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Objet : POST contribution to BEREC's public consultation on updated guidelines on the implementation of the open internet regulation

Following three judgments of the European Court of Justice regarding the interpretation of the Regulation 2015/2120 on the open internet (hereafter "OIR"), BEREC has launched, after a first collection of stakeholders' views, a public consultation on the updated guidelines on the implementation of the open internet regulation. The consultation is open from March 15th to April 15th.

POST Luxembourg, as a major player in the Luxembourgish telecoms market, hereby wants to contribute to BEREC's consultation by submitting the following comments:

- Guidelines must allow ISPs to comply with national legislation:

  On several occasions, the guidelines do not seem to allow for a "discriminatory" treatment of traffic that end users may generate by accessing their ISP's service portal. However, by national legislation regarding consumer protection, ISPs are obliged to provide for instance a means for real time consumption[1].

  However, should the end user have consumed all of its allowance and blocking applies, this facility is no longer feasible if the ISP's portal is to be treated an application-agnostic way.

  Moreover, without access to the ISP's service portal, the end user may also face complexity for subscribing to additional data volume.

[1] See for instance art. 113(5) of the Luxembourgish law transposing the European Electronic communications code (loi du 17 décembre 2021 portant transposition de la directive (UE) 2018/1972 du Parlement européen et du Conseil du 11 décembre 2018 établissant le code des communications électroniques européen). Art. 113(5) transposes art. 102(5) of EECC of

In that regard, POST considers therefore that it is important for the guidelines to clearly state that access to ISPs' service portals may be application-inagnostic and falls within the exceptions of art. 3(3) of the OIR.
To that end, an additional bullet point should be added to paragraph 35, which states this exception.

- Blocking all traffic should be allowed:

  Paragraph 35, 4th bullet point states that "*offers where the speed is throttled for all traffic after the data volume has been used up instead of blocking all traffic*" are typically admissible.

  As such, this statement amounts to the interpretation that blocking is typically *not* admissible. However, neither the OIR, nor the ECJ judgments consider blocking as problematic, for as long as it is applied to all traffic.

  It appears therefore necessary to either adapt the statement or to delete it, as it is seems not to have any basis and to go beyond the regulatory and judicial framework.

  Furthermore, this guideline shall be put in line with paragraph 55, which seems to acknowledge blocking as admissible, if applied equally to all traffic.

- Clarification which practices are admissible are needed

  On several occasions, the guidelines provide examples of commercial practices (of all kind and not only related to zero rating offers), which however seem to lack of a clear statement as to their admissibility under the OIR.

  For instance, paragraph 40 treats practices involving differentiated pricing to be applied to traffic within the same IAS offer. From the reading of other guidelines (for instance par. 40a or 55), differentiated pricing within the same IAS offer is inadmissible. Yet, the reading of paragraph 40 does not imply the same conclusion, adding thus regulatory uncertainty which the guidelines however aim to reduce to a minimum.

  Moreover, such clarifications should be coherent across all the guidelines. For instance, 138 states that ISP should specify "*in the case of price differentiation, a clear explanation on which data is counted under which cap or for which price*" whereas price differentiation by use of different data caps do not seem admissible from the reading of other guidelines.

- Use of language that provides for legal certainty

  Even though it is acknowledged that BEREC's mission is neither to approve nor to prohibit commercial practices *per se*, BEREC should make use of a language that provides for more legal certainty, especially in case which fall directly within the scope of practices covered by ECJ judgment. As such, expressions like "likely" or "most probably" should be avoided.

  A clear language is all the more important at this stage of the evolution of the guidelines, which, after 7 years of application of the initial EU Regulation, incur their 3rd update,

leaving market players with a lot of doubts about their margin of manoeuvre when it comes to potentially new and innovative services offers.