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Statement on the Draft BEREC Guidelines on the Implementation of the Open Internet Regulation (BoR (22) 30)

The Alliance of Telecommunications Terminal Equipment Manufacturers (VTKE) welcomes the fact that BEREC is updating its *Guidelines on the Implementation of the Open Internet Regulation* in order to adapt them to changed circumstances. We appreciate the opportunity to comment.

In its comments, the VTKE refers in particular to Guidelines 25., 26. and 27. on Article 3 (1) of Regulation (EU) 2015/2120, which lays down the right of end-users "to use terminal equipment of their choice".

Regarding Guideline 25.:

"25. Thirdly, end-users have the right to use terminal equipment of their choice. Directive 2008/63/EC defines "terminal equipment" as "equipment directly or indirectly connected to the interface of a public telecommunication network". The right to choose terminal equipment therefore covers equipment which connects to the interface of the public telecommunications network. This interface, the network termination point (NTP)¹⁵, is defined in Article 2 (9) of the EEC referring to the physical point at which an end-user is provided with access to a public electronic communications network."

According to Art. 3 (1) of Regulation (EU) 2015/2120, end-users already have the right to use terminal equipment of their choice. The European Electronic Communications Code (Directive (EU) 2018/1972, EECC) expressly refers to modems and routers as terminal equipment (please see Recital (273), Art. 105 para. 1 as well as Art. 2 (41) EECC). According to Art. 3 (1) of Regulation (EU) 2015/2120, the freedom of choice of end-users must explicitly apply to these terminal devices.

Looking at the practice in many EU Member States, these Guidelines have not necessarily contributed in the past to the consistent, coherent and correct application of the Regulation by national regulatory authorities, in particular with regard to Art. 3 (1).

However, the BEREC *Guidelines on common approaches to the identification of the network termination point in different network topologies* (BoR (20) 46) contribute to ensure that end-users can decide for themselves which terminal device they want to connect to the "socket on the wall" and use by providing for a network termination point at the so-called "point A" ("connection socket to the line", passive network termination point) as a rule. The VTKE strongly argues that in fixed public communication networks the NTP is the point (e.g. physical connector) at which the subscriber access line ends at the customer premises where there is no active equipment between the NTP and the subscriber access line (cf. point A in BoR (20) 46).

A clarification that the NTP is located at the (passive) "socket on the wall" (point A) or a clear concretisation of the NTP is indispensable for a uniform implementation of the right to free choice of terminal equipment.

Furthermore, it is essential that network operators specify the interface at the NTP (point A) (as required by Recital (10) of Directive 2008/63/EC) and that Member States or national regulatory authorities ensure that these specifications are published. Against this background, this requirement should be included in these Guidelines.

¹⁵ For further information please refer to BoR (20) 46, BEREC Guidelines on Common Approaches to the Identification of the Network Termination Point in different Network Topologies, 5 March 2020.

We would therefore like to suggest to amend Guideline 25. as follows [additions underlined]:

“25. Thirdly, end-users have the right to use terminal equipment of their choice. Directive 2008/63/EC defines “terminal equipment” as “equipment directly or indirectly connected to the interface of a public telecommunication network”. The right to choose terminal equipment therefore covers equipment which connects to the interface of the public telecommunications network. This interface, the network termination point (NTP)¹⁶, is defined in Article 2 (9) of the EECC referring to the physical point at which an end-user is provided with access to a public electronic communications network.

According to Art. 61 para. 7 of Directive (EU) 2018/1972, the national regulatory authority is responsible for defining the location of the NTP. The NRAs should take “utmost account” of the BEREC *Guidelines on common approaches to the identification of the network termination point in different network topologies (BoR (20) 46)* when defining the location of the NTP.

These Guidelines clearly indicate that point A should be the preferred NTP. Therefore, NRAs should consider point A as NTP when defining the location of the NTP.

The NRAs shall ensure that network operators adequately publish the specifications of the interfaces at the NTP.”

Regarding Guideline 26.:

“26. In considering whether end-users may use the terminal equipment of their choice, NRAs should assess whether an ISP provides equipment for its subscribers and restricts the end-users’ ability to replace that equipment with their own equipment, i.e. whether it provides “obligatory equipment”.”

Despite the clear legal obligations and the mandate of the national regulatory authorities to investigate abusive behaviour, network operators in many European countries are restricting their customers' freedom of choice of terminal equipment.

End-users who wish to use a terminal device they have chosen/purchased themselves, are discriminated if they do not receive the access data necessary for installation and registration on the network. In this way, they are also not able to make use of all contractually agreed services and/or functionalities of the terminal device. The examples and experiences of VTKE in this regard are numerous.

Through these practices, network operators restrict the end-users' ability to replace the obligatory equipment with their own terminal equipment and therefore restrict their freedom of choice.

Such an approach clearly contradicts the Regulation and should be taken into consideration by the national regulatory authorities when assessing whether an ISP restricts the end-users’ ability to replace the obligatory equipment with their own equipment. Such behaviour must be consistently sanctioned by the NRAs.

Regarding Guideline 27.:

“27. Moreover, NRAs should consider whether there is an objective technological necessity for the obligatory equipment to be considered as part of the ISP network. If there is not, and if the choice of terminal equipment is limited, the practice would be in conflict with the Regulation. For example, the practice of restricting tethering¹⁷ is likely to constitute a restriction on choice of terminal equipment because ISPs “should not impose restrictions on

¹⁶ For further information please refer to BoR (20) 46, BEREC Guidelines on Common Approaches to the Identification of the Network Termination Point in different Network Topologies, 5 March 2020.

¹⁷ Tethering allows an end-user to share the internet connection of a phone or tablet with other devices such as laptops.

the use of terminal equipment connecting to the network in addition to those imposed by manufacturers or distributors of terminal equipment in accordance with Union law” (Recital 5).”

Unfortunately, the specification in the *Draft BEREC Guidelines on the Implementation of the Open Internet Regulation* that NRAs should assess whether there is an "objective technological necessity for the obligatory equipment to be considered as part of the ISP network", does not lead to more clarity and/or consistent prosecution of abusive behaviour by the NRAs.

The abridged wording of Guideline 26. rather offers an additional possibility to undermine the right of end-users to freely choose their terminal equipment. This is because network operators very often use the general argument that an obligatory terminal device would be absolutely necessary from a technical point of view.

This false argument has already been objectively refuted several times. There are virtually no technical reasons that would require the use of a terminal device determined/obligatorily provided by the network operator. The examples of Finland, Germany, Italy, the Netherlands, the USA and others, where there is freedom of choice of terminal equipment for all access technologies (DSL, cable and fiberoptics), clearly and impressively demonstrate this.

In this context, BEREC should make it clear - unlike in the previous version of these Guidelines – that the technical reasons asserted by network operators need to significantly outweigh the restriction of the end-users' freedom to choose their terminal equipment – otherwise the network operators would clearly be in violation of these Guidelines and Art. 3 (1) of Regulation (EU) 2015/2120. This is particularly necessary because the access to the Internet service in fixed and mobile networks is based upon open international standards and specifications (ITU-T, ETSI, and so on).

In addition, the fact that the *Draft BEREC Guidelines on the Implementation of the Open Internet Regulation* lack an obligation for network operators to provide their customers with or make publicly available the access credentials and/or configuration data necessary for the use of freely selected terminal devices and all contractually agreed services, also provides an opportunity to undermine the right of end-users to the freedom of choice. In this case, end-users cannot connect or configure their self-chosen terminal equipment or use the contractually agreed services. Hence the right to "use terminal devices of their choice" is ultimately counteracted or rendered void.

At this point we would like to explicitly point out that according to Directive 2008/63/EC network operators are already obliged to publish technical specifications of all services provided at the network interface (NTP); this also includes Internet access services.

Thus in order to ensure that the right of end-users to choose their terminal equipment does not come to nothing, network operators must be obliged to provide their customers with the access and/or configuration data necessary to connect their own terminal equipment to the network and use all contractually agreed services on a non-discriminatory basis (compared to the use of terminal equipment provided by the network operator).

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