



## **BEREC – Body of European Regulators for Electronic Communications**

Subject: Yettel Hungary's response to the public consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation (BoR (22) 30)

12 April 2022

Yettel Hungary (2045 Törökbálint, Pannon út, previously Telenor Magyarország) highly appreciates and would like to thank BEREC the opportunity to comment on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation (Draft Updates).

In our opinion the draft updates to BEREC's Open Internet Guidelines do a good job with reflecting the recent rulings of the Court of Justice of the European Union (CJEU) that zero tariff offers are incompatible with the obligation of equal treatment of traffic in the Open Internet Regulation.

However, we think that further clarifications and amendments are necessary for the sake of legal certainty:

- **Paragraph 4 and 5.** The text must be amended with an explanation and justification if BEREC maintains that all CAPs regardless of the provision of publicly available electronic communications services shall remain to be considered and therefore protected by the Regulation as end-users.

The Draft Updates correctly state that the interpretation that **the concept of end-user** in the Regulation encompasses consumers as well as CAPs was confirmed by the CJEU in its Telenor Magyarország ruling. However, as Footnote 9 points it out correctly the applicable law in that case was the Framework Directive which has since been repealed by the EECC. It is mostly true that the definitions in the EECC have not changed in a material way but there is one relevant exception: the definition of publicly available electronic communications services in the EECC has been amended to include number-independent interpersonal communication services. Examples of these services are – among others - Viber, Messenger, Whatsapp or similar instant messaging services. Interestingly, these instant messaging services were exactly those zero rated in the Telenor Magyarország My Chat tariffs that were found to be incompatible with the Regulation in one of the rulings. In that ruling, however, these services ought not have yet to be considered and treated as publicly available electronic communications services or their providers as publicly available electronic communications service providers, therefore the CJEU could arrive to the conclusion that the concept of end-user in the Regulation encompasses the providers of these services.

In our opinion it is necessary for BEREC to provide an explanation how NRAs and ISPs should treat those CAPs which are not end-users because they provide publicly available electronic communications services when they use IAS.

Paragraph 5 contains already some explanation for the case when some CAPs may also operate their own networks and, as part of that, have interconnection agreements with ISPs but similar distinction is missing for when some CAPs provide publicly available electronic communication services.

The essence of the whole Regulation is the protection of the rights of end-users, and NRAs should consider to what extent end-users' choice is restricted by the agreed commercial and technical conditions or the commercial practices of the ISP. Therefore, for the applicability of the Regulation we think it is a must to amend the Updates.

- ISPs in several member states are still providing zero rating tariffs which have not been considered inadmissible based on the current BEREC Guidelines (e.g. zero rating is applied to an entire category of an application and is open to all CAPs in the category). For the sake of fairness, we would like to ask BEREC to amend the Guidelines with a guidance for NRAs to apply a legal solution so that **ISPs could change currently available zero rating tariffs in a way which is not considered as a unilateral modification** proposed by the provider when consumers shall have the right to terminate their contract.<sup>1</sup>
- **Differentiated pricing practices are normally dealt with competition law** or by ex-ante market regulation. Therefore, we kindly ask BEREC to provide explanation why it remains to be necessary to assess these practices of ISPs on the basis of the Regulation and to provide clarification of the competences of NCAs and NRAs in this regard.

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<sup>1</sup> According to the EECC end-users shall have the right to terminate their contract without incurring any further costs upon notice of changes in the contractual conditions proposed by the provider of publicly available electronic communications services other than number-independent interpersonal communications services, unless the proposed changes are exclusively to the benefit of the end-user, are of a purely administrative nature and have no negative effect on the end-user, or are directly imposed by Union or national law.