# COMMENTS TO BEREC REGULATION FOR NET NEUTRALITY

In relation to BEREC's public consultation on its Guidelines on the implementation by National Regulators of European Net Neutrality Rules WIND Hellas provides herein-below its comments:

General Comments :

The proposed BEREC Guidelines are an instrument of "soft" law, which has as its aim the interpretation of the Open Internet Access rules of the TSM Regulation. Nevertheless, the regulatory impact of the proposed Guidelines is significant, since the NRA of each member state is bound to follow their interpretation of the Regulation, so as to achieve a homogeneous regulatory environment in the EU single market for electronic communication. Therefore, the interpretative stance of the proposed Guidelines will play a crucial role in regard to the implementation of the Regulation throughout the EU.

WIND Hellas argues that the interpretative stance proposed by BEREC does not fulfill the criteria of the proportionality principle, as the latter is laid down in Article 5 of the Treaty on European Union and its Protocol no. 2. The principle of proportionality regulates and sets the boundaries for the exercise of powers by the European Union. Even though the BEREC Guidelines do not strictly fall within the definition of an EU legislative act, it should be accepted that their content must be aligned with the principle of proportionality and, thus, "not exceed what is necessary to achieve the objectives" pursued. Nevertheless, the extensive and detailed terms of the proposed Guidelines impose regulatory burdens upon IAPs, which (a) are disproportional to the stated aims of the Regulation, (b) do not take into account the need to minimize and commensurate such burdens, and (c) are not the least burdensome available. In this light, BEREC should consider reviewing its proposal on the basis of introducing less wide, extensive and burdensome terms of interpretation, which do not deviate from the letter of the TSM Regulation.

As such, it is advisable to take seriously into consideration the observations and conclusions made by GIBSON DUNN for GSMA relating to this public consultation. In particular, its conclusion that "*BEREC's role needs to be confined to that of an advisory body which adds detail to the principles set forth in the TSM Regulation*". This is very important, since while the TSM provides for obligations that are general, the draft guidelines are extremely extensive and burdensome. Sometimes, they even go beyond regulatory boundaries, in essence obligating operators and service providers to adopt specific commercial policies. Thus, BEREC's role should be more on an advisory level, trying to mitigate the burdensome provisions of TSM with the true fulfillment of its basic principles and policies, taking into account the principles of proportionality and objectivity, as well as what is effectively logical and practicable to achieve. Otherwise BEREC's intervention risks hampering opportunities for business operations and hampering consumer experience and choice.

**Article 3 Paragraphs 32-45:**

Commercial practices – including Zero Rating

- As a general point, the open internet provisions of the Regulation refer to the regulation of electronic communications, not the regulation of content. Furthermore, the open internet provisions of the Regulation refer to the equal treatment of traffic, not its pricing. Nevertheless, paras. 37-45 explicitly refer to the regulation of internet content and the relevant internet content industry. Therefore, the BEREC Guidelines should be formulated, so as to apply strictly to communications, whereas content should continue to be regulated by legal instruments dedicated to the regulation of audiovisual and other media content [e.g. AVMS Directive].
- Paras. 32-45 of the Guidelines interpret the phrase "shall not limit the exercise of end-users' rights" of article 3(2) of the Regulation in a way which intersects with the subject-matter of ex post competition law. In specific, paras. 41, 43, 45 provide for criteria, which involve the evaluation of "market positions", the reduction of "end-user choice", "media pluralism" and "impact on competition". Hence, these paragraphs interpret the Regulation in such a way so as to effectively construct the legal basis for an ex ante regulation of competition in the internet content sector. According to the EU legal framework for electronic communications, the ex ante regulation of competition in the relevant markets should take place only when it is necessary. Such need for ex ante regulation has not been demonstrated or justified in the Regulation and, therefore, should not be included in the Guidelines. Ex post competition law is the most appropriate instrument for such cases.
- In the first place, NRAs are not the competent authorities for the regulation of competition in the audiovisual services sector and the provision of internet content. Paras. 32-45 of the Guidelines indirectly empower NRAs to regulate the internet content industry. Nevertheless, such powers are beyond the provisions of EU electronic communications law.

Taking all the aforementioned points into account, we provide the following comments:

1. Paras. 32-45 of the Guidelines should be replaced by simple and unambiguous rules regarding the regulation of commercial practices between ISPs and CAPs. Furthermore, such rules ought to be less extensive / burdensome, since their subject matter generally falls outside the scope and letter of the TSM Regulation.
2. Such rules should clearly and specifically describe the commercial practices, which are interpreted as being outlawed by the Regulation because they "limit the exercise of users' rights". Furthermore, prohibited commercial practices should be the exception and not the

rule in relation to the reduced pricing of internet access services, since reduced prices are generally in favour of end users' interests. Clear and specific rules are necessary to achieve the homogeneous regulation of the EU single market and create conditions of regulatory certainty for ISPs.

3. The EU legal framework on electronic communications imposes ex ante obligations on operators, only in certain circumstances whenever ex post competition law is considered to be inadequate to address market failures and foreclosure effects. Along the same lines, prohibited commercial practices in the BEREC Guidelines should only include those considered to be inadequately addressed by ex post competition law. Paragraphs 38, 39 and 42 need to be rephrased accordingly.
4. "Open door" business policies of ISPs in relation to zero rating commercial practices should be explicitly stated as lawful and in line with the Regulation, since such policies benefit consumers without having an impact on their rights. Paragraph 39 needs to be rephrased accordingly.
5. NRAs should refrain from extending their regulatory powers to any qualitative evaluations in terms of the market power and / or the impact on competition of CAPs by virtue of the BEREC Guidelines, as such evaluations relate to markets other than the provision of electronic communication networks/services. Paragraphs 41, 43 and 45 have to be erased.

**Article 4, Paragraphs 124-163:**

As far as transparency requirements are concerned, based on the general wording of the Regulation, we were expecting BEREC to issues **examples** of detailed requirements that NRA could set, rather than too prescriptive obligations. Accordingly, we question the "universality" of the said obligations, applying through the EU markets, with no consideration of objective operating challenges in individual Member States.

As a general comment, it is advisable that differences in the topography in each different member state be taken into consideration, when implementing Regulation 2015/2120. In this context, NRAs in member states with many islands, mountains and physical impediments, should show indulgence for network providers, compared to member states with extensive plains, plateaus and flat landscape in general. A unified continental territory of a member state, with no islands or very few ones, would qualify for more straightforward compliance with the rules laid down by Regulation 2015/2120, whereas a more complex landscape should provide additional technical and quality reasons, so as to relax certain rules provided in the Regulation. Such distinction should be recognized by BEREC, so as to avoid imposing the exact same conditions in different situations and under different circumstances, which could create competitive advantages for network

operators that provide services in territories and member states with least impediments.

In addition, the emergence and use of different technologies and the ability to measure speed in complex networks, such as the ones of the future, should, also, be taken into consideration, when imposing obligations to stipulate speed in consumer contracts. There exist areas served by copper network, whereas others by aerial cables, fiber optic or even fixed wireless access. These distinctions exist sometimes even in the same area, where different ways are used to cover different parts of such area. Besides that, most continental networks are based on copper cable provided by the ex-incumbent (in Greece OTE). This creates even more difficulties, when trying to determine minimum, maximum and normally available speeds, even in the same area, let alone in different ones. In most cases, challengers (operators other than the ex-incumbent) have little or even no knowledge on the topography of the incumbent's network and the real distance between the customer's end and the incumbent's switch. Thus, a skin-deep approach towards this issue, could create an additional competitive advantage for all European incumbents, who have full knowledge of the topography of the copper network, in comparison to challengers, who will have insufficient information, so as to provide the necessary data to their own customers, either before signing a subscription contract or after.

Taking all aforementioned issues into account, we provide the following comments:

6. Paragraph 124: NRAs should provide local guidance by taking also into account any local regulation already in place as well as sufficient time, so as for IAS providers to implement the requirements recommended by the NRAs. Thus, it seems logical, justified and appropriate to provide a transitional period of at least 12 months to the network provides, so as to adjust to the provisions of the Regulation. It should, also, be noted that customized technical parameters in individual contracts are of no value for end-users and do not provide assistance in comparing different offerings. In this context, IAS providers would be required to publish a huge variety of different information, reflecting each customized contract, for no particular use or benefit. As a consequence, we propose to amend paragraph 124 as follows: "*124. <u>After one year from the publication of BEREC's guidelines,</u> NRAs should ensure that ISPs include relevant information referred to in Article 4(1) letters (a) to (e) in a clear, comprehensible and comprehensive manner in contracts that include IAS, and publish that information, for example on an ISP's website.*".
7. Paragraph 126: we believe that bullets 2, 3 and 5 should be either deleted in their entirety or be amended, so as to reflect reality. In particular, it is quite difficult to have comparable data for different offers, let alone different ISPs, when differences will primarily evolve for different areas of coverage. In the same context, the proposals in bullets 2 & 3 are very vague and could lead in exaggerations or

misunderstandings as to the real obligations of the ISP. It would seem more practical and appropriate that each NRA in each Member State introduces its own platform that would allow both consumers and operators (ISPs) to measure speed.

8. Paragraph 127: should be deleted in its entirety, because it goes beyond the mandate provide by the Regulation, while it provides no further clarification to an already complex procedure.
9. Paragraph 130: In this paragraph BEREC introduces retrospectively obligations to ISPs that lay beyond the mandate provided by the Regulation, without taking into consideration practical impediments. The provisions of paragraphs 1, 2 & 3 need further elaboration, this is why BEREC was required to provide its guidelines and NRAs will, also, need to further analyze those provisions, so as to adapt their underlined policies into each member state jurisdiction. In this context, it would be unreasonable and unfair to require IPSs to implement such provisions, before their clarification; let alone, provide subscribers with rights which cannot be specifically determined and assessed at this premature stage. Thus, we propose that paragraph 130 be deleted in its entirety.
10. Paragraph 131: we propose that the phrase “only if such applied technics affect the provision of services” be added after “… subparagraphs of Article 3(3),”.
11. Paragraph 132: should be deleted in its entirety, because it goes beyond the mandate provided by the Regulation, while it provides no further clarification.
12. Paragraph 134: the last sentence should be deleted in its entirety, because it goes beyond the mandate provided by the Regulation, while it provides no further clarification and imposes additional burden to the ISPs, with no practical justification or use.
13. Paragraph 137: Upload and download speeds are not suitable for monitoring IAS performance over fixed networks. IAS providers can provide information on the access line speed, but the end-to-end service that is actually received by a customer, will depend on a number of factors outside the control of the IAS provider. Effective and proportional measures shall be examined by NRAs, taking into account technology limitations. In this context, we propose the deletion of the last sentence in paragraph 137: “137. In order to empower end-users, speed values required by the Article 4(1) letter (d) should be specified in the contract and published in such a manner that they can be verified and used to determine any discrepancy between the actual performance and what has been agreed in contract.
14. Paragraph 140: The policy objective is for end users to be able to make informed choices. In this context, the Regulation provides for

obligations to explain minimum, normally available and maximum or advertised download and upload speeds of IASs for fixed networks and estimated maximum and advertised download and upload speeds for IASs in mobile networks. However, the over prescriptive requirements set by BEREC relating to minimum, maximum, advertised and normally available speeds to be included in the consumer contract introduces additional complexity and confusion to consumers, without helping them make informed choices. In this respect, we believe that paragraph 140 should be amended as follows: "*140. The minimum speed is the lowest speed that the end-user may experience, according to the contract which includes the IAS. In principle, the actual speed should not be lower than the minimum speed at any time, except in cases of interruption of the IAS.*".

15. Paragraph 141: should be deleted in its entirety, because it goes beyond the mandate provided by the Regulation, while it provides no further clarification. A "reasonable proportion" obligation appears to be both unjustifiable and unpractical.
16. Paragraphs 140-141 (minimum speed for fixed networks): Minimum speed: can be considered the one of the minimum DSL line profile (in case of LLU). This is 64Kbps for ADSL services and 1024kbps for VDSL services..A commonly accepted – from customer, provider, NRA- way of measuring the speed is needed, defining the way, reporting, displaying and way of helping on disputes
17. Paragraphs 142-143 (maximum speed for fixed networks): it is quite difficult to provide accurate and useful results, because:
    - DSL subscribers are synchronized in a speed from 64kbps to 24Mbps;
    - DSL which is widespread in Greece, is a best-effort service by design. Achievable maximum speeds are subject to many factors and this can vary much among users
    - The synchronization bit rate depends mainly on the attenuation/distance of the subscriber from the central office, and secondary to the electrical quality of a line, the noise/interference existing from external sources;
    - Most operators have no policy for applying specific maximum rate for their subscribers; they are all up to 24mbps;
    - This cannot be an average value, since it should be achievable by the subscriber based on the definition; and

    BEREC should exchange with NRAs common practices and measurements definitions adopted in other member states for ADSL/VDSL technologies, in order to be able to decide on the most

appropriate solution for this issue.. In all cases, speed should be provided in ranges and not in specific numbers.

Thus, we believe that paragraph 142 should allow for more realistic and lenient approaches towards maximum speed, while paragraph 143 should be deleted in its entirety.

18. Paragraphs 144-146 (normally available speed for fixed networks): The Normally Available Speed that could be provided will refer to DSL Synchronization speed, i.e. a network wide "average" speed that can be calculated and presented as such. However, it is difficult to assess the availability of the Normally Available Speed (e.g. for what part of the day the speed/service can be provided). In addition, practical issues need to be taken into consideration, for example:
    a) The normally available speed is the speed that an end-user could expect to receive most of the time, when accessing the service. This is not always in alignment with the DSL Synchronization Speed (which is the available measurement for this definition) e.g. the user could synchronize on 10 Mbps (download speed) and upon usage of the service, he could be receiving files with 6 Mbps, for several reasons such as the state of the network, congestion or foreign networks.
    b) A more elaborate definition of the actual segmentation of the Normally Available Speed should be provided by BEREC, e.g.. will this refer to greater areas/regions (e.g.. Attika, Thessaloniki e.t.c.)?
    c) When and on what frequency will these data be updated? We believe that once per year (annually) would be more realistic. This is due to the fact that these data are not subject to heavy changes during time and also due to the fairly large amount of effort, needed to provide them.
    d) A commonly accepted – from customer, provider, NRA- way of measuring the speed is needed, defining the way, reporting, displaying and way of helping on disputes
    e)

    In all cases, speed (except from minimum) should be provided in ranges or based on specific scenario(s) and not in specific numbers.
19. Paragraph 145: should be deleted in its entirety or at least the bullets included therein, because they go beyond the mandate provided by the Regulation, while they provide no further clarification. A "reasonable proportion" obligation appears to be both unjustifiable and unpractical, while percentages mentioned in the first bullet raise issues as the ones mentioned in 9 hereinabove. In any event, it must be underlined that normally available speed cannot be indicated in a customized way. The indication of this parameter in the contract can only reflect an estimated

value that refers to the mass market and may significantly differ from individual circumstances. Accordingly, deviation of individual measurement from normally available speed cannot lead to contractual consequences.

20. Paragraph 148: should be deleted in its entirety, because it goes beyond the mandate provided by the Regulation, while it provides no further clarification. Advertised speeds are mostly subject to technology used (ADSL, VDSL etc)
21. Paragraph 150-152 (estimated maximum speed for mobile networks): WIND's proposal is to be defined based on the spectrum band used. In addition:
    a) It should be defined by mutually agreed by operators and the NRA mechanisms, engines and procedures that should be finally determined, monitored and supervised by the NRA; and
    b) BEREC should exchange with all NRAs common practices adopted in each member state jurisdiction, so as to be able to decide on the most appropriate solution for this issue.
22. Paragraph 156: all bullets should be deleted in their entirety, because they go beyond the mandate provided by the Regulation, while they provide no further clarifications. In particular, all network operators and ISPs have already adopted procedures and mechanisms to handle complaints for any reason pertaining to the provision of networks and telecommunications services. There exists no need to create new ones, particularly for net neutrality. Alternatively, the following sentence could be added at the end of paragraph 156: "*ISPs can use their established procedures and mechanisms of handling consumer complaints, in order to fulfill the aforementioned obligations, as long as specific cases relating to net neutrality complaints can be separated, so as to be provided to NRAs for executing their monitoring obligations.*".
23. It is advisable that NRAs undertake to set, operate and monitor specific and common certification criteria, so as to ensure consistent and reliable and official monitoring results. In this context, we propose the following amendments in paragraph 158: "*158. The relevant facts proving a significant discrepancy between the contractually agreed parameters and the generally (non-individually) monitored values may be established by any monitoring mechanism certified by the NRA, whether operated by the NRA or by a third party. The Regulation does not require Member States or an NRA to establish or certify a monitoring mechanism, however, it seems appropriate that NRAs undertake relevant initiatives, so as to guarantee official and more objective results. The Regulation does not define how the certification must be done. If the NRA provides a monitoring mechanism*

*implemented for this purpose it should be considered as a certified monitoring mechanism according to Article 4(4).*".

24. Paragraph 159: in the last sentence we suggest to add the following words (underlined): "*The use of any certified mechanism should not be subject to additional costs to the end-user* ***or the ISP*** *and should be accessible also to disabled end-users.*".

**Article 5, Paragraphs 164-182:**

25. Paragraph 174 (enforcement): it is not clear, where in the regulatory framework for communications it is provided that advances in technology create a genuine right of consumers for advanced levels of quality. Net neutrality has to do with no discrimination and not with creating new consumer rights, when no legal basis exist for such rights. Advances in technology always improve consumer experience, but not under legal or regulatory enforcement; rather due to market forces and competition. In this context, all bullets of this paragraph should be deleted in their entirety, because they go beyond the mandate provided by the Regulation, while they provide no further clarifications. Particularly, bullets 3 & 4, refer to the enforcement of market and technical obligations to ISPs, in addition to those provided in their licenses (e.g. minimum QoS requirements, "*other appropriate and necessary measures*" a vague prescription allowing for unreasonable and unjust interpretation and intervention in the ISPs' commercial policies and network dimensioning and planning.
26. Paragraph 176: the fact that requirements and measures could be imposed on one or more ISPs could lead to discriminations. For this reason, we propose to add the following sentence at the end of this paragraph: "*All such requirements and measures should be adopted in full transparency and NRAs should not discriminate between operators and ISPs, according to the principles of proportionality, objectivity and non-discrimination.*".