concerned markets and by assessing the effects on overall welfare (including consumer welfare). Additionally, we expect NRAs to collaborate closely with competition authorities when defining relevant markets and evaluating competitive outcomes.

10. In your view, did the assessment methodology for commercial practices in the Guidelines influence the development of new content and applications offered on the internet? Please explain.

    This question should be answered by app developers and content producers. It is fair to assume that most developers and content producers are not even aware that the Guidelines exist.

11. Do you think that the current application of the Regulation and the Guidelines concerning commercial practices, such as zero-rating, sufficiently takes account of possible long term effects of such practices? If not, how could BEREC further facilitate this?

    No, it currently does not. To further facilitate this we suggest a consultation with all the relevant scholars that have conducted economic research on the subject of long term effects. The relevance of specific authors can easily be assessed by consulting the Social Sciences Citation Index (SSCI).

D. Traffic management (article 3(3))

12. Is there a need for improvement of the Guidelines concerning reasonable traffic management (ref. in particular to paras 49-75)? If yes, how could this text be improved? Please provide concrete suggestions.

    Yes, this section definitely needs a revision. The Regulation states that reasonable traffic management is permitted and also recognises that it contributes to the efficient use of network resources and optimisation of

overall quality. It is simply wrong to assume that more capacity is the best answer in every case (as implied by § 93).

While the regulation prohibits commercial discrimination between applications and services within an IAS, it explicitly supports segmentation of IAS offers proposed to end-users. This needs to be acknowledged by the Guidelines. The wording "Not based on commercial considerations" in the second subparagraph has to be read in this context and not as an absolute standalone rule. Consequently, § 68 needs to be adapted (in particular the first and last sentence).

Concrete suggestions:

- Delete second sentence of § 53 in order to allow a different treatment of different categories of traffic
- Last bullet point in § 60 must be deleted to allow different treatment also for encrypted traffic
- Deletion of example in § 69 "(i.e. transport layer protocol payload)"
- Clarify that header information remains header information even when it is written into the payload section of an IP packet (§ 70)

13. Is there a need for improvement of the Guidelines concerning traffic management measures going beyond reasonable traffic management measures (ref. in particular paras 76-93)? If yes, how could this text be improved? Please provide concrete suggestions.

Yes, this section needs a revision. The concept of "imminent" network congestion is currently too narrow (§ 88 and subsequent).

14. Does the text of the Guidelines concerning traffic management influence the development of network technologies offered on the market? Please provide concrete examples.

[needs to be answered by manufacturers]

15. Do any terms used in article 3(3) concerning traffic management need further explanation in the Guidelines? If yes, please specify.

Before considering "further explanation" the current version of the Guidelines needs to be brought back in line with the Regulation. This is especially true for the interpretation of Article 3 (3).

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E. Specialised services (article 3(5))

16. Is there a need for improvement of the Guidelines concerning specialized services (ref. in particular paras 99-127)? If yes, how could this text be improved? Please provide concrete suggestions.

Unlike the Regulation, the Guidelines use the term “specialized services”. The debate during the legislative process was intense but finally no common understanding of the term “specialized service” could be reached. A definition of such services carries the obvious risk of being too narrow and not future proof. Secondly it should be taken into account that subject of the Regulation are Internet Access Services (IAS) only. Other services are only relevant in conjunction with their potentially limiting effects on the IAS. Other than that, there is no need to further specify these services for their provisioning. In order to avoid confusion BEREC needs to further refrain from such an approach and should explicitly use the term Services other than Internet Access Services (SoIAS) in line with the Regulation.

Different from the Regulation, a restrictive, biased positioning against the provisioning of SoIAS in general is manifested in the Guidelines. According to the Guidelines (§ 101) and “Article 3 (5)” these “specialised services” should be characterized by being (i) a service other than IAS, (ii) optimized for specific content, applications or services, or a combination thereof, and (iii) intended for an optimization which is objectively necessary in order to meet requirements for a specific level of quality. The word “objectively” clearly narrows the third requirement under which such services are deemed in line with the Regulation. Article 3 (5), however, does not contain such restriction. Even Recital 16 reads “…where the optimization is necessary …” (Rec. 16 sentence 3). It is not the same if the TSM Regulation, on the one hand, merely describes that “National regulatory authorities should verify whether and to what extent such optimization is objectively necessary …” (Rec. 16 sentence 4), while the regulation itself, on the other hand, clearly stipulates that no such objectivity is required.

Not being transparent regarding the source of the adverb “objectively” and far more obviously, the broader understanding of this third characteristic demonstrates the overly critical stance BEREC has taken against SoIAS. This impression is further confirmed by the following example: the Regulation explicitly confirms that “There is demand … to be able to provide electronic communication services other than internet access services …” (Rec. 16 sentence 1). The Guidelines only concede that “… there can be demand …” (§ 99). The antipathy to SoIAS could not be expressed more obviously.

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Any prescriptions leading to a procedure of ex-ante authorisation for SoIAS provision (see § 106ff.) would fundamentally contradict the guarantee of freedom of service innovation by the Regulation; the same innovation-friendly approach is taken in the EC's statement made on 8 July, 2015, clearly stating that there is no authorisation procedure put in place by the Regulation: "The Commission explained that in its view neither Article 4 nor Recital 11 of the agreed text of the draft Regulation introduces a special authorisation regime".

The described aversion to SoIAS also manifests itself in far reaching measures NRAs should apply when evaluating such services. Firstly NRAs "…should verify whether the application could be provided over IAS at the agreed and committed level of quality…" (§ 105). And it "should be demonstrated that this specific level of quality cannot be assured over the IAS." (§§ 108 and 111). If this should fail, the Guidelines suggest that these electronic communication services should "not be allowed" (§ 111 sentence 3). In addition, upon request by a NRA ISPs "should give information about their specialized services, including what the relevant QoS requirements are, e.g. latency, jitter and packet loss, and any contractual requirements" (§ 108). These are further examples burdening ISPs unilateral in addition to the already foreseen measures and requirements such providers have to fulfil. The sum of IAS safeguards established by BEREC ends up being disproportionate. With these additional requirements the guidelines burden ISPs with disproportionate tasks.

BEREC states that Guidelines contribute "to regulatory certainty for stakeholders" (§ 1). This is clearly an objective worth supporting. When it comes to SoIAS the opposite is the case. If such a service has managed to be acknowledged as a lawfully provided SoIAS, its existence is permanently threatened by the improvements of IAS (§ 112). This demonstrates that BEREC seems to have little faith in market outcomes and does not want SoIAS to become successful in the market place.

OTE S.A. has always put the development of IAS among its top priorities. This is because IAS quality is one of the key differentiators both for inter and intra infrastructure competition in EU broadband services. No operator could afford to offer mediocre IAS since a loss of market share would be inevitable. These services are best provided by private entities freely competing for customers. BEREC contradicts this fundamental paradigm by encouraging NRAs to actively interfere in market mechanisms by forcing providers of IAS to invest only in one single product: the IAS. In order to do so, NRAs should execute far reaching powers to evaluate network capacity requirements for SoIAS and the IAS itself. Something that is at the very core of network providers competencies and something done best in competitive markets

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instead of state-directed regulatory provisions.

It is welcomed that BEREC Guidelines clearly state that “NRAs should not consider it to be to the detriment of the general quality of IAS when activation of the specialized services by the individual end-user only affects his own IAS” (§ 122). However, it is not in the interest of the end-user that a certain capacity is still blocked for the IAS even if the user is – temporarily – not actively using the IAS. This would not be efficient and is in fact handled differently. If the SoIAS is not actively used, the IAS uses the total bandwidth available. This symbiosis characterizes IAS business models and products.

The Guidelines have to maintain that freedom which is protected by the Regulation. When assessing a potential detriment of the IAS, NRAs need to asses this over a reasonable – sustained – period of time. Short term variations over hours and days are obviously not enough to assert a possible detriment (§ 125). In order to be proportionate not any “detriment” qualifies as an infringement of Article 3 (5) subpara 2 sentence 2. A potential detriment has at least two dimensions namely time and grade. First regard – as stated above – a reasonable period of time needs to by characterized by the respective variation (sustained detriment). Second, the variation it-self needs to be of a substantial scale. Clearly not any negative variation qualifies as a detriment and therefore as an infringement of Article 3 (5) subpara 2 sentence 2. When assessing the impact of SoIAS on IAS NRAs should do this in a proportionate way by requiring i) a substantial and ii) a persistent detriment of the IAS by SoIAS.

17. Does the text of the Guidelines concerning specialized services influence the development of specialised services offered on the market? Please provide concrete examples.

All the prescriptive measures introduced by BEREC on NRA control and verifications for all services will unavoidably hinder a flexible provision of new and innovative services, especially those enabled by the deployment of new technology such as network function virtualization and network slicing.

18. Do any terms used in article 3(5) concerning specialised services need further explanation in the Guidelines? If yes, please specify.

No, the Regulation is clear enough and does not require further explanation. On the contrary, the Guidelines should refrain from elaborating on services other than IAS, which are clearly outside of the scope of the Regulation. In the Guidelines it is fully sufficient to consider whether or not those services other than IAS are to the detriment of the availability and general quality of the IAS.

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In order to make this judgement, empirical evidence will be needed on a case by case basis. It would be a clear improvement if the Guidelines described how to gather and analyse this data in an objective and scientific manner.

F. Transparency (article 4)

19. What has been your experience regarding the application of the transparency measures in the Regulation and the Guidelines, particularly in relation to speed of mobile internet access services? Is there a need for improvement? If yes, how could this be improved by BEREC? Please provide concrete suggestions.

With respect to the different bandwidths (§§143-157), BEREC also makes statements on possible significant discrepancy. It is not the task of BEREC, but of the national jurisdiction, to decide whether there is a significant discrepancy, continuous or regularly recurring, within the meaning of the TSM Regulation or not. The BEREC guidelines are more extensive than the regulation. It is also to be criticized that the existing case law in the Member States regarding the deviations from "up to" bandwidths (same as maximum bandwidths) has not been taken into account.
For Example: According to TSM Regulation discrepancies from all Bandwidths are tolerable as long as they are not significant. Therefore it has to be possible to diverge even from the minimum speed at least in a certain range. Because the TSM- Regulation obliges operators to indicate four different speeds it is obvious that the permitted discrepancies vary between these different speeds.

Several transparency recommendations in the Guidelines significantly diverge from the regulatory obligations or the Guidelines are too specific in an unjustified way:

- In § 155 the random specification that information on broadband should be indicated on a map needs to be deleted.
- The majority of customers are not interested in the majority of the overly detailed technical requirements specified in the Guidelines, the information overload within contracts further increases and distracts end-users from reading and understanding most crucial contractual provisions.

20. How could BEREC further assist consumers, ensuring that they get the internet access service that they pay for?

The question is misleading and gives impression that IAS providers are not compliant with their contractual obligations. Such a general assumption is

wrong. Even before the Regulation was adopted, any customer of IAS had the possibility to demand the provider to deliver the service as agreed in the contract, in case of breach, e.g. through mediation, court decisions or contacting a NRA.

The TSM adds the explicit right of consumers to demand redress in case the measured bandwidth diverges from the contractually agreed bandwidth. In European markets consumers have the possibility to demand the NRA/other competent authorities for dispute resolution.

The Guidelines do not assist consumers in understanding the delivered performance. BEREC does not oblige NRAs to ensure reliable measurement systems in order to get a certification. Instead, any system provided by a NRA is supposed to be automatically certified, which is not foreseen in the Regulation (§ 161).

Also, the notion that measurement systems should only be reliable as much as possible is not helpful (§ 164). Only reliable measurement systems enable consumers to assess whether the delivered performance is in line with the contractual agreement. With regard to mobile measurements, the specific characteristics of this shared medium have to be considered, which has per se a high fluctuation of performance, depending on the number of users in a cell and the specific location of the customer.

Advertised speed that is possible in the scope of specific contracts must not be confused with contractual agreed speed or speed that is usually available. Ensuring that customers get the speed they pay for always must refer to the contractually agreed speed, which is a range between minimum and maximum available speed.

G. New technologies (horizontal)

21. Do you think the Regulation and the Guidelines provide sufficient flexibility to adopt new technologies which are likely to be used in 5G? Please explain, preferably with examples.

The 5G technology is expected to efficiently allocate spectrum and network resources. Efficiency and, specifically with regards to spectrum, efficient use, are statutory objectives for NRAs. It is within this context that the application of the Regulation should be considered in order to avoid conflict with overarching regulatory objectives.

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Most importantly the Regulation was written in the spirit of banning "innovation by permission" regimes. If BEREC was to implement such a system of "approving" new services, the intention of the legislator would be undermined completely.

22. Considering the rules for traffic management and specialized services in the Regulation, are the Guidelines providing sufficient clarity to the adoption of new network technologies such as "network slicing" and "edge computing"? Please explain in detail.

To clarify that 5G services, or any other access networks and network technologies, can be delivered over specialised services using network slicing, BEREC added footnote 26 to the Guidelines. Therefore, ISPs are free to offer new services and business models in the environment of a 5G network whilst adhering to the principles laid down in the Regulation. This important statement should be a main feature of the Guidelines and not only a footnote.

23. If not, which specific points are unclear in the Guidelines and how could BEREC improve this? Please provide concrete suggestions.

There is no need for further specifications in the Guidelines. Instead, the Guidelines need to be brought back in line with the Regulation. The Guidelines need to allow innovation where it occurs, also on the networks, i.e. the transport layer. Protecting customer choice and innovation on the Internet is the essence of the Regulation.

H. Other comments

24. Do you want to share any additional comments?

No.

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