1st November 2011

ECTA contribution on BEREC's draft Guidelines on Net Neutrality and Transparency[1]

Executive summary

ECTA's members welcome BEREC's draft guidelines on Net-Neutrality and Transparency and support BEREC's pragmatic approach to the Net-Neutrality debate. ECTA members stress that, with respect to transparency and Net-Neutrality, it is important to consider that:

- Transparency measures are not sufficient to ensure Net-Neutrality. In order to have an effect, transparency should build on effectively competitive markets and on the ability for end-users to switch. NRAs should thus focus primarily on the effective implementation of the 2009 Regulatory Framework.
- Bespoke offers to high-end businesses and administrations should be excluded from the scope of the transparency guidelines.
- Any retail transparency policy should ensure that in parallel the necessary wholesale transparency conditions are applied and that operators relying on wholesale services have flexibility to set their own QoS standards at the retail level thereby ensuring competition on quality of service in retail markets.
- Self regulation should play a decisive role in transparency and should be further promoted.
- ISPs should continue to be the principal actors in providing information about their services to their clients. Interaction between ISPs, NRAs and third parties is key to create a transparent commercial environment in which ISPs are encouraged to put on the market differentiated offers and compete on quality and on prices.
- A clear distinction should be established between "internet access" based on best effort which is unrestricted in terms of access to content, to services and to applications and any other service that is limited in this respect. For the sake of transparency, services providing access only to a subset of the Internet and IP-based limited, premium or managed services should not be forbidden or restricted but they should not be commercialised as "internet access" services as this would mislead consumers' choice.

[1] BEREC Document BoR (11) 44, submitted to public consultation on 3 October 2011.

General comments

ECTA welcomes the approach taken by BEREC on Net-Neutrality (NN) and Transparency. In particular ECTA agrees with BEREC that transparency is fundamental to maintaining the open Internet and choice for consumers. As also noted by BEREC, while transparency is necessary, it is not sufficient. The existence of competition in the relevant market and the ability of end-users to choose and switch between operators as well as between service providers are paramount for transparency measures to have an effect.

ECTA believes that under the regulatory framework for electronic communications, it is the role of the Commission and of NRAs to ensure that wholesale broadband markets are open to effective competition. If that objective is met and a high level of transparency is provided, then the demands of consumers, including their demands for different levels of quality of service, will be met by competing providers. Ensuring there are no barriers to competition should thus remain the main focus.

Accordingly, ECTA stresses at the outset **that the punctual and effective implementation of the 2009 regulatory framework for electronic communication is a prerequisite for achieving the goals underlying the NN debate.**[2]

Scope

The draft Guidelines distinguish between different types of offers, different networks and technologies, and multiple types of users and usages but fails to recognise that strict transparency measures would not be suited for high-end business receiving bespoke offers from operators for which the required transparency is usually provided in the contract negotiation phase.

In this context **it is paramount to exclude bespoke offers such as those provided to high-end businesses and administration from the scope** of any transparency obligation. The focus on consumers as opposed to business users is supported by the relevant provisions of the 2009 Regulatory Framework for electronic communications[3] and is justified by the tailored nature of business services and by the high levels of QoS details agreed in the individual negotiations between service providers and business clients.

Additionally, ECTA stresses that most retail ISPs rely on wholesale offers (resale, wholesale broadband access, unbundling) and that the level of transparency at the retail level depends to a large extent on the information provided at the wholesale level. In this context, **any**

[2] ECTA does not exclude that other measures might be needed for particular cases. For instance, a regulation preventing discriminatory and exclusionary conducts could be needed where such conduct was found to be unduly restricting competition.

[3] See Articles 20, 21 and 22 of the Citizens' right Directive 2009/136/EC to be read in conjunction with Recital 21 (CRD) and with Recital 49 of the Universal Service Directive 2002/22/EC.

retail transparency policy should ensure that in parallel the necessary wholesale transparency conditions are applied and that operators relying on wholesale services have flexibility to set their own QoS standards at the retail level thereby ensuring competition on quality of service in retail markets. The 2009 Regulatory Framework provides the necessary legal basis for regulators both to ensure transparency on wholesale QoS[4] and to mandate changes to the reference offer to ensure that wholesale products allow the access seeker flexibility over the QoS that they can offer when relying on regulated wholesale inputs.

This point is crucial because in order to have effective competition each service provider must be able to set its QoS independently of its competitors. If the regulated wholesale offers do not guarantee this flexibility, competition would be severely impaired.

Who should provide transparency?

ECTA welcomes the recognition by BEREC of the role of different parties in communicating information (i.e. ISPs, NRAs, third party commentators) and of the information needs of different audiences *i.e.* end users (who themselves will have differing degrees of understanding), NRAs, and third party commentators. ECTA believes that **ISPs should continue to be the principal actors in providing information about their services to their clients.** As recognised by BEREC, ISPs are best placed because of the knowledge they have of their business and of their clients.

ISPs and access providers should be encouraged to develop and commit to providing a consistent and comparable set of information about their services in the form of a voluntary or co-regulatory code of practice. It may be useful for NRAs to facilitate this effort.

Nevertheless, ECTA agrees with BEREC that a robust transparency policy enabling end user to choose the broadband offer that is most suited to their needs should necessarily allow those users to compare effectively the offers available in the market. NRAs should therefore have the general task of making sure that transparency obligations are respected and that the information provided is accurate, complete and offered in a way that allows end user to compare the market proposition made available by different ISPs. With respect to third parties, ISPs could make available technical data to a selected list of stakeholders (NRAs and third parties). However, NRAs should guarantee that third parties are independent and do not engage in unfair commercial practices.

ECTA believes that interaction between the three actors involved is key to create a transparent commercial environment in which ISPs are encouraged to put on the market differentiated offers and compete on quality as well as on prices.

[4] Article 9 of the Access Directive 2002/19/EC.

In designing this system, although some national peculiarities may be taken into consideration a consistent approach across the EU is key. As acknowledged by BEREC,[5] excessive administrative burden on ISPs should be avoided; otherwise, ISPs would be obliged to transfer the costs onto the end-user.

On the content of a transparency policy

Any transparency obligation should respond to the proportionality criterion, which in this case is closely linked with the definition of understandability given by BEREC. Therefore transparency policy should carefully take into account the minimum clear information that the end-user needs in order to make an informed choice. Too comprehensive and too technical information would be costly for the ISPs and not understandable to the consumer.

Transparency obligations should nevertheless take into account elements that ISPs cannot control, *e.g.* the quality of the end-user equipment[6], the effects of content delivery networks and the quality of connection to the Internet provided by content and application providers.

ECTA agrees that consumers' perspective is paramount. For this reason ECTA proposes to **establish a clear distinction between consumer "internet access" based on best effort which is unrestricted in terms of access to content, to services and to applications and any other service that is limited in this respect.** For the sake of transparency, services providing access only to a subset of the Internet and IP-based limited, premium or managed services should not be forbidden or restricted but they should not be commercialised as "internet access" services as this would mislead consumers' choice.

As acknowledged by BEREC, internet access services need a fair level of traffic management in order to fulfil end-users' expectations. Existing regulations at national level require already most ECTA members to provide transparency to their clients by specifying in their offers that, in order to guarantee a balanced quality of service especially in peak times, some traffic might be prioritised.

ECTA thus agrees with BEREC that, for internet access services, it would be useful to establish a common terminology defining general limitations, fair management policies, data caps and speeds.

With respect to transparency labelling (e.g. common coding, traffic light visual representation), there is a risk that such an approach would tend to align the available

[5] Chapter II, 2.d. of the consultation document.

[6] Construction specifications compliance / quality of the connexion from household to LL, quality of TV, PCs. For instance, the use and configuration of in-home WiFi can have a considerable effect on speed and packetloss anddifferent OS may have a significant effect on QoS: for an illustration see this graph http://lafibre.info/images/tuto/201106_impact_du_ping_en_fonction_du_systeme_exploitation.png

offers and thus incentivise coordination of market actors.[7] ECTA believes that in any event **a clear definition of what constitutes Internet access (i.e. excluding restricted services from such a definition) and distinguishing between consumer internet access service and any other service would make such a labelling system redundant.**

Promoting self-regulation is essential

As recognised in the consultation document, **self regulation should play a decisive role in transparency and should be further promoted.** Collaborative approaches are in the best interests of all market players and, as shown in the UK KFI example, they can deliver balanced results.

ECTA believes that before enacting guidelines and obligations related to transparency, NRAs should invite operators to agree by self-regulation in the context of a common framework of reference promoted at EU level. NRAs should then have the task to provide guidance and monitor the implementation of self-regulation and act accordingly.

In this respect, **ECTA calls on BEREC and the European Commission to invite the industry, consumer organisations and experts to agree on a common definition of internet access,** and, more in general, of terms to be used to describe transparency expectations with respect to various topics**.** Such a platform could provide, for example, the answers to the specific questions on traffic management asked in the consultation document. The outcome could be used as a basis for a Recommendation to Member States helping creating a level playing field for transparency in Europe.

This approach would avoid the adoption of measures taken at national level exceeding the required level of regulation.

Conclusions: ensure a European approach

It is crucial for the Single Market that a transparency policy is firstly discussed at EU level and avoids creating further fragmentation in the market. This extends to the development of common terms of reference, to the clarification of what can be considered as a reasonable limitation to an unrestricted internet access offer (e.g. absence of restrictions, subject to fair management policies, data caps and speeds) and to the desired level of user empowerment. Unjustified differences in transparency policies between EU Member States

[7] In addition, the labelling or visualisation systems described, if not properly designed, could have unintended effects on the choice of consumers. For instance, the described traffic light labelling system with green, yellow and red colours could have an implicit powerful message as they could be automatically associated with a judgement of being good, average or bad respectively thus excluding a choice based on the specific features of the offer.

could create unfair advantages for market players established in countries with more relaxed regulations.

NRAs should monitor and encourage the development and implementation of self regulatory measures.

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