

Statement of the Free Modem Alliance regarding the public consultation on the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines (BoR (18) 33)

Who we are

The Free Modem Alliance is an aggregation driven by the common purpose of discussing and promoting ethical technology and digital fairness. The Alliance has a heterogeneous composition, comprising different players of the digital supply chain. Currently, the active members are AIIP and Assoprovider (Internet Service Provider Associations), AIREC Confcommercio (Electronic retailer association), ALLNET (ICT distributor), MDC (customer protection association) and VTKE (terminal equipment manufacturer association). All of them are aiming to defend net neutrality, in this moment with a special focus on promoting awareness about the implications of Regulation (EU) 2015/2120, safeguarding the right of internet users to freely choose their terminal equipment, and opening new spin-off discussions about transparency and digital regulation items. The Alliance has currently applied to the national public consultation set out in Decision AGCOM 33/18/CONS and AGCOM 35/18/CONS by means of its members and it is willing to provide BEREC with an extended feedback about some of the consequences stemming from the Regulation's application.

- **In respect of questions 1, 2, 3, 5 and 7, the Alliance refers entirely to the response separately submitted by VTKE.**
- **Response to question 8. *Does the current assessment of zero-rating as recommended in the Guidelines, offer sufficient protection of end-users' rights as referred to in article 3(1) of the Regulation? Please explain.***

The Alliance believes that the current assessment of zero-rating doesn't offer a full protection of end-users' right as referred to in article 3(1) of the Regulation. In fact, while the guidelines may offer a sufficient protection of the end-users' *"right to access and distribute information and content, use and provide applications and services"*, they are insufficient in guaranteeing the users' *"right to use terminal equipment of their choice"*. Right now, on the Italian market, some of the major ISPs are putting in place commercial practices that might not represent zero-rating in the strict sense, but are nonetheless likely to restrict competition and to discriminate against those users that choose to exercise their right to use a terminal equipment of their choice.

We would like to share a recent example. During the last years, the largest ISPs operating on the Italian market have been imposing the use of a specific terminal devices on the end-users, i.e. wireless internet access gateway, depriving them of the possibility to use different ones. Depending on the offer, the users would be charged a fixed amount of money for buying the obligatory device, or a monthly fee for its rent. Such a commercial practice represents a clear violation of the right set forth in article 3.1 of the Regulation. Thus, since AGCOM started its inquiry on the matter and set out Decision 33/18/CONS, major ISPs are beginning to change their commercial practices, in what appears to be an attempt to workaroud a possible outcome of the procedure stating end-user's right to use their own equipment. In particular, few days ago, one of the main Italian operators presented a new flat-rate internet access offer. The base offer starts at 26,90 € per month and it includes a modem router, allegedly supplied "free of charge". That might look like an improvement for the users, but it isn't. Indeed, such an internet access offer comes in a mandatory bundle with a new accessory service, which includes the connection to the public network, the

configuration and the optimization of the users devices, as well as the possibility to receive helpline assistance once every year for three years. It should be recalled that, at the time of writing, many ISPs still refuse to hand out to the end-users the access credentials necessary for them to autonomously install and configure their terminal devices. Thus, even if this service were contractually optional, it would be mandatory in practice. Its price amount to 212,40 € (payable by installments), a sum which is, unsurprisingly, of about the same amount as the cost previously charged for the imposed purchase of the ISP's terminal equipment. The price of the ISP-supplied modem has not disappeared, it has been shifted to a new service, under a new position in the customer bill. As a consequence, the end-users opting to choose their own, non-ISP terminal equipment, are nontransparently forced to pay the price of the - allegedly gratuitous - terminal equipment. This practice creates a discrimination against the end-user who choose to use his own modem/router instead of the one supplied by the ISP, since he has to actually pay for both. Needless to say, such a discrimination discourages end-users from buying terminal equipments on the free market, and consequently seriously distorts competition.

- **Response to question 9. *How could the assessment methodology for commercial practices in the Guidelines (ref. in particular to paras 46-48) be improved? Is there a need for more simplification, flexibility and/or more specification? Please provide concrete suggestions.***

The assessment methodology, as provided by paras 46-48 of the Guidelines, appears to be particularly focused on protecting the end-users right of choice regarding content and application. In order to address the issue highlighted in our response to question n. 8 of the consultation paper, it could be useful to explicitly extend this protection to the free choice of terminal equipments. For instance, while assessing - in accordance to paragraph 46 - the agreements between ISPs and end-users on commercial and technical conditions and the characteristics of IAS, the National Regulators might also analyze, inter alia:

- A. whether there is an effect on the range and diversity of terminal equipments which consumer end-users may use and, if so, whether the range and diversity of terminal equipments which end-users can choose from is reduced in practice;
- B. whether the end-user is incentivised to use certain terminal equipments;
- C. whether some producers of terminal equipments are materially discouraged from entering the market or forced to leave the market;

also taking into account (i) the market position of the provider involved on retail and/or wholesale market (ii) the scale of the practice and that (iii) an apparent zero price for the bundled provision of terminal equipment discourages end-users from buying terminal equipments on the free market and limits innovation and competition on such market, to the detriment of end-users on the long term.

- **Response to question 24.**

Paragraph 36 of the Guidelines considers the case in which an ISP chooses to bundle the provision of the IAS with an application. According to this paragraph, *“where the traffic associated with this application is not subject to any preferential traffic management practice, and is not priced differently than the transmission of the rest of the traffic, such commercial practices are deemed not to limit the exercise of the end-users’ rights granted under Article 3(1)”*. However, the Alliance is worried that allowing operators to bundle the provision of the IAS with the free subscription to a premium application could result in a distortion of competition, even if the traffic associated with the application is not subject to a

preferential treatment. In particular, such a distortion is likely to happen if the small IAS operators are not enabled to enter into agreements with the providers of premium applications under equivalent conditions to those provided for in the contracts between major operators and said CAPs.

To guarantee this equivalence of conditions, and the consequent replicability of the offers, the regulators should promote a greater transparency on the market. Specifically, the ISPs should be forced to disclose the price they pay to CAPs for the subscriptions they purchase on behalf of their users. Currently, the relevant per-user cost is hidden, since major ISPs only disclose the aggregated price they charge for the bundle, thus precluding their smaller competitors from accessing the economic information that is necessary to ensure a fair negotiation with CAPs. That said, the Free Modem Alliance encourages BEREC to address, both in its Opinion for the European Commission and in a possible revision of the guidelines, the need for a greater transparency of the commercial offers for internet access.

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The members of the Free Modem Alliance

		
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