



**ETNO – GSMA contribution
to BEREC Public Consultation
“On the implementation by National Regulators of European Net
Neutrality rules”
18 July 2016**

About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with almost 300 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai and the Mobile 360 Series conferences.

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About ETNO

ETNO represents Europe’s leading telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO’s primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

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Executive Summary

ETNO and GSMA members welcome the opportunity to comment on the draft BEREC guidelines, but have concerns about the tight timing and the process of the consultation. Ideally, the guidelines would have been developed through a series of exchanges with the industry. Given the end of August deadline for the guidelines to be finalised and the fact that the current draft already represents a compromise among the NRAs, this will be difficult and the present consultation risks being a formality rather than meaningful exercise. Such a process may reduce legal certainty for stakeholders and limit the harmonisation of Open Internet rules, as the text may be challenged in courts in different Member States.

The Regulation on Open Internet 2015/2120 (further – “the Regulation”), was a difficult compromise to reach, involving two years of tough negotiations, during which every single word and rule was debated at length and finally agreed upon. The Regulation aims to ensure an open internet for end-users, while allowing reasonable traffic management and enabling innovation in a dynamic sector that is now deploying fibre networks and developing 5G.

With this goal in mind, several key aspects of the draft guidelines need to be reviewed as they go beyond what is necessary to implement the Regulation. This is the case of the guidelines relating to definitions, specialised services’ characterisation, commercial practices and interconnection markets, which all need to be revised. As they stand, the guidelines also risk hampering innovation by adopting too static an interpretation of networks’ evolution and markets’ functioning (for instance on business offers) or by imposing contractual obligations that place a large burden on internet service providers (ISPs) to the detriment of end-users. When finalising its guidelines, BEREC should refrain from introducing extra layers of regulation for services other than those defined in the Regulation.

ETNO and GSMA members’ primary concerns regarding the guidelines are the following:

- **The scope of the guidelines and the BEREC mandate:** On several aspects, the draft guidelines go beyond the mandate given to BEREC by the Regulation. The BEREC mandate is to “*issue guidelines for the implementation of the obligations of national regulatory authorities*”, also taking into account the scope of the Regulation itself (“*laying down measures concerning open internet access*” and establishing “*common rules [...] in the provision of internet access services*”). The BEREC remit is to provide guidance only, but the draft guidelines are currently going too far in determining what operators can or cannot do, for instance by prohibiting *per se* some kind of commercial offers, instead of taking the case-by-case approach stipulated by the Regulation.
- **Business offers & network evolution:** The draft guidelines do not take into account the specificities of business needs, notably in terms of customised requirements, such as traffic types’ allowances or barring of non-work related sites or guaranteed levels of service (§60, 64). Moreover the draft guidelines adopt a rigid and static interpretation of VPNs (§111) by distinguishing between VPN apps and VPN networks without considering future network evolutions. New technologies such as SDN/NFV and 5G will blur this distinction and centralise/virtualise the intelligence that is currently in the terminal, in the core networks.

It is essential that the final guidelines enable EU operators to remain competitive in these business markets, that they are technologically future-proof and, particularly, that they do not prompt customers to seek service providers outside the EU, more able to provide them with the flexible services they require.

- **Commercial practices and ex-post assessment:** The Regulation is clear in the fact that NRAs should only monitor commercial offers and services other than Internet Access Services on an ex-post basis. Yet, the draft guidelines create major uncertainties on this point and are unacceptably intrusive, making decisions in advance and in the absence of market conditions, especially in relation to commercial agreements. These aspects of the draft guidelines should be reviewed and several provisions deleted (see notably detailed comments on § 38, 39, 45). Regulatory intervention into highly competitive retail markets will ultimately harm the consumer by stifling innovation and limiting choice. It would make it difficult for non-commercial zero-rated services (such as eHealth and eGovernment SIM cards) to emerge for example. When trying to regulate commercial practices, BEREC should rely more on well-established EU competition law principles rather than adding new rules and criteria's for assessment.
- **Innovation with services other than IAS (SoIAS);** Co-legislators have decided not to define and not to regulate these services, but the draft guidelines take the opposite approach. Indeed, they provide a definition for SoIAS (§106), take an ex-ante regulatory position in relation to SoIAS (§ 103 and next) and seek to reverse the burden of proof (§104). The Regulation stipulates that SoIAS are allowed under certain conditions and it is for the NRAs to demonstrate when a given practice is not in line with the Regulation. Finally, the concept of "sub internet" offer (§17 or 52) is also questionable, as it is not part of the Regulation.
- **Traffic management and investment decisions:** As acknowledged by the Regulation, reasonable traffic management is necessary and cannot be avoided by simply increasing network capacity. For example, an increase in capacity does not reduce latency. In any case, the operator should be able to determine the network-dimensioning required to offer the best possible services for its customers in a competitive environment. Network-dimensioning should never be in the mandate of the NRA, as seems to be the intention of the guidelines (§70, 88 & 89 or 112).
- **Transparency and contractual performance:** BEREC's very prescriptive draft goes far beyond the limited scope of BEREC's mandate as included in Art. 5 of the Regulation. Several proposals are not fit for purpose, are very costly for ISPs and will come to the detriment of end-users. Due to the retrospective application of the Regulation, all EU broadband customers will receive newly defined contractual information that diverges from concluded contracts. This will lead to massive complaints and demands for redress. Good practices already put in place by ISPs would be overruled, causing new costs. The obligation to agree on fully customised speed ranges conflicts with ISPs' needs to provide standard tariffs for mass markets. Customisation will lead to lower maximum speeds, due to the inclusion of safety margins. National broadband targets will have to be lowered accordingly and ISPs' will have less incentives to differentiate through investment in the

latest technologies. Moreover, the interpretation of performance parameters, such as normally available speed, does not match technical realities. Customers will have more, but less valid information on their IAS. Invalid contractual information combined with NRAs' non-certified monitoring systems will lead to less customer satisfaction and unjustified user complaints.

In summary, the guidelines, as currently drafted, risk reducing consumer choice, stifling further opportunities for businesses and creating legal uncertainty.

Concerns on BEREC draft guidelines on the implementation of European Open Internet Rules

ETNO and GSMA members have major concerns about the draft BEREC guidelines on the implementation of European Open Internet rules with respect to the following:

- BEREC process for the forthcoming adoption of Open Internet Guidelines
- Scope
- Definitions
- Commercial practices, and zero-rating offers
- Traffic management
- Services other than IAS
- Transparency and contractual performance
- Supervision and enforcement
- Entry into force and transitional provisions

Note: the paragraphs of the BEREC draft guidelines to which the ETNO and GSMA concerns refer, are identified as “§ X”. For instance, a paragraph beginning with “§ 18” means that the concerns expressed refer to paragraph 18 of the BEREC draft guidelines.

BEREC process

1. The process followed by BEREC to adopt its draft guidelines and consult stakeholders is highly questionable. There has been no significant transparent interaction with stakeholders nor with the industry during the elaboration of the draft guidelines. The only workshop organised with industry associations took place at the very beginning of the process, in late 2015, with no debate about BEREC’s possible interpretation. Subsequent requests for additional exchanges of views have been refused. BEREC received the views of an unbalanced panel of experts during a closed door workshop in February 2016. The six week process of consultation with stakeholders (from 6 June to 18 July) in view of the final adoption of the text by end of August, risks being just a formality rather than a meaningful exercise. Given that the draft guidelines are based on a text understood to be a complex compromise among BEREC members, there seems to be little possibility of substantive changes to the guidelines in response to the results of the consultation.
2. BEREC’s timeline for the adoption of the guidelines was not synchronised with the deadlines provided by the Regulation. The Regulation entered into force on 30 April 2016, as stipulated in Art. 10(2). BEREC is obliged to provide guidance by 30 August. This leaves providers with major legal uncertainty while they await the final guidelines. This uncertainty is even worse in the case of Art. 4(4) which entered into force in November 2015 already, shortly after the Regulation was adopted. BEREC needs to acknowledge that timeframes are challenging and do not reasonably allow providers to comply fully and adequately with all provisions at once as recommended in the final guidelines. The delay creates uncertainty around network management practices and the contractual policy of operators. The process lacks regulatory predictability and increases related costs for operators. The guidelines need to explicitly grant NRAs flexibility in terms of timing and when the

guidelines should be considered as a possible benchmark for providers' compliance with the regulatory provisions, e.g. no earlier than 12 months after the final adoption of the guidelines. Irrespective of such a transition phase for applying the Guidelines, ISPs have to comply with the regulatory obligations since 30 April. The guidelines should explicitly highlight that NRAs may disregard them as a benchmark for assessing the compliance of business practices that were established before the final adoption of the guidelines.

3. The unsatisfactory process for the adoption of a text which is of great importance to market players, and which may be challenged in the courts¹ in some Members States, weakens the legal security of all stakeholders.

Scope

4. The European Regulation 2015/2120 of 25 November 2015 (hereafter "the Regulation") lays down measures concerning "*open internet access*" as expressed in its title. Art. 1 states that the subject matter and scope of the Regulation is "*to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services.*" Therefore, **to ensure a harmonised implementation in Europe, the BEREC guidelines should refer to "open internet access" and not to "net neutrality", as the latter wording is deliberately not used in the Regulation.**
5. **The scope of the Regulation:** The objective of the Regulation is to safeguard equal and non-discriminatory treatment of IAS traffic. It carefully tries to balance this objective with the rights of operators to continue innovating and diversify and differentiate themselves through their commercial offers. However, the draft guidelines are very prescriptive on some aspects, taking a more restrictive interpretation of the Regulation, as detailed below.
6. § 4 - The Regulation provides that the definitions set out in Art. 2 of the Directive 2002/21/EC apply. These include a **definition of "end-user"** as "*a user not providing public communications networks or publicly available electronic communications services*". BEREC has interpreted this to mean that this includes **Content and Application Providers (CAPs)** and has gone even further by providing that CAPs are protected under the Regulation insofar as they use an IAS to reach other end-users. This is incorrect. They are protected insofar as they use their own IAS to distribute/access content under Art. 3(1). **They do not have rights which are independent of this and it should be clarified within the guidelines.**
7. **The scope of the BEREC mandate:** The Regulation requires BEREC to adopt guidelines to harmonise the way NRAs execute their competences under the Regulation. BEREC should act as an advisory body clarifying the principles found in the Regulation and not exceed its mandate by acting on several aspects as a lawmaker without the corresponding legal basis. This relates in particular to provisions where BEREC prescribes what is legal or not for

¹ See in particular the recent decision N°390023 of Conseil d'Etat in France, which allows the challenge in court of texts such as communications, guidelines or recommendations when they may affect the practice of administrative authorities, are supposed to be known by stakeholders and have economic effects.

operators, thereby seeking to extend the material scope and rules; see further details below.

8. § 5 and § 6 - The Regulation concerns end-users' rights in the retail market. **Interconnection issues**, including between CAP and ISPs, should be addressed through relevant regulatory provisions concerning interconnection. **There is no justification for BEREC to lay down recommendations on these aspects in their guidelines; these provisions should therefore be deleted.** BEREC should also clarify in §47 that IP interconnection practices are outside the scope of the Regulation (and not only in the scope of Art. 3(3)). This same approach should also be taken elsewhere in the guidelines.
9. § 18 – When a customer demands a service in addition to the IAS, the terminal equipment should not be considered as the only resource allowed to limit access to certain end points of the Internet. As set out in the general principles of EU law and settled case-law, comparable situations should not be treated differently and different situations should not be treated in the same way unless such treatment is objectively justified. Such a provision risks creating a discriminatory situation in which limited access for “device-based” offers would be permitted but not, for instance, for an app installed on a portable device (the app would have a limited number of reachable end-points). The principle of technological neutrality would also be violated, in breach of the Regulation (Recital 2). Therefore the right to provide a specific service, or a limited number of services over an IAS to meet customer demands should apply without discrimination to all undertakings in the digital value chain, not only to providers of terminal equipment. **This paragraph should therefore be amended to enable any element in the digital value chain to provide end-users with access to such services.**

Finally, IAS providers should not be deemed responsible for the quality of the service when a service sends all encrypted traffic from an OS or a browser of a device to a specific proxy over an IAS.

10. § 23 - *“End-users have the right to use the terminal equipment of their choice”*. **BEREC should however add in this provision that terminal equipment must comply with the interfaces of public networks that network operators have the obligation to publish under EU law** Directive 2008/63/EC on competition in the markets in telecommunications terminal equipment.

Definitions

The BEREC guidelines should use the same definitions as those in the Regulation:

11. § 2 - The Regulation defines IAS and by default the other services without other considerations; BEREC should therefore avoid using the term ‘specialised services’ or using criteria that were disregarded by the co-legislators. **BEREC should not refer to “specialised services” in its final guidelines but use the concept of “services other than internet access services” or the acronym SoIAS.**

12. § 2 - BEREC refers to content, applications and services provided on top of the network as “applications” while using the term “service” for the underlying electronic communication service. By making this distinction, BEREC implies that all “applications” are provided by so-called over-the-top providers (OTTs) and deserve protection, while telecom operators’ services must abide by the rules set by the Regulation. This definition does not account for the possibility that telecom providers can also supply “applications”. The misunderstanding might lie in the reference to the underlying “electronic communication service” in the definition instead of to the underlying IAS. In any case, **there is no need to insert this confusing distinction at all, as it is not present in the Regulation. It should thus be deleted.**

13. § 12 - The **definition of “public” when defining IAS** - BEREC has defined “*provider of electronic communications to the public*” to mean services which are offered to any customer who wants to subscribe to the service or network. The draft guidelines stipulate that if a service is offered to a predetermined group of end-users, that service may not be considered as publicly available. ETNO and GSMA members **would be grateful for more clarity on this point.** If services are offered to enterprise customers who are required to fulfil specific conditions (e.g. number of employees, size of business) or if they are provided on a bespoke basis, we would assume that these services are excluded from the scope of the Regulation as they are offered to a pre-determined group of customers. The same reasoning has been applied to WIFI hotspots in cafes and any interpretation must be consistent. This is essential to continue to provide guaranteed quality for enterprise customers who rely on specific service levels to compete on the global stage and also to deliver time critical services.

14. § 17, § 35 and § 52 – Although the Regulation does not define the **concept of “sub internet” services**, BEREC prohibits such offers, raising questions about the possibility of launching innovative offers, such as eHealth or eGovernment SIM cards. These paragraphs risk creating a discriminatory situation in which limited access for “device-based” offers is permitted but not for “access-based” offers. Users, in particular businesses, should be allowed to contract with ISPs for the service that best fits their requirements. **These paragraphs should be deleted as they create new rules beyond those in the Regulation.**

15. Neither the Regulation nor BEREC’s draft guidelines clarify that single play voice services - which include narrowband internet access services - are excluded from the obligations. This clarification is required to ensure that customers of single play voice services don’t fall under this Regulation and, therefore don’t receive information that is of no use at all and potentially confusing. It would not make sense to inform consumers about bandwidths of narrowband access services or about traffic management measures for instance.

Commercial practices

Various types of commercial practices answer various end-users' needs

A large proportion of end-users struggle to understand their online usage in terms of their consumption of Mbytes, because such consumption varies widely between application categories and between providers of a given application category. End-users' lack of control on data consumption leads to reduced online usage as users over-compensate by switching off data, especially when they are using mobile services. **A variety of new and innovative services seek to address this question of data consumption.** These include:

- 'Pure zero-rating' - An operator zero-rates a site for all of its customers, irrespective of their particular tariff plans with no data usage restrictions. Examples include services such as customer care apps and sites providing customer support or enabling customers to check their balance and top up, network analysis apps that enable customers to measure the speed of their IAS service. This model is also particularly well suited for education, health and e-government services, such as Wikipedia Zero. It has similarities to the current practice of offering freephone numbers for customer care and charitable services. Recent empirical research² has found that zero-rated plans don't reduce the actual variety of applications or content used by end-users. While in some cases such "discriminatory" practices might in theory be harmful to certain sites not benefitting from such a practice, an assessment based on the specific facts would need to be done. This assessment would need to take into account the market positions of the ISP and/or the preferred site, the impact on competitors and whether foreclosure actually occurs as well as the impact on customer choice. For this reason and given that it is a form of discriminatory pricing that will most often produce real benefits for consumers, the Regulation has not expressly prohibited zero-rating. In contrast to the Regulation, the BEREC guidelines seek to prohibit this model, irrespective of the effects on consumer choice or the benefits to those consumers.
- 'Sponsored data' – Sponsored data can help contribute to reducing network costs for end-users. Indeed CAPs support part of the cost, allowing ISPs to propose lower IAS prices and consequently increasing choice and penetration of IAS in the population. Such offers are similar to telephony freephone services, or to "transport paid" postal services, which are never criticised as non-neutral. Sponsored data offers are supported by economic theory³ and may incentivise end-users to try new innovative services instead of mainstream platforms and CAPs; they are therefore innovation-friendly. Such pricing schemes can enhance innovation and competition and increase user choice. Only offers involving dominant CAPs could, potentially raise a concern if they actually limited choice for end-

² "Zero Rating: Do Hard Rules Protect or Harm Consumers and Competition? Evidence from Chile, Netherlands and Slovenia" Roslyn Layton, Aalborg University, Center for Communication, Media and Information Studies, Silvia Monica Elaluf-Calderwood London School of Economics & Political Science (LSE) - Department of Management ; Oxford Brookes University, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587542.

³ See for instance "Internet Regulation, Two-Sided Pricing, and Sponsored Data" by Bruno Jullien and Wilfried Sand Zantman, TSE, January 2016.

users. For example, if dominant CAPs require ISPs to set conditions that limit the possibility for smaller CAPs to sponsor their own content. Conversely, sponsored data models can help smaller content providers, who cannot compete in terms of building complex content delivery networks to optimise their traffic; BEREC should acknowledge that sponsored data offers do not raise specific issues.

- “Bundled data and content” - A new emerging model is one where content and data are bundled into one overall price. Mobile operators might, for example, combine the price of data and content in a single music offer, in return for specific tariffs or as an add-on option. This provides a worry-free option to customers who have purchased video or music services through their own tariff. While there may be specific circumstances in which both the operator and the content provider have market power and where customer-choice is severely restricted, there may also be many circumstances in which this type of service provides real benefits to consumers, who can access the service they want, while helping smaller providers compete more effectively.

- “Content categories” – A category of content (social, music, video) is priced differently, either within a tariff or as a separate bundle. As recognised by the BEREC guidelines, these offers are unlikely to affect customer choice. The guidelines should not prevent differential pricing from applying when a data cap is reached, as this causes confusion and reduces the value for both the end-user and the content-provider.

BEREC guidelines should remain in line with the criteria of the Regulation and with general principles of the EU law when assessing commercial practices.

The BEREC draft guidelines need to be consistent with the key principles enshrined in the Regulation as follows.

First of all, the Regulation is not designed to regulate marketing, pricing and product issues. To go beyond what was intended and have an *ex-ante* type of approach to commercial practices - which would pre-define how companies develop their offers, set their prices and sell their services - would have a devastating effect on the free market economy. In practice, this would mean that companies in highly competitive markets would not have the opportunity to differentiate their offerings to the benefit of their customers. This in turn would lead to significant restrictions on ISPs’ activities. For example, it could discourage companies from proposing new services and pricing models that form a vital component of effective competition. Competition legislation in Europe is fully equipped to deal with any problems in commercial practices and remain in line with the criteria in the Regulation.

Rec.7 of the Regulation states that NRAs should be empowered to intervene against agreements or commercial practices which, by reason of their scale, lead to situations in which end-user choice is materially reduced in practice. **Therefore, when it comes to commercial practices, it is clear that the legislation calls for an ex-post case-by-case assessment, based on the following criteria:**

- a) **Scale** of the practice,

- b) **Materiality** in reduction of end-user choice,
- c) Reduction of **choice in practice**.

On many aspects BEREC's draft guidelines contradict the Regulation by prohibiting per se some commercial practices.

Moreover, the **guidelines should avoid potentially restricting customer choice**, which is protected by Art. 3(1) and 3(2), by preventing customer from negotiating commercial and technical characteristics of their IAS with the ISP. Under Art. 3(2), end-users have the right to agree the commercial and technical conditions and characteristics of the internet access service of their choice. Choice is a key concept throughout the Regulation. End-users have the right in Art. 3(1) to use the content/applications/services of their choice, choose their terminal equipment and negotiate the conditions of their service. The only restriction is that such agreements should not limit their ability to choose what services they can access pursuant to Art. 3(1). Recital 7 also guards against commercial agreements that materially restrict end-user choice.

With respect to differential pricing, BEREC is correct to say that such practices may influence end-users' exercise of their rights without necessarily limiting them. Price discrimination is a well-known and well-studied topic both in competition law and in economics. Except for certain situations in which it can be deemed to constitute an abuse of dominant position, price discrimination is a welfare-enhancing commercial practice that increases the total output of a given industry. Differential pricing can create more choice for customers, allowing them to purchase the services that best meet their needs. It can also help create services which are beneficial to society, whether e-government, education, health or other services. Finally, differential pricing can help smaller content providers drive adoption of a less well-known service or compete more effectively within a content category, such as video.

Non-discrimination is a general principle of EU law and, therefore, is a higher norm than the one referred to in the Regulation. However, the concept of discrimination in the guidelines appears to be broader and vaguer than the corresponding concept under EU law. In principle, when assessing the cases of discrimination, the assessment should be limited to whether the measure results in a disadvantage and, if so, whether the measure is objectively justified. This is a widely used approach in EU Competition law, and BEREC should not adopt new types of tests. For a disadvantage stemming from discrimination to exist under EU law, it requires some kind of damage or harm to occur. Building on this premise, it is therefore important for the guidelines to outline that every commercial practice or traffic management measure will undergo the above described assessment process before being declared illegal on the basis of discrimination.

Several aspects of the draft guidelines should, therefore, be reviewed so as not to prohibit commercial practices per se.

In line with the criteria of Rec 7 of the Regulation (as set out above) as well as other corpus of EU principles and law, the following paragraphs in the guidelines should be reviewed.

16. § 25 – **Tethering**: The draft guidelines consider that the practice of restricting tethering is likely to constitute a restriction in breach of the Regulation. But this is not explicit in the Regulation and a more proportionate approach should be taken as such prohibition risks jeopardising innovation for IAS providers. Prohibition would imply risks to some commercial offers by ISPs, such as unlimited data offers or other types of offers that reduce the IAS bandwidth when the cap is reached. BEREC needs to assess the broad benefits that such a general “non-restriction” on tethering would provide for end-users and what it would deprive them off. **The sentence starting with “for example” should thus be deleted.**

17. § 32 – As set out above, the Regulation allows end-users and ISPs to agree on the technical and commercial conditions and other characteristics of the IAS of their choice. In the draft guidelines, §32 is more restrictive and incorrect when it stipulates that data volume and speed characteristics must be applied in **an application-agnostic way**. For example, an end-user may agree to an IAS with a specific data cap, but that offers free access to customer care and top-up websites. **The sentence “moreover [...] condition” should thus be deleted.**

18. § 38 and § 45 - **While the Regulation does not prohibit zero-rated offers per se, the draft guidelines take a negative stance to differential pricing based on the content or services being accessed and go even further by prohibiting zero-rating once the end-user reaches their data cap.** However, such offers can benefit end-users, as set out above. For instance, such offers can give customers an opportunity to trial new services (such as video or music streaming) or to access necessary services such as customer services (topping up the mobile data bucket after the initial amount has been consumed) or speed tests (as foreseen in Art. 4 (4)). Zero-rating can also enable end-users to continue using the internet in a simple and accessible way, via top up pages, without having to worry about their data consumption. In addition, both today and more so in the near future, voice calls will be delivered as data calls. Some of these calls (such as emergency calls, freephone numbers, or customer’ care lines) will be priced differentially and should not be prevented by the presence of a data cap.

The Regulation allows operators to continue exploring innovative business models on the basis of a case-by-case ex-post monitoring by the NRA. As set out above, the market is based on segmented offers. For example, a provider of a music app may prefer to charge a higher data rate (and collect a percentage of the revenue from the operator) than to charge for the content itself. This makes the collection of revenue much easier for both the content provider and the customer and is similar to the structure already in place for premium rate services. Rather than reducing the development of new applications, the freedom to explore zero-rated business models will stimulate the development of services by providers who do not have the funds to invest in complex revenue collection. Providers must be free to offer a variety of services, at different prices, linked to the value of the offers. The

Regulation gives providers this freedom and the scope of the guidelines means BEREC should not alter that situation.

§ 38 and 45 should therefore be deleted from the guidelines.

19. § 39 - The draft guidelines also strongly advise against zero rating an application. For the reasons given above, this type of blanket ban is not in line with the aim and the terms of the Regulation as each case needs to be considered on its facts. Zero-rating some, but not all content, does not “pick winners and losers.” It can be an efficient way for providers to meet consumer demand for particular data, while increasing the consumers’ ability to access the content they wish to access. **This § 39 should be deleted and the guidelines should instead use existing competition law practice to establish what is the standard for a material reduction of choice for end-users.**

20. § 39, § 41 and § 42 - Openness should be a key point for NRAs when assessing a commercial practice concerning IAS. If all CAPs have the same rights and ability to conclude commercial agreements with ISPs, then the practice should be considered as compliant with the Regulation. As explained above, this is the case of “sponsored data” offers, which are offered to all CAPs and through which the IAS traffic is paid by the CAP rather than by end-users. Sponsored data should be permissible in any commercial form, either when the CAP pays for the traffic consumed by the client, or when the CAP pays so that the client can recover the initial speed of the service (for those bonus-based offers in which the speed is reduced once a limit is reached).

21. § 43 - This paragraph should be substantially reviewed for the following reasons:
 - **It should be made clear in this paragraph that the analysis must be done on an ex-post basis and also that all of the factors need to be considered, rather than just one being sufficient;**
 - Fourth bullet point: There is a key element missing from the analysis, the non-discriminatory character of the considered commercial practices;
 - **The last bullet refers to Rec. 13** of the Regulation and adds a criteria on the freedom of expression and media pluralism. However Rec. 13 only concerns traffic management going beyond what is reasonable (first exception) and should not be applied in the context of commercial practices. Secondly, the Regulation does not address the issues of media pluralism and freedom of expression and neither vests the NRAs nor other competent authorities the obligation to consider these aspects in the context of the “open internet”. There are other laws dealing with these issues. **This bullet point should be deleted.**

22. § 52 – As set out above, the concept of non-discrimination is a well-known European principle; this § should be reviewed so that it is in line with the meaning of the non-discrimination principle in the context of EU law.

IAS traffic management

IAS traffic management should be compatible with IAS quality segmentation that addresses consumers' needs

23. § 48 and § 60 - The principle set out in the Regulation is that all traffic in relation to a given IAS should be treated equally, “when providing internet access services”, that IAS providers should not discriminate between CAPs and should not interfere in the relationship between CAPs and end-users. But it does not entail that all individual IAS should be identical, as also reminded by Rec. 8 of the Regulation. Art. 3(2) of the Regulation explicitly supports the ability for ISPs to segment IAS by characteristics such as speeds and volumes. Such segmentation can involve quality differentiation between individual accesses, which is particularly relevant to meet demand for business-grade access. Therefore, when analysing non-discrimination, NRAs need to account for the freedom for ISP to segment the quality between the IAS offers provided to different end-users and addressing different needs. This freedom is embedded in the Regulation as:

- It does not impose specific rules concerning management of traffic with regard to two different end-users accesses. Any rigid rule on how network resources should be allocated between different end-users using IAS services of different quality or speed requirements would go beyond the provisions of the Regulation and lead to inefficient and arbitrary outcomes.
- Applications and services should not be confused with end-users. Whereas the Regulation prohibits commercial discrimination of traffic management between categories of applications and services within an IAS, it explicitly supports segmentation of IAS offers to end-users, and therefore commercial segmentation between end-users.

QoS applications do not inherently degrade or impact other contents or applications that are less sensitive to transmission quality. The operation of the Internet network has been always based on algorithms that assure an adequate traffic handling and permit to assign each traffic the transmission capacity necessary as per its characteristics and specific critical nature. Such reasonable network management practices can improve the traffic delivery experience for all service types, with the data accorded its appropriate priority (e.g. real-time two-way video requires a higher priority than email, in order to ensure a quality end-user experience).

Quality segmentation between customers that have different QoS requirements (e.g. business customers) is a typical case for which the freedom provided by the Regulation should apply. Unreasonable constraints to the use of reasonable traffic management and prioritization practices can negatively affect the quality of the service and reduces the usefulness of the Internet for the users. **BEREC guidelines should explicitly confirm that different customers may, under Art. 3(2), agree different speeds with their ISP. In addition, if a customer negotiates a bespoke arrangement for specific QoS requirements, the service would no longer be an IAS given that the negotiated service is not available**

to the general public, and would therefore fall outside the scope of the Regulation. The same remark applies to § 110.

24. § 61 - BEREC requires that *“in order to identify categories of traffic, the ISP relies on the information provided by the application when packets are sent into the network”*, and even that *“Encrypted traffic should not be treated less favourably by reason of its encryption”*. This guideline implies that, in order to decide whether or not to apply network management measures on a certain packet, IAS providers should rely on information provided by either the header of the packets itself or directly by the content provider when the traffic is encrypted and the IAS provider has no means to detect the kind of traffic it is transporting. This would lead to a high degree of risk for the IAS provider, opening the door to fraud, either by mismatching the header with the real content or by declaring one traffic for another in case of encryption. In some cases, when the application uses proprietary protocols, it would even be utterly impossible from a technical point of view. **The second sentence of § 61 should be amended as it would not be proportionate to require IAS providers to automatically apply the foreseen network management measures on traffic categories on the basis mentioned above.**

25. § 64 - **Prioritisation between traffic concerning different IAS can support efficient network architectures for the provision of high quality IAS.**

For instance, mobile infrastructure could contribute to efficient fixed IAS provision, assuming the Regulation isn't interpreted in a rigid way that inadvertently prohibits it. However, if the Regulation is interpreted as prohibiting prioritisation between types of traffic of different IAS services, then an efficient contribution of mobile infrastructure to fixed IAS service would become impossible.

- For example, hybrid fixed mobile access can be used to improve fixed access speed. Internet access provided at a fixed location may take advantage of spare capacity available on mobile access to increase their access speeds, when they are not used by customers of mobile services. Nevertheless, when mobile customers need to access the internet, they should get priority on mobile access resources over fixed access customers which only use mobile access resources as a complement. However, if such prioritisation were forbidden by a rigid interpretation of the Regulation, then the risk that mobile access consumers would experience congestion due to traffic generated by fixed access would be too high, which eliminates the opportunity to efficiently improve access speed with such hybrid access.

Prioritisation between traffic of different IAS can also be justified to serve specific needs, such as those of police, fire department, hospitals or other emergency services. Such users do not necessarily use leased lines or VPNs on dedicated resources, but may need urgent access to information only available on the open Internet. If prioritisation between different types of traffic of different IAS is considered as prohibited, then emergency services may be denied access to vital information.

BEREC guidelines should not prevent or hamper the emergence of network evolutions based on 5G or SDN/NFV solutions and/or adopt a too static approach to business VPNs

The driving vision of 5G is to enable the internet to become far more attentive to user demand and responsiveness, whether the users are humans or things. 5G networks will utilise cloud, software and “network slicing” solutions to become more flexible, reactive and efficient. The draft guidelines risk locking in today’s technologies and thereby limiting network and service innovation.

26. § 50 - The Regulation permits reasonable traffic management recognising that it contributes to the efficient use of network resources and optimisation of overall quality. While the Regulation focuses on the technical needs of the traffic, the draft guidelines go further and provide that *“packets can normally be considered to be treated equally as long as all packets are processed agnostic to sender and receiver, to the content accessed or distributed, and to the application or service used or provided”*. **Traffic today, and even more so in a 5G world, will have different needs and cannot be processed in a way that is “agnostic to sender and receiver, to the content accessed or distributed, and to the application or service used or provided”. This wording should be deleted.**

27. § 111 – Although the notion of “VPN” could be divided between “VPN application” (over IAS) and “VPN network service” (over a SoIAS), this division is not future-proof as it ignores the impacts of SDN and NFV, and how they address business needs. Under SDN and NFV architectures, existing dedicated private network resources will be replaced by software-defined routers available in the cloud and reachable on-line. By definition under SDN, “VPN network services” and “VPN applications” will merge.

It is of critical importance for the future of the European economy and innovation that business grade access to software and virtualised networks located within the internet can be guaranteed when implementing the Regulation. It is all the more important not to deprive European and multinational businesses of this possibility, also taking into account rules applying in other part of the world like the US FCC 2015 Open Internet order that only concerns mass market subscribers to broadband internet access services. As they stand, the guidelines risk incentivising European and multinational customers from migrating their services to non-European platforms that are able to provide them with the specificities that they require. **This § 111 should be reviewed in order to allow technology evolution and be future proof. BEREC guidelines should not restrict the way innovative offers are delivered in the future.**

Traffic management is allowed under certain conditions, and needed; it should not be confused with operators’ investment decisions

28. § 54 – Art. 3(3) - The Regulation provides that ISPs are free to technically optimise the IAS service they provide to their customers as long as they use reasonable traffic management as defined by the Regulation itself. Excessive regulatory interference in this domain would hurt the efficient management of IAS traffic, impede competition between providers and ultimately harm end-users. The Regulation clearly acknowledges the need and right for

operators to manage their networks. **BEREC should therefore delete wording such as “prima facie appears to infringe this principle”.**

NRAs should focus on the outcomes of traffic management, rather than monitoring the technical options chosen by each ISP to achieve these outcomes. To keep operational traffic management efficient for the benefit of end-users, administrative interference should be avoided.

29. § 58 – Again the draft guidelines’ requirements are more restrictive than the Regulation. They require NRAs to monitor that ISPs properly dimension their network and that application-specific congestion management should not be applied or accepted as a substitute for more structural solutions, such as expansion of network capacity. The guidelines also state that traffic management should only be used if there is no alternative (and less interfering) way of achieving this aim (e.g. equal treatment without categories of traffic) with the available network resources. However, in practice, traffic management is a critical part of network operations and is essential to increase the overall network quality and to provide customers with a better performance and usage experience. **As a consequence, the fourth bullet point should be deleted (“there is no less interfering [...] with the available network resources”).**

30. § 59, § 60 and § 63 - Determination of the required QoS level and optimisation (either through QoS or QoE) for a given service should remain the sole responsibility of ISPs and not be subject to arbitrary administrative control. Differentiated treatment of voice or video packets may be necessary to ensure quality or to manage network capacity. The needs of emergency communications or law enforcement, and public safety and national security authorities may also require traffic prioritization for public safety purposes. Otherwise, it would harm the consumers, or public authorities, who would be deprived of the benefit of competition between providers of quality services. It may also lead to lengthy and costly discussions on complex issues, placing a significant burden on NRAs, operators, and ultimately on end-users.

31. § 84 –This § starts with: “In exceptional cases...”, and then deals with all types of congestion (impending, exceptional, temporary). This means that the paragraph qualifies the three types of congestion as “exceptional”. However, this is not implied by the Regulation. Treating all types of congestion as “exceptional” would be a source of uncertainty for more recurring or permanent traffic management. **The word “exceptional” at the beginning of the § 84 should be removed.**

32. § 70 and § 88 - The draft guidelines clarify that a trigger function can be implemented on an ongoing basis. This is in line with the technical realities as traffic management is integral to the way networks are configured and is not something which can be switched on and off at any time and in all cases. The guidelines should however not go on to state that *“However, where traffic management measures are permanent or recurring, their necessity might be questionable and NRAs should, in such scenarios, consider whether the traffic*

management measures can still be qualified as reasonable within the meaning of Article 3(3) second subparagraph.” Latency needs, in particular, cannot be addressed simply by adding more capacity. As explained in Rec. 9 of the Regulation, traffic management is about the efficient use of network resources and will continue to be relevant as more and more devices become connected, delivering a much wider and more diverse set of applications and services that have significantly more heterogeneous technical requirements. Moreover, in a highly competitive environment, such as the IAS market, it is the ISPs’ aim to provide the best possible service to their customers, taking the necessary measures, both in terms of traffic management and network dimensioning, to survive in the market. So long as traffic management practices are reasonably transparent and there is no evidence of an anti-competitive intent to such practice, further intrusion limiting the many types of network management practices that are reasonable is unwarranted. Thus, the draft guidelines are unnecessary and unjustifiably intrusive, going above and beyond what the Regulation clearly defines. **The last sentence of § 70 (“however....subparagraph) should be deleted. The same remark can be made to § 112.**

33. § 89 – Again the draft guidelines’ requirements are more restrictive than those stipulated in the Regulation. They require NRAs to monitor that ISPs properly dimension their networks and that application-specific congestion management is not applied or accepted as a substitute for more structural solutions, such as expansion of network capacity. However, as discussed above, traffic management is a critical part of network operations and is essential to increase the overall network quality and to provide customers with a better performance and usage experience. **Therefore, § 89 is not proportionate and is not consistent with the Regulation according to which NRAs shall monitor if ISPs are compliant with the provisions and intervene where necessary.**

ISPs are not liable for all congestion cases

34. § 81- To allow traffic management only after a security attack is detected is misguided – by then it will be too late to address the problem. Thus § 81 weakens the ability of operators to fight against piracy or security problems.
35. § 85, § 86 and § 87 - When assessing congestion cases, NRAs should take into account the fact that not all congestion situations can be controlled by ISPs. CAPs can operate their own networks or have agreements with transit providers, which can also influence the routing of the internet traffic, the users’ own network, and can impact the performance of the services provided. The choices or policies of these third parties can limit end-users rights to benefit from an adequate level of quality of service for IAS.

ISPs should remain able to block illegal content and propose content filters to end-users

36. § 35 - If an IAS provider offers an option by which end-users may choose for whatever reason to ban types of applications or specific content, ad-blocking, or access to certain categories of sites, this should not be considered as a restriction of freedom of choice of

end-users. On the contrary, it is an enhancement of end-users' choices and freedom. **BEREC should not prevent end-users from making personal choices.**

37. § 75 - The draft guidelines give an example of advertising blocking: if chosen by the end-user – and terminal equipment-based – it will be permitted, but if it is network-internal, it will not be permitted, unless the exception for reasonable traffic management is met. This is discriminatory and not technology-neutral (network level vs terminal equipment based). It is the outcome that is important (“open internet”), not the level at which it is technically executed. Users should be able to apply any restriction they want, as long as they have chosen to do so knowing the consequences. **This § 75 should therefore not only refer to “terminal equipment- based restrictions” but to any restrictions chosen by the users.**

Provisions related to encrypted traffic should take into account the limited knowledge of ISPs about the nature of this traffic

38. § 57 and § 61 - ISPs may have little knowledge on the specific requirements of encrypted traffic, depending on whether the encryption chosen by the CAP only covers the payload, extends to the metadata or also includes the header. Such encryption may limit the ability of the ISP to use traffic management in accordance with the characteristics of the corresponding traffic. **BEREC should therefore delete/amend those sentences.**

Services other than IAS (SoIAS)

BEREC guidelines should not adopt a more restrictive approach on SoIAS than the Regulation; those services are not to be defined and NRAs monitoring can only be done ex-post

39. § 98, §103, §104, §105, §107, §108 - The key principle of the Regulation, as written in Art. 3(5), is that providers “*shall be free to offer services other than internet services*” under specific conditions. This acknowledgment of ISPs freedom to provide SoIAS should be the starting point for BEREC analysis. Any suggestion of a procedure for ex-ante authorisation for SoIAS provision would be in full contradiction with the freedom of service innovation guaranteed to ISPs by the Regulation as well as with the statement made by the European Commission on July, 8th 2015: “*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*”. Therefore any assessment of those types of services can only be done ex-post on a case-by-case basis by NRAs that have to prove that the specific conditions for freely providing services have not been met. **BEREC’s final guidelines should explicitly mention that this assessment is “ex-post” as the current wording reverses the burden of proof.**

40. § 106 – Provisions, such as “strict admission control”, “logically separated from the IAS”, which have been explicitly rejected from the Regulation during the legislative debates, cannot be reintroduced in the BEREC guidelines. Recital 16 does not impose those provisions, and during the legislative debate the co-legislators explicitly decided not to define or characterise SoIAS to avoid obsolete or non-future proof definitions. Clearly

BEREC guidelines should not do the opposite. **The second and last sentences (“it is understood [...] strict admission control”) should be deleted.**

41. § 106 – Whether optimisation of a particular service is “necessary” should only be assessed in the light of the impact of SoIAS on the IAS and not independently as this provision seems to imply. In such case, as the guidelines state, the question of optimisation should be assessed from the perspective of demand on the part of the CAP and service provider, using end-user demand as a proxy. Art. 3(5) is intended to apply to potentially innovative services which, all else being equal, points to a flexibility of interpretation (since otherwise innovation would be stymied).
42. § 108 - This paragraph is questionable as it states that a service that is deemed to be a “specialised service” today may not necessarily qualify as such in the future due to the fact that the optimisation of the service may not be required, as the general standard of IAS may have improved. This introduces major uncertainties about the future regulatory treatment of SoIAS, as a service considered SoIAS today may not be so in the future. And even today it may raise complex debates about the regulatory consideration of existing SoIAS, introducing unnecessary discussions and potential for litigation. An interested party could trigger a regulatory procedure just to delay or prevent a specific SoIAS from becoming available. **This § 108 should be deleted.**

Impact of Services other than IAS on IAS availability and general quality

BEREC guidelines cannot impose contradictory requirements on SoIAS that would be structurally impossible to meet, while undermining the freedom to provide SoIAS foreseen in the Regulation. In particular, it would be logically inconsistent to require SoIAS to provide better quality than is possible over IAS, and at the same time to prohibit priority access to network resources for SoIAS. There is a good reason why the Regulation allows discrimination between IAS traffic and SoIAS: it is precisely to enable SoIAS to offer quality of services or guarantees that cannot be delivered via IAS. Any provision in the guidelines that would prohibit priority access to network resources for SoIAS (subject to the non-impairment of the availability and general quality of IAS) would betray the text and the spirit of the Regulation and would have highly damaging effects on EU citizens and businesses.

43. § 101– While the Regulation grants NRAs the power to verify whether the optimisation is necessary in light of its impact on IAS, this should not lead to burdensome and administratively complex processes hampering the launch of innovative services. In particular, **the requirement to verify whether “the application could be provided over the IAS” should be deleted.** This creates uncertainty and implies that NRAs should decide what level of quality is necessary and not the market and end-users.
44. § 104 - It implies that there is a burden of proof on the provider of SoIAS to demonstrate the necessity of optimization for SoIAS independently of their impact on IAS. It is highly confusing why SoIAS from now on shall be regulated as stand-alone services and not only

in its relation to IAS. The whole purpose of addressing SoIAS in the Regulation was because of their possible impact on IAS, therefore **the wording of § 104 should be changed accordingly – requirements on SoIAS can be addressed only as much as of its impact on IAS.**

45. § 114 - The analysis of the impact of SoIAS on IAS availability and general quality must take into account two essential facts:

- (i) SoIAS can be optimised with tools operating on top of IAS and using network solutions above the layer of IP transport; In such case SoIAS do not interfere with IAS (e.g. protocol optimisations, compression techniques, cache, etc.). By definition they have no impact on IAS availability and general quality;
- (ii) SoIAS can be optimised through prioritisation in the network; in such case the assessment of the capacity allocated to SoIAS should be made net of the IAS capacity saved by having such SoIAS provided outside IAS. Should any given SoIAS disappear, the usage served by this SoIAS would indeed continue, even at a degraded quality. It would then occupy IAS resources, inefficiently because of lack of optimisation. For instance, absent the optimisation allowed by IPTV, the traffic in the IAS would be much greater than today. In that sense BEREC is right when considering in § 118 that the end-user choice on whether to activate a SoIAS impacts the network capacity.

46. § 119 and § 122 - To formalise this idea, **BEREC guidelines should use the right counterfactual to compare the situation with or without SoIAS.** In the absence of SoIAS, the corresponding usage would not disappear, but would have to be carried on IAS resources, in a less optimised way, with less quality, less consumer satisfaction, and more network capacity requirements due to the absence of optimisation. Therefore, in general, the existence of SoIAS saves network capacity to the benefit of applications and content provided on IAS. Considering the appropriate counterfactual scenario, it should be clear that, in general, the existence of SoIAS improves the general quality of applications and content provided over IAS. **This should be clarified in the BEREC guidelines.**

47. § 117 and § 121 - The draft guidelines seek to introduce a procedure to measure IAS quality, by turning the SoIAS “on” and “off”. The implementation of such a methodology would require a complicated procedure that would be beyond the goal of the Regulation. It is often not possible to “turn off” a service that is supposed to be continuously running. **It should be left to the NRA to decide the methodology to analyse each SoIAS on a case-by-case basis.**

48. § 112 and § 120 – The draft guidelines (§ 112) state: *“Specialised services shall only be offered when the network capacity is sufficient such that the IAS is not degraded (e.g. due to increased latency or jitter or lack of bandwidth) by the addition of specialised services”*, which is not consistent with the Regulation. The Regulation says that the provisioning of a SoIAS *“shall not be to the detriment of the availability and general quality of the IAS”* which is substantially different. The approach as stated in § 112 is not possible, as at a given point

in time, the introduction of any new SolIAS would by definition, all things being equal, always lead to a 'degradation' of the IAS (loss of capacity for IAS). What NRAs should verify is that the minimum required quality of IAS is still available. Moreover, lowering measured speeds and an increase in delay, as mentioned in the BEREC guidelines §120 are not adequate indicators of general internet quality, as internet speeds, delay, etc. are not static. Thus the general quality of the Internet is also not static, nor linear; it does not evolve in one (increasing) direction only, as seems to be wrongly assumed in § 120 of the guidelines.

49. Recital 17 – The Regulation does not prevent providers from offering only SolIAS (e.g. pure telephony providers or pure business access providers): the wording *“in addition to any internet access services provided”* in Recital 17 and Art. 3(5) of the Regulation should be interpreted as: *“if there is any internet access service provided”*.

Transparency and contractual performances

BEREC's mandate on Art. 4: BEREC's prescriptive recommendations in Art. 4 go beyond its mandate which is of limited scope.

50. The Regulation's Art. 5(3) in relation to Art. 5(1) and 5(2) clearly limits the mandate of BEREC to issuing guidelines that serve only to inform NRAs on how to monitor and ensure compliance with Art. 3 and 4. Recital 18 also mandates BEREC only to develop a methodology as described in Art. 4(4). However, this mandate does not include adding prescriptive and disproportionate obligations in relation to transparency on end-users. **As such, BEREC should refrain from providing overly prescriptive guidance on Art. 4.**

Retrospective application of contractual obligations and legal uncertainty

BEREC should refrain from recommending an application of the provisions to already existing contracts, which risks being understood as a contractual modification. BEREC has to acknowledge that many ISPs have already adjusted business practices which provide customers with better transparency, in compliance with applicable regulation.

51. § 130, § 133 and § 186 - BEREC's interpretation is not correct when concluding that Art. 4(1), (2) and (3) imply that the provisions should apply to any contract in the market, whether entered into force before or after 30 April 2016. This would require adjustment of contractual documents not only for new but also for many millions of existing customers. Customers would get confused and lose trust if new contractual parameters diverged from agreed provisions (while the actual service performance has not been modified). This could result in contractual consequences (see elaboration below on Art. 4(1) letter (d) and Art. 4(4)) and the demand for termination rights based on Art. 20(2) of the Universal Service Directive. Even more importantly, a retrospective application is not prescribed in the Regulation and there is no room for such an interpretation:
- Art. 10 prescribes that the obligations enter into force on 30 April 2016. The listed exceptions do not refer to Art. 4(1)-(3) and, thus, no variation from this general

- deadline is allowed. There are no exceptions included elsewhere (as this is sometimes the case in other regulation such as in Regulation 531/2012 Art. 7, referring to Art. 6 which explicitly prescribes an application to all contracts in the market, both existing and new).
- Moreover, in that case, to avoid negative consequences on operators, a provision was included in the Regulation's recital 30 that refers to roaming, specifying that modifications made to tariffs in order to comply with the requirements of the regulation should not trigger any termination right.
 - Art. 4(1), in conjunction with Recital 18, aims at facilitating consumers' informed choice, which can only refer to new contracts.
 - A retrospective application would be highly detrimental as providers can only agree new performance parameters within new contracts: amending the existing agreement would mean notifying each broadband customer, who then may demand – depending on the national application of Art.20 (2) of the Universal Service Directive – to terminate the contract without penalty.
 - The provisions in Art. 4(1) have to be considered in conjunction with Art. 4(4), which aims at enabling customers to control the contractual performance. Since Art. 4(4) applies solely to contracts concluded after 29 November 2015, it would make no sense to require all existing contracts to contain new information. If that were the case, many end-users would be informed about new contractual parameters, even though they would have none of the related rights foreseen in Art. 4(4).

In summary, BEREC should not go beyond the regulatory provisions. Consequently, new obligations in Art. 4(4) are not applicable to contracts concluded before 29 November 2015 and new obligation in Art. 4(1), (2), (3) are not applicable to contracts concluded before 30 April 2016. **§ 130 needs to be deleted accordingly.**

52. § 133 – If the recommendation to provide additional information to existing customers is unwisely maintained, BEREC's reference to contractual modifications and national legislation linked to Art. 4(1) letter (a) should clarify that providing this information should not be considered as contractual modifications. Accordingly, this must not trigger an exceptional right of termination as included in Art. 20(2) Universal Service Directive.

Publication of Information

BEREC's proposal to further extend the Regulation's already tightened obligations to publish information would result in significant additional burdens for ISPs. BEREC's call for customised technical parameters also contradicts the Regulation's requirements for the publication of general information.

53. § 127 - The guidelines recommend that ISPs publish the information referred to in Art. 4(1) letters (a) to (e) preferably in two parts. However, there is no such requirement in the Regulation that would justify a further restriction on how detailed public and contractual information has to be presented and that more detailed explanations, beyond general information, are required. The general provision to publish information on contracts

already goes beyond horizontal rules, which do not provide any such publication requirement. Horizontal law only obliges service providers to indicate the main characteristics of a contract before contract conclusion. This rule also applies to ISPs, as BEREC states in the footnotes. BEREC's draft proposal to also publish "more detailed technical parameters" would be a burden for providers and needs to be removed. In any case, the publication of information to facilitate informed end-user's choice conflicts with BEREC's interpretation of Art. 4 (1) letter (d): While published information is per se general and non-individual, BEREC recommends the provisioning of customised technical parameters in individual contracts (e.g. individual speed ranges). At least corporate customers would likely object to the publication of what may be proprietary information such as network configuration, negotiated performance requirements, security controls and other sensitive information – the publication of which would be detrimental to the customer. Additionally, the publication of customised contractual information is of no value for end-users who want to compare different offerings, and ISPs would be required to publish a huge variety of different information, reflecting each customised contract. BEREC should clarify that ISPs only need to publish general information.

Contractual information and compliance requirements

BEREC should not recommend technical parameters that would distort the information given to end-users and the customised offerings that are provided in the mass market. End-users would have less valid information on the available speed, and ISPs less incentive to promote the latest available technology, which both would be to the detriment of end-users. Moreover, there would likely be a negative impact on national broadband targets.

54. § 131 and § 132 – BEREC's draft guidelines on Art. 4(1) letter (a) unreasonably restrict the regulatory provisions. To allow some flexibility for network operators, the information they are required to provide on traffic management measures has to be general. Otherwise, any minor change in future traffic management will lead to a requirement to amend contractual information and, thus, would appear as a contractual modification. BEREC should avoid imposing such an excessive burden on providers, which would restrict their capability and incentives to innovate. BEREC's recommendation to provide information on personal data does not consider that ISPs are already under strict EU data privacy laws and the future General Data Protection Regulation (GDPR).

These applicable provisions include information requirements on the impact of intended processing activities and certain information to data subjects. These data privacy obligations are both horizontal and flexible, putting the burden on the organisation to decide on the effective level or means of communication. BEREC should anticipate this obligation and refrain from an attempt to prescribe specific information or means of communicating the information. This would be an unwarranted duplication of the duties under the data privacy laws/GDPR.

55. § 134 and § 135 - While the Art. 4(1) letter (b) of the Regulation requires operators to provide clear and comprehensible explanations on how IAS are impacted, BEREC recommends the provisioning of detailed explanations and information which are more

suitable for experts. It is unlikely that average customers will understand the degree of detail that BEREC requires. Contractual documents would be further inflated with technical information on e.g. jitter, delay and packet loss, that are of no practical use for most end-users. Besides this, BEREC's recommended information does not indicate the performance of the IAS, as it is highly dependent on factors beyond the ISPs' influence (e.g. the kind of downstream in higher network topologies). For example, packet loss metrics are of little or no practical use to consumers or edge providers for evaluating service quality, or for comparing the performance of alternative networks, even for delay intolerant applications. On the contrary, low packet loss could be an indication of slow network performance, and thus worse for delay-intolerant applications. The focus on packet loss metrics could have adverse unintended consequences that ultimately harm end-users and CAPs. New transparency requirements on packet loss could prompt end-users to choose IAS with low packet loss. Consequently, ISPs have an incentive to reduce packet loss through increased router buffers, which could result in slower and less optimized Internet routing systems.

56. § 139, § 147, § 148, § 153, § 154 – BEREC's recommendations on Art. 4(1) letter (d) on advertisement should not go beyond the obligations laid down in the Regulation. Art. 4(1) only imposes obligations on ISPs to ensure that contracts include certain mandatory information. Art. 4(1) does not impose any obligations in terms of public advertisement practices, it does not oblige ISPs to include any references to advertisement in the contract if the tariff is not advertised, and the article does not aim at empowering NRAs to regulate the content of public advertisement. **Accordingly, BEREC should only clarify in its guidelines that advertised speeds are part of the information in ISPs' contract.**

To not regulatory intervene in ISPs' legitimate marketing practices, BEREC must not link advertised speed to any specific performance parameter as this would indirectly regulate the content of advertisement, which is not foreseen in Art. 4(1).

Apart from this, BEREC should acknowledge that advertised speeds or tariffs (as contained in the contract) address large groups of customers. Public advertisement is per se targeting mass markets and is, thus, not customised. Often one single advertised tariff brand includes various sub-categories with different speed ranges. Therefore, an advertised tariff brand may stand for a variety of different contracts and does not necessary link to the individually agreed speed range. Otherwise, providers would be forced to create an individual tariff brand for every possible speed range, which leads to a huge variety of different tariff brands. Alternatively, providers would have to advertise only the lowest possible speed. This would mean that providers could not differentiate any more through advertising the available maximum speeds. Consequently, ISPs would lose an incentive for investments in next generation networks.

Horizontal law, particularly based on the Unfair Commercial Practices Directive, proves to be an effective tool to tackle misleading advertisement, such as advertisement of speeds which cannot be realistically delivered to end-users. The directive's current review will ensure that it stays future-proof and effective. A further restriction of marketing rules

applicable only to ISPs, particularly based on BEREC's prescriptive recommendations that go beyond the Regulation's objective, is neither required nor proportionate.

57. § 137 and § 141 - BEREC's far reaching and very prescriptive recommendation on speed ranges with regard to Art. 4(1) letter (d) are impractical, will not improve transparency on individual performance and will likely impact national broadband targets negatively. The performance of IAS fluctuates for technological reasons. This applies to fixed IAS and, even more, to mobile IAS. The degree of fluctuation depends on the end-user's location and the employed technology. In any case, providers have to offer speed ranges to customers and customers have the right to always receive a speed that is not lower than the minimum agreed speed range. For technical reasons, ISPs cannot contractually offer a single speed parameter but have to offer speed ranges. If NRAs were to impose strict limitations on the maximum speed as recommended in BEREC's proportionality criteria in § 141, providers may default to indicating a maximum speed in the contract that is significantly lower than the available speed. As a result customers would not be informed of the realistically available maximum speed. This will also directly impact advertised maximum speed, which must not be higher than the contractual maximum speed.

Since national broadband targets usually refer to the maximum available speed as offered in tariffs, a necessary reduction of that speed reference would also impact the national broadband targets (see also elaborations on § 142). Since the Regulation only stipulates to "a clear and comprehensive explanation" of the different speed parameters, a further restriction by BEREC is neither required nor proportionate. This also includes the recommendation to indicate a "single numerical value" as proposed in § 137. **Considering these negative impacts, little benefit for end-users and the lack of respective rules within the Regulation, § 137 and § 141 should be deleted.**

58. § 142 – Beyond the provisions of the Regulation, BEREC recommends that the maximum speed of fixed IAS indicated in the contract according to Art. 4(1) letter (d) has to be achieved by the end-user at least some of the time, e.g. once a day. This recommendation does not reflect the technological reality or the requirements for commercial offerings in mass markets. Customers regularly achieve the maximum speed, but in some cases the maximum agreed speed is not available due to technical constraints or in cases of preliminary agreements (where network roll-outs are planned). Consequently, there are some customers who will only have available a maximum speed in the lower areas of the speed range. Moreover, even though ISPs have sophisticated calculations models to estimate minimum and maximum speed before contract conclusion, there is always the risk that the speed is found to be lower than expected after establishment of the physical connection (after contract conclusion). To ensure they comply with BEREC's interpretation of maximum speed, ISPs would be forced to lower the maximum speed they offer below the speed that is available in most cases. As a result, end-users would be less accurately informed. The safety discounts will ensure that customers always receive at least the agreed minimum speed. If ISPs were also obliged to ensure that every customer sometimes reaches the maximum speed, the safety discounts for maximum speed would have to be significantly increased. Since this would apply to tariffs in mass markets, which have to

cover all possible constellations, ISPs would have to dramatically reduce the offered maximum speeds well below the speeds that are actually available to most customers (see elaborations on § 141 regarding negative impact on national broadband targets).

At the same time, the flexibility to offer different maximum speeds enables ISPs to offer different tariffs for each network technology. If providers have to reduce the offered maximum speed, below what is actually available to most customers, this important instrument for price differentiation is lost.

The criterion by which speed should be achievable at least “some of the time (e.g. at least once a day)” is very well suited for cable networks, which have strongly fluctuating performance during a day, due to peak-times. However, it does not reflect the more stable performance of DSL networks, where the maximum available speed does not alter over peak times during a day but based on different criteria. Technical measures implemented in DSL-networks, such as digital line management or rate adaptive mode optimise the individual IAS performance regularly, but not necessarily on a daily basis. If BEREC maintains its proposed description of the maximum speed, cable network providers will be allowed to agree and advertise higher maximum speeds than DSL network providers, which may be obliged to indicate speeds below the technically available maximum. Therefore, **the proposed definition that refers to speed that is available “some of the time (e.g. at least once a day)” is not technologically neutral. This criterion should be deleted, or at least distinguish between different network technologies, considering also technical optimisation measures.** In any event, for DSL networks the maximum speed indicated in the contract should be the technically available maximum speed.

59. § 144, §145 and § 146 – BEREC recommends a very specific definition of “normally available speed”, as included in Art. 4(1) letter (d), which is not justified by the Regulation and does not provide valuable information for end-users. BEREC’s proposed definition focuses mainly on time windows when networks tend to have bottlenecks; normally available speed would reflect the performance measured 90% of time over peak hours. Such “normally” available speed will not reflect the experience of users during most of the day. Accordingly, BEREC’s requirement that the maximum speed should be proportionate to the normally available speed would unreasonably limit the indication of maximum speed. Again, the proposed definition favours cable networks over DSL networks in an unjustified manner (see elaborations on § 142). Additionally to the proposed proportionality of minimum and maximum speed, the normally available speed will further restrict the indication of maximum speed. This limitation applies even if the speed is available to customers. **Considering all this, the reference to maximum speed included in § 145 needs to be deleted.**

Furthermore, “normally available” speed cannot be indicated in a customised way. Such a contractual parameter can only reflect an estimated general value that refers to overall network performance and which may significantly differ from IAS’ individual performance. Considering this, deviation of individual measurement from normally available speed must not lead to contractual consequences. **BEREC should clarify this in § 146.**

Instead of going beyond the Regulation and restricting maximum and advertised speeds, BEREC should provide NRAs with flexibility and only recommend a reasonable definition of normally available speed in line with the experience of most customers and which must not necessarily be a single numerical value. This would give end-users an indication of the speed that can be generally expected. Such a general indication must not establish individual contractual rights. However, should provide reasonable and representative information.

60. § 149-152 - Information on “maximum speeds” in a mobile context should be understood as estimated maximum speed achievable under optimal conditions. The Regulation’s requirement to indicate the “estimated” maximum speed for mobile IAS reflects the fact that mobile performance depends on a broad variety of factors (e.g. congestion, weather, amount of customers using the same antenna).

BEREC recommends that the provisioning of coverage maps in §152, which reflect estimated and measured maximum speeds and network coverage in all locations, including both indoor and outdoor coverage, should be withdrawn. Art. 4(4) only aims at specific parameters to be included in end-users’ contracts and, in parallel, to be published.

This scope and objective does not correspond with the recommendation of providing sophisticated coverage maps. Obviously, coverage maps cannot reasonably become part of a contractual agreement, but they are a tool to illustrate, inter alia, networks’ performance. Very often maps are provided by ISPs on a voluntary basis, e.g. to advertise good network performance. Considering this, a recommendation for regulatory intervention that obliges ISPs to provide coverage maps would be inappropriate. Besides this, an obligation to provide a range of performance parameters, covering also indoor and outdoor, is very complicated. An accurate information would not be possible, which conflicts with BEREC’s objective of “accurate and up to date” information included in § 126.

61. § 155 - Contrary to the Regulation’s general information requirement in Art. 4(1) letter (e), referring to this article BEREC is proposing extensive information requirements and the provision of certain remedies for a discrepancy such as price reduction, early termination of the contract, damages, or rectification of the non-conformity of performance, or a combination thereof. There is no indication that ISPs’ customers require more information. ISPs already provide significantly more transparency to their customers compared to other service providers. **Consequently, BEREC should refrain from making such prescriptive recommendations on what information should be provided by ISPs. The relevant paragraph should be deleted.**

Non-conformity of contract

BEREC’s interpretation of technical parameters in Art. 4 (1) letter (d) together with unspecific provisions on conformity of contracts and unreliable measurement mechanisms, risks massive confusion and legal uncertainty for end-users and ISPs.

62. § 158 – As explained above, ISPs can only reasonably commit to delivering speed to individual customers within individually agreed speed ranges (between minimum and

maximum speed). Accordingly, the provision in Art. 4(3), according to which any significant discrepancy between the contractual parameters and the available performance at the customers' IAS, constitute a non-conformity of contract, can only refer to the contractually agreed speed range.

The technical parameters "normally available speed" and "advertised speed" have to be general per se and do not necessarily reflect the performance at the individual customer's IAS. Accordingly, any significant discrepancy of these contractually agreed technical parameters and the general (non-customised) monitored values should constitute non-conformity of contract. Therefore, this approach **has to be based on a reliable measurement mechanism (see elaborations on § 170-172).**

63. § 158 – Although the Regulation does not foresee such an exclusion, BEREC exempts NRAs' monitoring systems from the certification requirement in Art. 4 (4). It is not clear why third party monitoring mechanisms should reasonably fall under specific certification criteria, while NRAs' systems may apply diverging criteria. In order to ensure consistent and reliable monitoring results, all providers of monitoring mechanisms that are officially recognised to measure contractual compliance should be certified to ensure reliable measurement results that fully reflect ISPs' performance. **An independent and official body, empowered for fact-finding measures regarding the performance of IAS should handle the certification.**
64. § 159 – The provision according to which usage of a monitoring system should not be subject to additional costs will, in practice, require that the data traffic necessary to perform measurements, is zero-rated. A proper measurement, particularly to measure higher bandwidths, will involve high data consumption. **Therefore, BEREC needs to adjust its excessively restrictive position on zero-rating, inter alia, to ensure measurements do not incur costs for end-users.**
65. § 160 – BEREC should clarify that any measurement that can be used for assessing contractual conformity has to be certified on the basis of criteria that will ensure reliable measurement results (see elaboration on § 170-172).

Monitoring and reporting requirements:

BEREC should clarify that reliable measurement mechanisms have to be based on a specific set of clear technical criteria.

66. § 170-172: ISPs can only ensure quality within their own network. This requires that reliable measurement systems, which are supposed to indicate the actual performance, exclude interference from factors outside ISPs' networks. Such factors can be located in end-users' infrastructure (e.g. capacity bottlenecks in laptops, smartphones or routers; limited performance of Wi-Fi or in-house cabling) as well as servers and networks beyond the ISPs' backbone network (that do not belong to the ISP). The latter requires the installation of measurement servers within or close to the ISPs' backbone. Further details on criteria for measurement systems are provided in "ETNO-GSMA Position Paper on the BEREC

guidelines for the implementation of the Open Internet provisions of the TSM Regulation”⁴. BEREC should make a clear statement on the requirement for sound measurement mechanisms in order to ensure that certified measurement mechanisms are indeed providing reliable results for end-users.

Supervision and enforcement

Within the framework of its responsibility of supervision, BEREC should not add to its general workload nor to that of individual NRAs and operators, by asking for too much (and unreasonable) information and by setting up demanding processes that generate an undue burden on a sector which is already facing a heavy load of regulatory monitoring and reporting. An undue use of resources should be avoided. The draft guidelines foresee disproportionate and unacceptably intrusive regular reporting ex-ante measures, for instance with respect to commercial agreements, which should only be justifiable ex-post following an evidence-based complaint or market failure.

In §177 BEREC itself is noting, with respect to enforcement, that effectiveness, necessity and proportionality (though there is some confusion in the interpretation of necessity and proportionality) are equally applicable to any request or obligation issued in the context of monitoring, reporting and any information request under Art. 5 (2) of the Regulation. Similar paragraphs or cross references should be inserted in these respective parts of the guidelines.

As it executes its task – particularly enforcement and further information requests – BEREC should give guidance to NRAs. This guidance should by default be compliant with the Regulation. Any action or deeper information request should be founded on a reasonable indication and/or suspicion of non-compliance or infringement with the terms of the Regulation.

Entry into force and transitional period

BEREC should clarify that the guidelines will enter into force twelve months after their publication in order to give a reasonable time to implement the relevant provisions, especially if they remain so detailed and/or overly prescriptive, despite the above comments.

⁴ Downloadable at the following link: <https://www.etno.eu/home/positions-papers/2016/328>