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Executive officer:
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Our date:
02.11.2011

Our ref.:

Your date:
10.2011

Your ref.:
BoR (11) 44

Draft Guidelines on Net Neutrality and Transparency

First of all we would like to thank BEREC for taking a solid approach to the question of network management, and net neutrality. The Norwegian Consumer Council (NCC) has awaited and anticipated a further progress and process on these topics since the implementation of the Telecom-package, which in our view came a bit short in securing net neutrality for European network users.

In our opinion, the infrastructure these networks rely on is, when it comes to importance, nothing short of both electricity and water: access to internet has to be regarded as a fundamental service, and treated like that. In this context, we urge BEREC to implement the thoughts and initiatives presented in the report from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue¹.

NCCs more general take on network neutrality can be found in our response to the European Commission's (DG Information Society and Media) public consultation from September 2010². Our position is summed up as follows:

- Net neutrality is a prerequisite to ensure freedom of expression, to hold opinions and to receive and impart information and ideas.
- Net neutrality is a prerequisite to ensure further innovation and development of network related services.
- It must be up to individual broadband customers to decide how to use their bandwidth.
- The quality of the content must not be affected by the Internet service provider's agreements, preferences, financial interests or other concerns.
- Congestion must be met with further development of capacity, not by traffic management.

Below you will find our special comments to BERECs "DRAFT BEREC guidelines on Net Neutrality and Transparency: Best practices and recommended approaches". We would also like to point to BEUCs response, and emphasize our support for their response.

¹ <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>

² http://forbrukerportalen.no/filearchive/net_neutrality_consultation.pdf

Transparency depends on competition and switching possibilities

First of all, NCC would like to state that the greatest challenge by far to transparency as a tool to avoid breaches of net neutrality is the fact that transparency predicts breaches. This is thoroughly displayed in the otherwise very useful information tools presented in chapter 4, sub section 2.

According to the BEREC approach on this question, the throttling of P2P-traffic performed by the Dutch ISP UPC in the summer of 2009³ would be well within the suggested framework. With this in mind, it might not be a surprise that the Dutch users are the first European users to have their net neutrality secured by law. For further comments, we will try to look past this paramount objection.

NCC appreciates the emphasis given to the importance of real and sound competition along with low barriers for users to switch service provider. This perspective is being introduced already in the executive summary (p. 3):

“At the same time, we underline that transparency alone is probably not sufficient to achieve net neutrality, since other factors also have to be taken into account - the existence of competition in the market, the reduction of barriers to switching are, among others, important factors that, alongside transparency, can contribute to achieving the objective of net neutrality set out in the Framework Directive.”

It is then reiterated and further emphasized in page 6, where it is made clear that

“(...) the European approach towards net neutrality consists first of all of promoting competition, and improving the conditions for end users to switch from service provider (...)”

In NCCs opinion, this is absolutely paramount for any market, and we cannot see that these two requisites are in place in our national markets. Other national markets are believed to have similar challenges, as stated in the Swedish NRAs report “A survey and analysis of conditions in consumer contracts that affect customer mobility in the electronic communications market” from fall 2010⁴. Their conclusions indicate that termination restrictions, binding time and bundled services can result in the user taking irrational choices, and reduces the possibilities to switch provider, even when competition is deemed to be good. The Norwegian Consumer Ombudsman has pointed to similar challenges in their report “Forbrukerutfordringer ved koblingsalg av bredbånd, TV og telefoni”(Consumer challenges related to bundling of broadband, TV and telephony)⁵.

In NCCs opinion, many reports on broadband markets do not take sufficiently into account the impact bundling has on these questions, when they are looked upon solely as broadband markets.

NCC very much welcomes BEREC’s stand that there is no principal differences between fixed or mobile networks when it comes to net neutrality and transparency. As technology progress, we believe this divide would become rather diffuse and meaningless, and believe a technology neutral approach is the only way to approach these challenges. Any other approach could also lead to an unfair and/or unintended technological development.

Transparency vs. marketing

NCC would also like to comment on an aspect that is given some attention in the draft regarding marketing and net neutrality. A difference between advertised speed/capacity, and traffic management are two very different subjects, and should be kept clear apart. Questions regarding speed/capacity are usually regulated by a different authority and on different legal grounds than traffic management.

³ <http://www.v3.co.uk/v3-uk/news/1951975/dutch-isp-heralds-net-neutrality>

⁴⁴ <http://www.pts.se/upload/Rapporter/Tele/2010/2010-22-possibility-to-switch.pdf>

⁵ <http://www.regjeringen.no/pages/16201881/Prosjektrapport.pdf>

In Norway, the Consumer Ombudsman is closely monitoring these aspects of the broadband market, while the Post- and telecommunication authority is the regulating authority on telecom. In this case, there are two different sets of legislation, two different bodies of authority managing the legislation and they are based on two very different rationales. It is important that these differences aren't blurred in any way. NCC is glad that BEREC differentiates between the two, and strongly suggests this is continued in BERECs coming work.

When it comes to what entities that should or could be providing the information needed, NCC would point to the fact that issues relating to transparency often involve technical matters, far beyond what any regular consumer would have any deep understanding of. This said, the consumer has a valid and empirical perception of what internet is, and NCC suggests that any service that is managed on content, applications or other services, should be deemed as something else than internet. From a marketing point of view, an ISP should have to choose an all or nothing-approach in this aspect: either they are an internet service provider, or they are a provider of some other sort of service.

Who gives what information?

From an empirical point of view, the NCC is not quite sure of the roles the different NRAs are willing or able to play when it comes to gathering and supplying information. The Norwegian NRA has for instance refused NCCs request to inform users of which provider has and has not signed the Norwegian guidelines. In NCCs opinion, this would have been a very useful information to give, and with very few efforts. The Norwegian NRA runs a similar service as is referred to in the draft as the Irish www.callcosts.ie.

When BEREC discusses problematic vs. non-problematic traffic management, it is within the scope that transparency does not directly safeguard against breaches of net neutrality. This said, the NCC would like to stress that this discussion and line-drawing could be improved if given a macro-dimension as well as the end-user dimension. We understand that this point is intended to be made under a more narrow scope, but the effect of the different managing measures, as mentioned as one of the relevant momentums to be taken into consideration, could give interesting and relevant conclusions if a larger scope is chosen.

Data caps and limits on downloads

BEREC also discusses data-caps and download limits, and the NCC can agree that these are relevant topics under the discussion of net neutrality. At the same time, this must be under the legal obligation of the ISPs to inform their customers of any such restrictions on the subscriptions.

NCC would also like to point to the fact that very few consumers know exactly what kinds of applications/services use what capacity. Given that many more of the goods that surround us, will be attached to an infrastructure of some kind and serviced by a provider, caps and limitations could have severe impact not only on the experience of the service, but also the functionality of different apparatuses. This again could have fatal consequences, and we would like to strengthen the net neutrality-relevance of caps and limitations in this perspective.

Transparency and Public sector information

As mentioned above, the national NRA has so far been reluctant to include net neutrality relevant information on their comparison website. These services can also be seen from the perspective of how the Public Sector Information Directive (PSID)⁶ is being implemented in the different member states, and EEA states. The NCC have invested in several websites making comparisons between different services during the last few years, Finansportalen (Finance Portal)⁷ being the most successful, with more than XXX visitors every month

⁶ http://ec.europa.eu/information_society/policy/psi/index_en.htm

⁷ <http://www.finansportalen.no/>

Any entity that is presenting the information covered by BEREC within these draft guidelines should be doing so under the PSID regime. This could give a viral spin on how the information is presented, and at the same time open up for various different approaches on how and what information is being presented. It could also have the effect on the original information provider to take on a more proactive role.

The Norwegian Consumer Council would be happy to assist BEREC if there is a need to clarify our position, or if anything is unclear.

Yours Sincerely,

Thomas Nortvedt
Head of Section, Digital Services