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Consultation on BEREC draft Net Neutrality Guidelines BoR (16)94

Danish Telecom Industry Association (TI)
Confederation of Danish Industry – Digital (DI)
Danish IT Industry Association (ITB)

TI/DI/ITB takes note of the BEREC Guidelines as an important tool to clarify how the net neutrality provisions in the EU Regulation 2015/2020 may be applied by the individual BEREC members.

TI/DI/ITB acknowledges that the Guidelines as explained by the BEREC Chair at the presentation workshop in Bruxelles 6 June 2016 only intends to develop and clarify the given provisions. We also acknowledge that the BEREC representatives emphasized the case-by-case approach to be taken e.g. when it comes to a possible assessment of zero rating practices and specialised services.

We find the BEREC Guidelines on certain issues are too prescriptive and go beyond the scope of the Regulation. Thereby the Guidelines fail to observe the right balance between the need to ensure open Internet access and at the same time leaving sufficient flexibility to NRA's also to enable the freedom for end-users to choose the most relevant and competitive offers and evenly important to avoid unnecessary reporting obligations. This is apparent when it comes to the following issues:

- Scope of Regulation
- 'Zero rating'
- Reporting/monitoring
- 'Specialised services'

1. Scope of Regulation

The Guidelines classifies VPN as an IAS since VPN is offered to the public and is not a Closed User Group (para. 11) as further explained by a distinction between VPN provided by a VPN application (para. 111) which is categorised as an IAS and an MPLS based VPN network service which can be seen as a 'specialised service'. However, this assessment of VPN services and the distinction between two type of VPN cannot be derived from the Regulation which concerning VPN states that:

> *Recital 17: However, the mere fact that corporate services such as virtual private networks might also give access to the internet should not result in them being considered to be a replacement of the internet access services, provided that the provision of such access to the internet by a provider of electronic communications to the public complies with Article 3(1) to (4) of this Regulation, and therefore cannot be considered to be a circumvention of those provisions*

VPN services including application based VPN services are in general, and without any distinction of application based VPNs, an important tool for the provision of business services by ensuring a managed high-quality, encrypted service for homeworkers and/or mobile access for remote locations/employers. The approach of the Guidelines in para. 11 to VPN therefore exceeds the scope of the Regulation and is in contradiction with the overall aim of the Regulation.

- The current wording on VPN in para. 11 and 111 should be removed and instead it should be noted that VPN services fall outside the scope of the Regulation

Furthermore, according to para 6. BEREC holds the view that NRAs have a mandate to intervene in the interconnection policies and practices of ISPs. We disagree with this interpretation of the Regulation. The subject matter of the Regulation concerns equal and non-discriminatory treatment of traffic in the provision of '*internet access services and related end-users' rights'*, and does not extend to IP interconnection practices or agreements.

It seems that BEREC's justification appears to rely on a misinterpretation of the term "commercial practices" in Art. 3(2) and Recital (7) of the Regulation. The objective of the said article and recital is to enshrine the freedom of ISPs and end-users to agree on the technical and commercial conditions and characteristics of the IAS and to subject commercial practices used between the same parties (i.e. ISPs and end-users) in connection with the retailing of internet access services to certain limitations. Commercial practices are defined by the Unfair Commercial Practices Directive where it is made clear that commercial practices should be understood as unilateral activities of ISPs related to the retailing of IAS services to end-users. The term

needs to be interpreted in the context of the article in which it is used, which prevents it from being extended to cover IP interconnect agreements.

Finally, it is the view of TI/DI/ITB that the term 'commercial practices' was introduced into the Regulation as a compromise afforded to Member States intending to regulate zero-rating. At no point in the legislative process was the term intended to include IP interconnect.

- The para 6. Should be modified to be in line with the Regulation, i.e. the reference to Interconnection policies should be removed.

2. 'Zero rating'

The Guidelines consider the role of 'zero rating' in some depth (para. 37 onwards) and deliver very categorical views (e.g. para. 39, 43 and 53) on what is not compliant with the Regulation, views that may not be justified for example when the Guidelines look at the role of zero rating in relation to innovation:

> *(39) .. However, the zero price applied to the data traffic of the zero-rated music application (and the fact that the data traffic of the zero-rated music application does not count towards any data cap in place on the IAS) creates an economic incentive to use that music application instead of competing ones. The effects of such a practice applied to a specific application are more likely to "undermine the essence of the end-users' rights" or lead to circumstances where "end-users' choice is materially reduced in practice" (Recital 7) than when it is applied to an entire category of applications.*
>
> *(43) .. whether the continued functioning of the internet ecosystem as an engine of innovation is impacted, for example, whether it is the ISP that picks winners and losers, and on the administrative and/or technical barriers for CAPs to enter into agreements with ISPs*

In this respect the BEREC guidance on the application of the Regulation's Article 3 on ensuring '*Open Internet*' should take into account the following two basic facts:

- 'Zero rating' has deliberately not been included in the Regulation by legislators
- The application of the Article 3.3 on commercial practices apparently including zero rating should only take place when the use of zero rating could have negative implications due to the state of competition ('*end-users' choice is materially reduced*' para. 40)

This is explained in a recent article by Alexiadis e.g.:

The omission from the terms of the TSM Regulation of any reference to a ban of the practice of "zero-rating", especially given the existing Net Neutrality rules banning such practices in jurisdictions such as the Netherlands, Slovenia and Norway prior to the adoption of the TSM Regulation, also support the fact that a more nuanced, fact-specific approach needs to be taken that is consistent with competition policy norms. Indeed, the Commission has itself confirmed the view that zero-rating "does not block competing content and can promote a wider variety of offers for price-sensitive users, give them interesting deals, and encourage them to use digital services". Such a normative view is a long way removed from the clear rule-making that one associates with ex ante regulation and is wholly consistent with the approach adopted under competition rules; by contrast, the roaming pricing aspects of the TSM Regulation are clear in their prescription that tariff information must be provided for free (i.e., zero-rated)

We therefore suggest two amendments to the Guidelines:

- Firstly, as also further highlighted by Alexiadis:
    - The Regulation (Recital 7) call for an assessment of a given commercial practice based on the *'market position'* of all the involved players (not just ISPs but also CAPs)
    - The Guidelines as well (para 43) say it has to be examined: *'… whether CAPs are materially discouraged from entering the market or forced to leave the market, or whether there are other material harms to competition in the market concerned'*

      This should imply that an assessment will have to rely on a proper definition of the relevant markets and then an assessment of all players' positon in order to prove presence of a potential dominant position as well as the possible anti-competitive effects. In other words, the key principle should be an effects based analysis of commercial measures such as zero rating bearing in mind the two-sided nature of such markets.

    - Therefore, the Guidelines should underline the need to take due regard to the interaction between competition in the CAP markets and in the ISP markets. For example, if one ISP should promote a certain service at the expense of other services competition will stimulate another ISP to take the opportunity and promote alternative service combinations

- Secondly in contrast to underlying assumption in the Guidelines para. 40-43 zero rating may actually contribute to the Internet as an '*engine of innovation*' as zero rating is one of several tools not to prevent but to create new innovative service offerings and to ensure a living competition as a tool enabling differentiated offers

meeting various customer demands. The Guidelines' underlying assumption seems to be that 'fringe innovators' are prevented from entering the market by zero rating but rather zero rating can be a way to highlight new services at the expense of otherwise large dominating service offerings. In any case the dominance of certain services typically social media is primarily related to the features and network effects of these services

- The Guideline exceeds in the guidance on 'zero rating' the scope for regulation provided by the Regulation Article 3.2 and the biased wording in para. 39, 43 and 52 should accordingly be less categorical and the potential for zero rating to promote innovation should be mentioned as well.

Finally, since the key point is to allow consumers to choose the service combinations and the prices they prefer, we therefore acknowledge BEREC's notion that the presence

> *(43) .. of alternatives - a practice is more likely to limit the exercise of end-user rights in a situation where, for example, many end-users are concerned and/or there are few alternative offers and/or competing ISPs for the end-users to choose from;*

since this observation has to be a key parameter if an NRA should make an assessment of a given practice.

3. Reporting/monitoring

The Guidelines provide detailed guidance on transparency and reporting/monitoring obligations that if applied literally by an NRA may not reflect the points made earlier by BEREC that users should be informed in a clear and meaningful way.

> *We have stated earlier that a fully effective transparency policy should fulfil all of the following characteristics:*
> - *Accessibility*
> - *Understandability,*
> - *Meaningfulness,*
> - *Comparability,*
> - *Accuracy*
>
> *In line with recital 41 of the Framework Directive and recital 51 of the Universal Service Directive, NRAs have an obligation when making provisions to do so in a proportionate way.*

These proportionality criteria which we assume are still valid should in practice mean that focus should be on the end-users' interest in key features typically such as insufficient capacity/speed compared with contracts rather than hypothetical impact of specific technical features for network optimisation.

Additionally, the Guidelines' para. 130 is likely to create uncertainty both for end-users and for the ISPs when it says that:

> '*Articles 4(1), 4(2) and 4(3) apply to all contracts regardless of the date the contract is concluded or renewed*'.

Such a retroactive application of the articles 4(1), 4(2) and 4(3) to any contract in the market (re paragraph 130) is not clearly foreseen in the Regulation and is obviously disproportionate, and entails an inappropriate burden for providers and consumers.

- Considering proportionality, the wording of para 130 should be changed so the said articles shall only be applicable to all contracts concluded after 30th April 2016.

An example is the requirements in the Guidelines para. 131:

> *NRAs should ensure that ISPs include in the contract and publish a concise and comprehensive explanation of traffic management techniques applied in accordance with the second and third subparagraphs of Article 3(3), including the following information:*
>
> - *how the measures might affect the end-user experience in general and with regard to specific applications (e.g. where specific categories of traffic are treated differently in accordance with Article 3). Practical examples should be used for this purpose;*
> - *the circumstances and manner under which traffic management measures possibly having an impact as foreseen in Article 4(1) letter (a) are applied;*

- The Guidelines should adjust this kind of requirements notably '*concise and comprehensive*' to reflect the Article 4.1.a:

  > *information on how traffic management measures applied by that provider <u>could</u> impact on the quality of the internet access services,*
  >
  > also in the sense that 'could' may imply that in case no substantial negative impact of traffic management can be expected then information can be given at general level.

While being mindful of the Regulation then monitoring and reporting should reflect the level of actual problems observed to avoid unnecessary burdens on the industry and evenly important the anti-competitive side-effect of the Regulation should be taken into account since the reporting obligations in combination with the possibility for NRAs to set minimum standards may lead to a de facto 'flattening' of competition. The Regulatory Framework's endeavour to create competition also between different platforms will be significantly weakened should the Guidelines para.174 be applied to its full extent as incentives to achieve a better competitive position by investing in better performing networks will be undermined:

In order to ensure compliance with the Regulation, and to promote the continued availability of non-discriminatory IAS at levels of quality that reflect advances in technology, NRAs could decide to:

- *require an ISP to take measures to eliminate or remove the factor that is causing the degradation;*
- *set requirements for technical characteristics to address infringements of the Regulation, for example, to mandate the removal or revision of certain traffic management practices;*
- *impose minimum QoS requirements;*
- *impose other appropriate and necessary measures, for example, regarding the ISPs' obligation to ensure sufficient network capacity for the provision of high-quality non-discriminatory IAS* (Recital 19);

- The concerns for preserving and incentivise competition both between ISP on the same platform and between platform operators as well as to avoid de facto unnecessary regulatory burdens should be reflected

4. Specialised services

The BEREC guideline does correctly not provide a (definite) list of possible services qualifying as 'specialised' but is only defining a number of parameters to be used if a given service shall be assessed.

However, the suggested parameters in the Guidelines seems to exceed what was intended by the legislators e.g. when the Guidelines in para. 102 and 104 say:

> *Initially, the requirement of an application is set by the provider of the specialised service, although requirements may also be inherent to the application itself. For example, a video application could use standard definition with a low bitrate or ultra-high definition with high bitrate, and these will obviously have different QoS requirements. A typical example of inherent requirements is low latency for real-time applications.*
> *NRAs could request from the provider relevant information about their specialised services, using powers conferred by Article 5(2). In their responses, the provider should give information about their specialised services, including what the relevant QoS requirements are (e.g. latency, jitter and packet loss), and any contractual requirements.*

The Regulation has however in Article 3.5 two main issues concerning delimitation of 'specialised services':

- 'Specialised services' shall not circumvent the restrictions put on provision of IAS i.e. '*optimisation shall be necessary*. *for a specific level of quality'.*

- However, the Regulation has not specified the technical parameters as such therefore a specification as made by the Guidelines may put unnecessary limitations on future new services be it in a 5G context or other new services that require specific technical features leading to a classification as a 'specialised service'.

- The 'specialised services' should only be offered if there is sufficient network capacity to provide these services in addition to IAS. In this respect we welcome the clarification concerning the role of access lines provided by the Guidelines in para. 118 that it is the choice of the informed end-user how to dispose of the capacity acquired:

  > *While IAS and specialised services directly compete for the dedicated part of an end-user's capacity, the end-user himself may determine how to use it. Therefore, NRAs should not consider this an infringement of Article 3(5) second subparagraph, as long as the end-user is informed pursuant to Article 4(1)(c) of the likely or possible impact on his IAS and can still obtain a minimum speed*

  - However, this notion is not reflected in the Guidelines para.115 which suggests that NRAs should verify if the provision of specialised services complies with the Regulation 3.5 2nd subparagraph as the Guidelines para. 115 say:

    > *NRAs could request information from ISPs regarding how sufficient capacity is ensured, and at which scale the service is offered (e.g. networks, coverage and end-users). NRAs could then assess how ISPs have estimated the additional capacity required for their specialised services and how they have ensured that network elements and connections have sufficient capacity available to provide specialised services in addition to any IAS provided*

  Level of coverage and of capacity offered vary geographically and between operators as competitive parameters and as long as no definite minimum level of capacity has been set it does not make sense to use coverage etc. as parameter in the assessment of specialised services.

  We further assume the intention is not to deprive users in areas with less coverage and/or lower capacity the access to various specialised services as e.g eHealth services which may only have limited capacity requirements but nevertheless require specific treatment to ensure performance and availbility.

In any case NRAs should request information from ISPs regarding capacity only when there is an apparent problem relating to the Regulation. There is no merit in burdensome data collections, if there are no actual problems relating to the availability and general quality of IAS in the market

- Concerning the assessment of 'specialised services' (e.g. *'verify'* in the Guidelines para. 101 and 107) the Guidelines should as well explicitly recall that NRAs shall not ex-ante assess services. It has been made clear by the Commission that services should not be notified to and ex-ante 'approved' by NRAs.

- Concerning the assessment of 'specialised services' the Guidelines should stick to the scope of the Regulation's article 3.5 1st subparagraph and the specific technical parameters in e.g. para.102/04 should be deleted

Finally, in relation to the case-by-case approach, we have in Denmark good experiences with an established Net Neutrality Forum with representation from consumers, the telecom industry, the it-industry and the regulator. This kind of forum could be considered a good practice for discussion of concrete cases and as such qualify the assessment to be taken by the regulator.

Yours sincerely,

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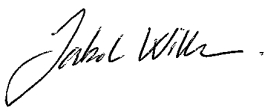

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