Cable Europe Response to BEREC:

DRAFT Guidelines on Net Neutrality and Transparency: Best Practices and recommended approaches

2 November 2011

Introduction

The Internet stands out as the single most important development for mankind in the history of communication. And it stands out as one of the most important communication offerings that the cable industry brings to over 23 million citizens across the European Union.

As such, we are pleased to see BEREC taking up the challenge of establishing guidelines for regulators which seek to clarify some of the pressing issues on net neutrality - i.e. transparency.

Cable Europe is committed to delivering an open Internet where consumers can exercise choice and we believe, as does BEREC, that transparency plays a central role. A **vibrant Internet ecosystem should also be reinforced by infrastructure competition** and innovation driven by ongoing investments. In this regard, it is important that any regulatory approach to transparency is proportionate and achieves a balance between achieving a first class end user experience, stimulating competition and avoiding the imposition of overly burdensome obligations on providers that could jeopardise future investment and innovation.

Cable Europe views transparency as an **emerging competitive differentiator** for providers of internet access providers wishing to attract customers. BEREC should be applauded for the useful and comprehensive overview of transparency.

We particularly welcome the fact that BEREC's scope of consideration extends in this instance beyond the transparency of traffic management practices specifically and recognises the importance of the transparency of other factors that are determinants in the end user experience. In the wider context we consider that there is a need to improve consumers' overall appreciation and understanding of their internet access products which, alongside transparency of traffic management, is vital in ensuring that consumers can make informed, contextualized choices.

In this regard we would caution against the trend to confine the transparency debate to ISPs or network operators. It is widely recognised that the internet is a multi-dimensional ecosystem and two sided market. The factors that determine an end user's experience are therefore not the sole preserve of ISPs/network operators. For example, content/service

providers can (and do) exercise discretion around the extent of access to, or availability of, their services (we note for example the emerging debate about 'device neutrality'). Any consideration of transparency must not, therefore, be restricted solely to the ISP/network operator domain.

It is also important to approach the wider debate on net neutrality in phases, as BEREC has done in its draft guidelines. But it remains unclear what sorts of triggers, which would still need to be defined, would be required to establish and agree upon.

We welcome, also, the fact that BEREC has seen fit to focus its consideration on transparency and has not sought within this exercise to potentially cloud the debate with, for example, consideration of the acceptability or otherwise of particular ISP practices or policies. As BEREC quite rightly implies, other elements of the debate warrant their own dedicated debates as and when appropriate.

Important transparency obligations are already incorporated in the revised EU telecom package which forms an adequate response to the issue of an open internet issue for Europe. But we welcome BEREC's consideration of how to improve transparency information for European end users. **High level principles on transparency merit debate while we believe that specific approaches are best left to national NRAs.** We also consider that, as a general principle, NRAs should be encouraged to pursue a progressive or graduated approach to transparency, with industry driven/self regulatory initiatives advanced in the first instance and more formal or interventionist measures considered only if the former have been proven to be ineffective and/or there is a demonstrable market failure.

The European Consumer & Informed Choice

We agree wholeheartedly with BEREC that **too much information can be counterproductive**. To make an example of some of the very characteristics that BEREC suggests should make up an effective transparency policy, **"understandability" and "meaningfulness" risk being cannibalized if "accuracy" of information is sought to be achieved by a perversely confusing and potentially alienating amount of data**.

At the same time, we regret that the European consumer is not adequately credited for being able to carefully choose appropriate services. NRAs should not underestimate the need that already exists for service providers to be clear in regard to their offerings as a means of retaining and growing customer bases. Again, we reiterate that **making sure that the European consumer has the information that they need is a competitive challenge for market operators** whereby transparency already today plays the role of a competitive differentiator. But an excess of detailed information will be counterproductive for achieving the end goal of allowing the consumer to make informed rather than confused decisions.

Progressive approach, reasonable focus

One of the principal concerns in achieving the laudable goals of the Digital Agenda is finding the financing for what will be very large investments in

critical infrastructure such as the internet. **BEREC's progressive approach, in beginning to look at one of the most important elements of an open internet, transparency, demonstrates an understanding of the care needed in approaching the wider issue of net neutrality.** The cable industry invests an average of 25% CAPEX annually in its networks across Europe. We would imagine that other market actors making outsized investments in infrastructure would also agree with such a focused approach on an issue as complex as net neutrality. Cable Europe also supports the current focus of the guidelines on the retail market.

Approach to Transparency

As we have set out above, we consider that there is a need to address what we regard as a general lack of consumer cognisance and understanding of the capabilities and characteristics of their internet access products. Traffic and network management practices are of course not the sole determinant of an end user's experience – equipment specification, in-home wiring factors, delivery technology etc all have an impact on that experience. By way of example, the practice of advertising headline or 'up to' speeds is a particular source of confusion and misinformation, with certain technologies substantially under delivering against those theoretical capabilities in the majority of cases.

We strongly support, therefore, BEREC's suggestion that transparency of factors additional to traffic management should be promoted by NRAs. Furthermore we consider that alongside this broader transparency scope, it is necessary to improve consumers' general appreciation of their internet access products. NRAs can play a key role in this and in involving all players in the internet ecosystem in appropriate initiatives. We believe that this latter requirement is vital in ensuring that consumers are able to put their own needs and experiences into context and to enabling them to make informed choices.

In terms of the approach to transparency specifically, we believe that NRAs should not underestimate the effectiveness of self-regulatory initiatives. For example, in the UK the Broadband Stakeholder Group (BSG) has recently implemented a traffic management transparency initiative[1], whereby the UK's principal ISPs have committed to abide by a common Code of Practice relating to how, where and when they make available information relating to their internet access products. This Code of Practice includes a commitment by signatories to publish, in a common tabular format, detail on their traffic management practices and policies, together with other information relating to the specific conditions and limitations applying to the internet access products that they provide.

This initiative is aimed not only at providing (direct) information to consumers but is also intended to facilitate comparison between different ISPs. In the latter regard this extends to ensuring the ease of use of the provided data by third parties (in particular comparison websites) – thereby additionally supporting indirect approaches to transparency. In fact comparison website providers were involved in and consulted about the development of the scheme. The BSG project has been welcomed by many stakeholders, including consumer groups, Government and information

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[1] Broadband Stakeholder Group transparency initiative as captured from BSG website on 2 November 2011: http://www.broadbanduk.org/content/view/479/7/

aggregators. We would note also that the signatories to the Code of Practice have committed to allow independent, third party verification of the information that they publish.

We consider that self-regulatory type initiatives deliver benefits for both industry and NRAs alike – and that BEREC should recommend that NRAs encourage and facilitate such an approach in the first instance. In our opinion industry players have a strong incentive to advance such initiatives (in lieu, for example, of being subject to more formal regulatory obligations), and they are arguably attractive to NRAs given the reduced resource intensiveness as compared to the imposition and enforcement of formal regulatory requirements.

Key Quality Assurance Tool: Traffic Management

One of the particularly positive elements of BEREC's draft guidelines is the recognition of traffic management as a tool for good at the disposal of European internet service providers. **Traffic management is relied upon as a crucial element of assuring the European consumer quality assurance.** BEREC rightly states that "traffic management measures are neither mandated nor prohibited, although any such measures must respect national and Community law."

While we recognize that not all forms of traffic management may be appropriate, a fruitful and non-emotive debate should take account of the necessity for reasonable and lawful traffic management as a basis for discussion. As we stated before, traffic management is needed to get the most out of current and future networks and is a reality in today's functioning market. **We call on BEREC to continue balanced discussion that underscores the legitimacy of traffic management** as a means of enhancing the consumer experience rather than allowing misinformation to negatively portray this needed practice.

We do not agree with the finding that "common terms of reference about internet access services and agreement on which traffic management measures are non problematic can make transparency policy more effective" as found on page 24. Given the multiple service offerings in the market and the combinations purchased by consumers, identifying and agreeing upon such common terms would be an overly onerous task for both internet service providers and NRAs. Moreover, as we have set out above, we believe that there is a significant risk of the development of transparency policy being undermined if consideration is extended to the acceptability or otherwise of certain practices. The latter is a complex and very likely contentious area, warranting its own (albeit complementary) debate.

For the sake of clarity of direct communication with our customers**, we would urge extreme caution in any consideration of a requirement for "real time information"** for the same reasons that are stated above in terms of information overload and potentially unneeded onuses on providers. Notwithstanding the considerable technical challenges and cost associated with the provision of certain real time information by ISPs, we consider that such information has the potential to prove both disruptive and mis-informative for consumers. There is, in our view, considerable scope for consumers to misinterpret this type of information or take it out of context –

leading, potentially, to them making inappropriate decisions or choices in respect of their broadband services.

Instead we consider that alternative measures would be far more effective – for example the provision of clear and understandable information about the circumstances in which traffic management is employed, the effects thereof and the impact that certain activities or actions can have on any usage limits or other constraints to which the end users' particular package might be subject.

We note also that tools to measure internet speed exist today on the market and can provide consumers with an immediate idea of how well their internet service is performing.

Functioning market and direct approaches to transparency

Cable Europe favours a "direct approach" towards transparency in the absence of market failure. We are confident that with high quality and consumer-friendly public information a natural market development will see indirect approaches emerge as third parties become compelled to evaluate information offered by internet service providers. **A forced or mandated indirect approach carries risk** of added and unneeded costs for ISPs/ regulators.

For example, a mandated requirement for ISPs to provide specific information (or information in a specific format) to third parties, or to explicitly support third part measures may be disproportionate and could prove counter productive. Rather, we believe that there is significant scope for direct measures to facilitate/support and indeed stimulate indirect measures on a complementary basis, instead of their being a need to formally require ISPs to underpin them. In this regard, we would again draw example from the UK model. In this instance a healthy and competitive 'comparison site' market has become established, based on an accreditation scheme underwritten by the national regulator. Third parties collate data about ISPs' products based on information available in the public domain, and provide comparison of that information to the general consumer market. The accuracy and credibility of those comparisons is underwritten by the NRA's accreditation scheme, to which third parties must comply if they are to be competitive and successful in the market. As a result of the aforementioned BSG transparency initiative these third parties are, in addition to tariff and general service elements, now enhancing their facilities to incorporate comparisons between ISPs' products based on traffic management and other conditional elements of broadband packages. Again, this is based on the sourcing of public domain information – and this approach has been facilitated by the engagement of comparison site operators in the development of the BSG initiative.

Cable Europe supports the idea that efforts on transparency should be technology-neutral with technological specificities to be taken account in defining an effective policy.

Conclusion

Transparency and consumer understanding is a critical component in ensuring that end users are sufficiently informed in order to be able to make their own choices about the service they require. However, it must be considered in a wider context. Transparency awareness is a step in the right direction but should also aim to establish a greater understanding and appreciation of broadband performance in general. It is worth considering Ofcom's Broadband Speeds Research[2] which examines UK broadband speeds, broadband performance and advertised speeds. It suggests that greater transparency and understanding of broadband throughput speeds (and the constraints on them) are important to help consumers make more informed choices. Such information must be accurate and honest.

In addition to improving consumers' overall perception of internet access products, a broader approach to transparency which takes account of the overall end user experience would help to improve understanding of traffic management practices specifically. We reiterate the role of transparency in traffic management practices as that of competitive advantage for an increasingly sophisticated, demanding and net-savvy European consumer base.

Finally, we would note that the continued growth in traffic will simply not be able to take place without consumer-experience focused traffic management to ensure a robust and efficient functioning of the network – which is, after all, a finite, shared resource. The provision of innovative services for users relies on it. Our vision is to see Europe continue to benefit from a strong, competitive market that provides high quality services to the end-user. In light of this, **we do not support co-regulation in a market where self regulation and self-sanctioning act as much swifter corrective tools** for increasingly demanding consumers who have many public avenues to address grievances.

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[2] OFCOM's Research Report on UK Broadband speeds, May 2010: Ofcom Announcement:
http://consumers.ofcom.org.uk/2010/07/increase-in-uk%e2%80%99s-average-actual-broadband-speed/;