ETNO Reflection Document replying to the BEREC Consultation on Draft Guidelines for Transparency and Net Neutrality

November 2011

Executive Summary

- Dealt with in the appropriate way, Europe's approach to net neutrality can have a significant positive impact on EU citizens and the ICT sector, as well as the ability of European businesses to compete in the global arena.

- ETNO supports a holistic view of the open Internet and believes in openness, transparency and competition across the Internet value chain.

- ETNO members are committed to providing transparent and meaningful information (i.e, appropriate, comparable, accessible and verifiable information) to end-users on their services of choice and as required by the existing telecoms regulatory framework.

- Network management is an indispensable means to control network congestion in view of rapidly increasing IP data traffic volumes and allows product differentiation based on quality of service in line with end-users' needs.

- Regulators have a role in monitoring ISPs' practices on transparency and any self-regulation initiatives. Any third party monitoring should be carried out by validated and reliable sources in order to provide the market with robust information.

- ETNO believes that BEREC has correctly identified the key areas relevant for the implementation of transparency and expresses its readiness to enter into a constructive dialogue with BEREC on how to further implement the transparency obligations.

General remarks

ETNO welcomes this opportunity to contribute to the BEREC Consultation on "*Draft Guidelines for Transparency and Net Neutrality*".

ETNO has 40 member companies from 35 European countries, representing a significant proportion of aggregate information and communication technology (ICT) activity in Europe. The members account for a combined annual turnover of more than €250 billion and employ over one million people across Europe. ETNO companies are the main drivers of broadband growth, having accounted for two thirds of total high-speed broadband deployment to date.

The EU approach to net neutrality

Dealt with in the appropriate way, ETNO believes that Europe's approach to net neutrality can have a significant positive impact on EU citizens and the European information and communications technology (ICT) sector, helping to achieve the ambitious broadband targets of the Digital Agenda. Commissioner Neelie Kroes has repeatedly stressed the need for a regulatory framework which promotes private investment in next generation networks. Investment in these smart broadband networks in Europe crucially depends upon network operators' freedom to innovate and develop new business models in line with EU competition and consumer protection rules. The Internet is a shared resource and all actors have the shared responsibility to operate within the legal framework which must also allow EU businesses to compete in the global market. As such, ETNO looks forward to contributing to BEREC's future work in the area of net neutrality, as described in its draft work programme for 2012.

As mentioned in its response of September 2010 to the European Commission's Consultation on Open Internet and Net Neutrality, ETNO advocates a holistic view of Internet openness, covering several dimensions:

- Users should be able to access any lawful content on the Internet and access services and applications of their choice;

- Users should be able to benefit from differentiated offers in line with their individual preferences;

- The principles of openness, transparency and competition should be adhered to by all players in the Internet value chain and not be limited to operators of electronic communications networks.

Fixed and mobile broadband markets in the EU are already highly competitive, providing effective choice for end-users. In line with the recently revised EU regulatory framework and specifically the revised Universal Service Directive, ETNO members are committed to providing transparent and meaningful information regarding any limitations of the Internet access services offered to end-users, further strengthening consumer choice in this field. Transparency requirements strengthen the positive effects of competition with regard to Internet access services. However, since the quality of service for best effort Internet services does not solely depend on

the Internet access provider, ETNO believes that it would be beneficial for consumers to extend such transparency principles to the overall Internet value chain. Transparency requirements for Internet access providers must respect the fact that the access segment is just one element within the chain of interoperated networks. The resultant quality of experience for any given end-user is the result of interaction between several actors along the value chain.

The role of traffic management

Although interest in this issue has grown in the last couple of years, the use of traffic management techniques is not new. It has been, and continues to be, a vital tool in supporting the efficient operation of the Internet and providing a good quality of experience for the end-user. Network management is an indispensable means to control network congestion in view of rapidly increasing IP data traffic volumes. Network management is, for example, used to prioritize quality sensitive applications over other more elastic applications. This can be done without analyzing the actual content that is transmitted and it does not affect citizens' fundamental rights such as the freedom of expression. Network management also allows service differentiation in the form of offering specified qualities. These tariffs and the corresponding service must, of course, be clearly communicated to consumers. ISPs also engage in ongoing efforts to protect their networks against cyber-attacks and other threats to network integrity, as well as to deal with illegal content (eg child abuse) and this may, at times, involve traffic management/throttling.

Transparency

ETNO agrees that transparent consumer information should be a key building block of an open Internet. Transparency can address most of the concerns about openness and competition in the Internet while empowering consumers and businesses to make choices according to their individual preferences. The information provided should be meaningful, i.e. it should strike the right balance between providing comprehensive information to end-users so they can fully exercise their choice and the risk of providing an overload of complex information that would create the opposite effect. As also indicated by the BEREC, the information should also be appropriate, comparable, accessible, verifiable and neutral, i.e. not include a pre-established value judgment. Additionally, transparency obligations should always take into account that information that is commercially sensitive or that is related to network security requirements can be kept confidential

Comparability appears particularly critical to ensure correct information for end-users and should always be kept in mind when defining and producing the information. Publication leading to non-objective comparisons could indeed have a potential detrimental effect on competition. In particular, it should be ensured that all players respect the agreed headline rules or concepts on transparency in order to achieve comparability and avoid possible competition distortion.

ETNO is prepared to contribute to a meaningful and consistent application of the transparency obligations of the revised regulatory framework. ETNO believes that given the clear and detailed provisions of the EU legal framework, and in particular Articles 20 and 21 of the Universal Service Directive, any further detailed regulatory intervention on transparency should be avoided, or in any case should be considered only when industry fails to deliver on transparency after existing legal provisions have been implemented. Rather, one could foresee a process of self-regulation or co-regulation on specific aspects of transparency where industry would develop a framework or code of conduct for making comparable information available to consumers. Such processes could be framed nationally, taking into account existing best practice and third party involvement at the national level.

Specific remarks on the draft BEREC report

1. Categorization into problematic / non-problematic traffic management techniques

ETNO believes that the BEREC guidelines on transparency should avoid any judgement on problematic/non-problematic traffic management techniques. It is up to end-users to decide whether they consider a practice to be problematic or not. Certain practices such as prioritising other traffic over peer-to-peer at certain times of the day can perhaps be considered problematic for a few users, but not for the majority. Traffic management practices which are legitimate under the existing framework should not be categorised as 'problematic', prejudging users' choice.

In this context and in order to provide the most accurate and complete input to the debate, ETNO believes it would have been preferable to have more information about the outcome of BEREC's work on QoS. Indeed, in the current transparency consultation, BEREC repeatedly refers to its upcoming report on QoS without the knowledge of which, ETNO members are not in a position to fully comment on QoS related points. The distinction of problematic and non-problematic practices is only one example.

2. Provision of information

Transparency on network management techniques has to be considered in the wider context of the full set of information that users have to look at when making decisions about their ISP. For the majority of users, the information they are interested in includes information on prices, speeds, handsets, services available, etc.

As far as information on traffic management is concerned, ETNO agrees with the draft BEREC guidelines that providing the right level of information is a

challenge. Detailed and rigid requirements may fail to meet the target and may imply unnecessary costs on industry.

ETNO believes that ISPs already provide good information to users, and in some countries, such as the UK, there are industry self-regulation initiatives in place to ensure the provision of additional information. When assessing the current situation, it should also be borne in mind that implementation of the EU telecoms framework still has to take place and that practical implementation by industry of the transparency requirements set out in the Universal Service Directive is still ongoing. The current status on transparency can therefore be expected to improve over the coming months.

3. Limitations

When addressing the issue of *actual speed*, one must acknowledge that ISPs are not the only party responsible for the end-to-end quality of experience on the best effort Internet. As previously stated, the Internet involves a whole chain of stakeholders where ISPs play an important role but the end-user's experience is also a function of other actors' performance. In this respect, the equipment used by the customer, choices of content providers and/or transit providers are also decisive. Any reflection on transparency and actual speed must take the utmost account of this point.

An actual speed requirement should also take into account technology specificities. This point is essential to avoid any distortion in competition between technologies. Indeed, transparency rules could become a pretext to leverage on technology specificities. In other words, one should ensure that transparency rules are sufficiently neutral in the context of infrastructure competition to allow a comparison across the whole market, avoiding rules that only apply to certain players and technologies. Otherwise, it could be asked that, for example, cable networks publish per segment how much Internet speed is available, how many active users are on the loop and what is the sustained speed when all users are surfing. Note should be made that most of the actual speed ideas are very DSL oriented. It is also the case that information relating to one platform may be much less reliable and stable than on another one. For instance, a mobile Internet access service will always be affected by factors outside the control of the network operator (such as building substance, weather, number of users in a cell etc). NRAs should refrain from obliging service providers to publish details on a level that (i) does not fully take into account the effect of the technology specificities and (ii) is too specific in relation to location and actual measurements because of disproportionate costs.

Finally, we consider that one should not confuse two goals, being on the one hand transparency towards end-users and on the other hand providing information which may be of use for the NRA in carrying out its task, but be of no or limited interest to the end-user. While NRAs may consider it interesting to receive additional information on wholesale agreements or type of interconnection, this information is not a value-add for end-users, not least due to the technical nature of the information. ETNO members therefore consider that any transparency measures based on the revised USO Directive should be limited

to end users' concerns and exclude from publication any information from the wholesale layers that can also be confidential. For these reasons, it would be more appropriate to limit end-user information to a set of understandable, observed and comparable performance data. For instance, the end-user is likely to be more interested in the time needed to download a movie from a specific content provider than in having details on the way content arrives on the ISP's network.

4. Monitoring and review

Regulators can have a role in monitoring ISPs' practices and self-regulation initiatives and their impact on the market. In particular, they will have to ensure that all players respect the agreed rules on transparency in order to achieve comparability and avoid possible competition distortion.

Regarding technical tools for checking traffic management practices / speed availability, most operators already offer such tools. Third parties may also have a role to play, however, it is necessary to check carefully the appropriateness and the proportionality of any kind of tool used. Moreover, third party comparison checks should be validated and carried out by reliable, independent sources.

Future action

ETNO members believe that BEREC has correctly identified the key elements relevant for implementation of transparency within its consultation paper, thus establishing the platform for further discussion. Network operators share the goal of coming to a common understanding of the transparency requirements, to facilitate better implementation. Building on its consultation response, ETNO would like to enter into a constructive dialogue with BEREC on how to further implement the transparency obligations created by the telecoms framework, for the benefit of end-users.