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Telefonica response to the public consultation on BEREC draft Guidelines on the Implementation of the Open Internet Regulation - BoR (22) 31

Overall context

Telefonica welcomes BEREC's draft for the revised Guidelines on the Implementation of the Open Internet Regulation and the opportunity given to all stakeholders to provide feedback on the modifications made to adjust the Guidelines in light of the European Court of Justice (ECJ) rulings concerning the interpretation of the specific Articles of the Open Internet Regulation (OIR).

The ECJ rulings have provided an unexpected interpretation of the OIR, further restricting ISPs commercial flexibility by banning of commercial services previously considered compliant by national competent authorities and that are currently being offered to European citizens. This highlights the lack of clarity and thus limited quality of the OIR, being subject to a wide interpretation that not even subject experts from BEREC neither national competent authorities were able to foresee.

Additionally, the ECJ rulings highlight the non-binding nature of BEREC Implementation Guidelines, which were not considered at all in the ECJ reasonings and have been proved wrong by the ruling.

It is our understanding BEREC Guidelines should provide certainty on the application of the OIR for both, national competent authorities to correctly and homogenously enforce the regulation across the EU, and for ECS providers / ISPs to be able to define and provide innovative services satisfying market demand in compliance of the OIR.

In the context of the current deployment of 5G and fibre networks, and incipient metaverse ecosystem, the telco industry is subject to high investment requirements to achieve Europe Digital Decade 2030 gigabit connectivity targets. Advanced technical capabilities of these networks, for example network slicing, are the basis for the development of innovative services to meet the evolving needs of a higher digitized society and businesses and at the same time monetize and get a return on the capital employed in network quality upgrades and new deployments.

Nevertheless, as we are on early days of 5G deployment, services based on network slicing are not yet commercially available, having not been launched, with regulation remaining untested on these grounds. Therefore, non-binding nature of the Guidelines and ECJ unexpected interpretation of OIR, as commented before, result in an increase legal uncertainty for the sector, which is not only confronting significant investment on network deployments, but also on the implementation of new services based on network slicing and on different QoS. Such new services could be legally deemed non complaint with OIR briefly after its launching even if counting with the "green light" of BEREC and national competent authorities. This would not only result in strong operational and commercial cost of discontinuing an active service offered to the whole customer base, as it is currently the case with Zero Rating offers enjoyed by many customers across the EU but put at risk the monetization strategy and returns on new 5G and fibre network investments.

We therefore stress on the urgent need not only for clear Implementation Guidelines but for a OIR that provides legal certainty and fosters the provisioning of innovative connectivity services for the benefit of the EU society, businesses and economy.

Specific comments to BEREC draft Guidelines

Telefonica positively values BEREC's efforts to adjust Implementation Guidelines to fully enshrine ECJ ruling while at the same time, to the highest extent possible, preserve consumer welfare and limit the introduction of further commercial restrictions on ISPs in strict compliance of OIR.

In this sense, we positively value, as a mean to increase certainty, BEREC providing a list of commercial practices typically admissible within the OIR. In this regard, the inclusion within such list of the possibility to provide different IAS tariffs with different QoS is highly relevant in the context of new service evolution and slicing, as it is also relevant BEREC's previous views on OIR and Implementation Guidelines not inhibiting the launching of services based on network slicing.

Still, BEREC proposed guidelines results in relevant challenging concerns that should be addressed:

General ban of non application and content agnostic zero-rating

The general ban of non application or content agnostic zero rating results in a strong limitation of consumer welfare by prohibiting zero rating public for good content and of ISPs own consumer attention apps that enable customers to buy additional data when their allowance is depleted.

Customers should be able to enjoy unrestricted access to public for good apps or content such as covid tracing apps or health information.

EU citizens should be able to access free of charge applications and content for public good, such unrestricted access to vital resources that was provided during the pandemic (e.g. covid tracing apps; educational apps; health information apps) or applications linked to charitable causes. In many cases, these were supported, although not mandated by law, by regulators and governments, representing a flexible and sensible interpretation of the OIR.

In some cases, the Government may mandate zero-rating specific content or apps, that is not counting towards the customer's data franchise specific content or apps; such zero rating would be compliant with OIR as it would be considered an exception to reasonable traffic management as provided by article 3.3.a in order to "comply with Union legislative act, or national legislation ...". However, in most cases, it would not be practicable or desirable for the Government to have to intervene and identify and define the most appropriate content and applications for zero-rating, especially in exceptional circumstances where such work is done in cooperation between Government and the sector without specific or formal legal requirements.

We call for BEREC to provide a flexible mean allowing the provisioning of unrestricted access to public for good apps / content without the need of recurring to the exception of reasonable traffic management provided in article 3.3.a.

Customers who have used up their monthly data allowance must have the ability to purchase more.

This possibility that was precisely included as an example of practice likely to be accepted in second bullet of paragraph 35 of the previous guidelines,” the ability for an end user to access the ISP’s customer service when their data cap is reached in order to purchase access to additional data” has now been eliminated by BEREC in the updated draft. Moreover, new paragraph 40b adds that “applying a zero price to ISPs’ own applications” is likely to be considered inadmissible. This leads to prohibiting providing free data to access ISP customer care application or website for the purpose of purchasing additional data and keep the possibility to access the Internet.

We are highly concerned about the arbitrary implementation of the policy framework. While the Roaming Regulation sets the obligation on ISPs to provide free internet access to information on roaming tariffs and on access to emergency services (zero rating these web pages), BEREC’s implementation forbids these same ISPs from providing free access to customer attention services (i.e. “applying a zero price to ISPs’ own applications”) in order to buy additional data. It is inconsistent, to protect consumers’ welfare and right to freely access information on the Internet, while at the same time not allowing them the ability to purchase data to continue accessing the Internet.

We therefore call on BEREC to include an exception allowing this practice as it does not pose a threat to equal treatment of traffic principle in Article 3.3 while it aids in substantiating end users right to access the Internet as laid down in Article 3.1 of the Open Internet Regulation.