Summary of the FSFE‘s contribution to the Draft of the BEREC Guidelines on Common Approaches to the Identification of the Network Termination Point in different Network Topologies based on BEREC‘s report about the public consultation and the Guidelines‘ official text, published in 05.03.2020

General comments

In November 2019, the FSFE took part on the public consultation on the Draft of the BEREC Guidelines on Common Approaches to the Identification of the Network Termination Point in different Network Topologies (the Guidelines). On March 3, 2020, BEREC published the report on the public consultation, adopting the official text of the Guidelines.

The Guidelines on the location of the Network Termination Point (NTP) have the objective to orientate the National Regulatory Agencies (NRAs) to determine in their jurisdiction if the router/modem should belong to the Internet Service Providers (ISPs) or to users.

The official text does not contain substantial changes in comparison with the Draft. It provides more precise definition for several points. BEREC provided clearer explanation to many specific points, the legal principles of access and competition that the Guideline’s should focus on.

Specifically for Router Freedom, the most important novel is the BEREC’s confirmation of the point A as standard for NTP. Only when condition of strict technological necessity are in place the NRAs can choose other definition to NTP in other position than point A.

BEREC‘s decision to keep the original framework of having NTP in three different locations is the most controversial point, in our opinion. Not clearly recognising the necessity of having the NTP only on point A, opens a a dangerous precedent for discretionary and abusive interpretation of the Guidelines. While such necessity would be hard to prove to establish the NTP on point C, political influence could easily prove such necessities in order to have at least the modem at ISPs' premises (Point B), which could cause serious harm to Router Freedom. Besides, the decision by the NRAs to determine "technological necessity" would be hard to counterpoint, perhaps only through judicial ways.

BEREC‘s reactions to FSFE’s contributions

Although the FSFE defended the argument that only point A could be Router Freedom compliant, BEREC kept the possibility of having NTP in three different configurations. Nevertheless, the FSFE made a positive influence, and welcomed BEREC's readiness to accept the some contributions, made also together with other stakeholders. The FSFE focused on the necessity of keeping Router Freedom as the major principle when defining NTP.Here are the key points:

1. BEREC modified the official text in order to partially adopt FSFE’s position that BEREC should make clearer the that point A should be the rule when determining the NTP. BEREC has slightly modified the draft Guidelines insofar as to clarify the point that an objective technological necessity has to exist to include equipment into the NTP. Nevertheless, should such conditions exist, an NTP at point B or C can be identified.
2. BEREC explicity recognized FSFE’s and other stakeholders’ argument that it was not possible to find a real case where any incident with customer premises equipment (CPE) would have justified a violation of the basic user rights determined in Regulation 2015/2120 and Directive 2008/63/EC. The experiences made in Germany after the legal clarification to set point A as NTP as of 1 August 2016 serve as a positive example that devices chosen by end-users do not cause technological damages for ISPs and other customers although some ISPs and network providers warned against this. A significant number of end-users decided to make use of this freedom, a vital market for CPE is evolving, and there were no such breakdowns in neither the cable nor the DSL network.
3. BEREC agreed with FSFE’s conclusion that the NTP at point A contributes the most to innovation and competition on the TTE market.
4. BEREC acknowledged the comments from FSFE that liberalisation of the TTE market did not cause significant harm to the public network and the request to network providers and manufacturers to work together instead of trying to create a false sense of security by isolating the public network. BEREC concluded that there is no need to adapt the Guidelines results from these comments.
5. BEREC confirmed FSFE`s argument that the lack of Router Freedom increases the probability that large parts of the router market is dominated by only one or a few product families or manufacturers is already addressed in the Guidelines.
6. BEREC acknowledged FSFE’s argument that every other NTP location than point

A would seriously hamper end-users digital sovereignty, ecological footprint and seriously hamper end-users switching costs. However, only in case there is an objective technological necessity that it needs to be part of the public network it is not part of the TTE.

7. BEREC stated that FSFE's argument that data protection is best served by point A as the NTP is already addressed in the Guidelines but it must be decided by NRAs.
8. BEREC aswered to FSFE's view that ISPs do not care best for their client's security is a matter for NRA to solve and, therefore, there is no need to adapt the Guidelines.
9. BEREC did not share FSFE's position that only point A can respect net neutrality principles. For BEREC, the net neutrality issues can can be solved using the criteria already present in the draft Guidelines.

Unclear legal questions

Notwhithstanding BEREC's effort to clarify obsured points on the Draft, the liability in case of a router harming the public network will need a special attention in the future. Point 67 of the Guidelines says that it needs to be clarified who is responsible in case of faults (e.g. interoperability issues between modem, router or media box etc. and public network), the end-user or the network operator.

Another legal point made by VTKE that the EECC (recital 273 and Art. 105 (1)) refers to modems and routers as terminal equipment. This means that the first active device (the modem) at the end of the local loop is already a terminal device. Consequently, only an NTP at point A is consistent with the EECC. BEREC's response was not clear saying that it is possible to identify NTP in other positions because the art. 61 EECC stipulates so, but gave no other technical detail to the question.

Summary of the main changes on the official Guideline's text in comparison with the text draft

New text	Comments
2. NRAs may allow an appropriate transitional period in case their definition of the NTP location differs from where the NTP is currently implemented in networks.	The new text derives from the request made by Dutch telecoms operators.

11. Network operators have to define the (technical) characteristics of the NTP at which they provide access to their networks and services; End-users' TTEs have to comply with: a. the essential requirements of the applicable directives transposed into national law like Directive 2014/30/EU and Directive 2014/53/EU ; and b. with the characteristics of the NTP to which they are connected if they want to receive the services they expect from their contract with the network operator and/or service provider.	The new text derives from the argument made by VTKE about the lack of legal obligation to use only equipment in conformation to NTP specifications. BEREC added language about Radio Equipment Directive. This can produce consequences for RF.
17. The immediate context of the Guidelines in the EECC (Art. 61 (7)) is regulation of access and interconnection. From this follows that the competition issues, especially thebottleneck conditions in the access to networks, affect the methods to be used when defining the NTP location and interpreting the legal provisions that refer to the NTP. 18. Access regulation aims at overcoming specific obstacles to competition which cannot be addressed sufficiently by general competition law. Part of access regulation is the principle of unbundling which states that an access seeker does not need to access the infrastructure of the network concerned that he can deploy of his own, and the operator subject to access regulation need not grant access to such infrastructure. From this follows that equipment like modem, router, media box are only part of the accessed infrastructure if there is an objective technological necessity.	The new text derives from he demand made by ecta, ETNO and AIIP that the focus should be on the effects of the NTP on access regulation and competition. Berec added two paragraphs to explain better the principles. This plays in favor of Router Freedom.
24. The definition of the fixed NTP location has an impact on whether a piece of equipment at the customer premises is part of the local loop. For example in the case of an internet access service, if modem and router are part of the public network both devices also form part of the local loop, if they are TTE they do not form part of the local loop. 25.This also has an impact on the infrastructure the access seeker has to rent from the network accessed (see paragraphs 17 and 18), which affects the prices for access, and whether the access seeker has to use infrastructure like modem and router of the access	The new text is a consequence for adding paragraphs 17 and 18. This has positive consequences for RF.

provider.	
30. This shows that, at least for internet access services, the principle that the infrastructure encompassed by the public network must follow from an objective technological necessity also from the perspective of the end-user and not only from that of the access seeker (see paragraphs 17 and 18).	The new text is a consequence for adding paragraphs 17 and 18. This has positive consequences for RF.
38. The definition of the fixed NTP location affects what types of equipment are subject to competition effects that result from the ability of end-users to choose their own equipment.	Berec made this position clearer. This has positive consequences for RF.
39. If the definition of the fixed NTP location stipulates that the fixed NTP is located at point A, then the end-user and not the network operator 13 decides which equipment (e.g. modem, router, media box) will be used. 40. In this case, the impact on the TTE market is as follows: a. Equipment like modem, router, media box are part of the TTE market. b. It has a relatively high number of customers (the end-users and network operators who offer non-obligatory equipment beyond their NTP) and each of them may have different needs (e.g. private and business requirements). c. Manufacturers and vendors may develop a variety of different devices in order to meet these customers' demand; operators will foster this effort to present an attractive range of non-obligatory equipment to avoid end-users opting for unknown customer-provided equipment (effect of market contestability). d. Then end-users would be able to buy devices on the free TTE market or from their operator which meet their individual needs to a comparatively large degree. e. This is likely to foster innovation and competition on the TTE market.	Berec extended and prodived more information about the impacts on TTE. It derives from our demand to state clearly the consequences on TTE. It has a positive effect on RF.
41. The degree of the impact on the TTE market as described in paragraph 40 above depends not only on the extent to which end-users decide to use their own equipment and not the equipment provided by the network operator, but also on the contestability of the market on which network operators offer non-obligatory TTE to their customers.	The new text is a consequence for adding paragraphs 17 and 18. This has positive consequences for RF.

114. Communication between the premises of an end-user and the premises of other end-users (e.g. email, video conference) or a server in the public network (e.g. web server) always takes place via the public network irrespective of the NTP location. 115. In case of this type of communication: a. The legal provisions mentioned in paragraph 113 apply as well. In addition, end-users may protect their personal data against unauthorised access by using encryption, e.g. email communication using an appropriate end-to-end encryption protocol (e.g. S/MIME 37) or communication with web servers based on Transport Layer Security (TLS). b. End-users may use a firewall in order to protect their private network. In case the NTP is located at point A or B, the firewall is in the domain of the end-users and, therefore, they have the possibility to configure the firewall according to their needs. In case the NTP is located at point C, the firewall is in the domain of the network operator and, therefore, the end-users have only the possibility to configure the firewall if the network operators allow this.	An individual (Hans-Peter Lehmann, HP. L.) expresses that the possibilities to protect private data are limited in case the ISPs do not allow to adjust firewall rules in their routers. BEREC agrees with HP. L., that the possibilities to protect private data are limited in case the ISPs do not allow end-users to adjust the firewall rules in their routers, according to their needs, and adapted the Guidelines accordingly. BEREC agrees also with L. L.'s view on potential privacy issues outside of the local network and adapted the Guidelines accordingly.

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