Submission to the

Consultation on draft Guidelines on Net Neutrality and Transparency

In reference to the draft of
"BEREC Guidelines on Net Neutrality and Transparency:
Best practices and recommended approaches"

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Preamble

Net neutrality has to be a fundamental right to grant a positive development of the European Community, and can not be replaced by "transparency". In our point of view every byte has to be treated with the same accuracy, speed and discretion. The European Community should explicitly forbid tools like "deep packet inspection" in order to secure the protection of personal data of its citizens.

Knowing the efforts of the digital agenda in regard of open government, net-neutrality should be the backbone of such an agenda to grant every citizen of the European Union the same strength and the protection of his voice.

> *"Public authorities should play their part in promoting markets for online content. [...] governments can stimulate content markets by making public sector information available on transparent, effective, nondiscriminatory terms. This is an important source of potential growth of innovative online services. The re-use of these information resources has been partly harmonised, but additionally public bodies must be obliged to open up data resources for cross-border applications and services".*[1]

As we will argue, BEREC should initiate a discussion on whether or not there are bytes that – at least at a certain given time – should be treated with priority without extra charging of any player (ISP, end user, third party).

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[1]   http://bit.ly/uIdKzE, page 9

Transparency Versus Neutrality

We understand net neutrality as a fundamental choice of our society to grant every citizen equal access to the Internet as well as access to all its services. With net neutrality there is no restriction on content, sites, platforms, services and communication methods offered. All information transmitted via the Internet is treated impartially.

In this context we understand transparency as mere regulations for ISPs to offer their services in a comparable way in a market where net neutrality is not fully granted anymore and the fundamental values of net neutrality are no longer governing the Internet.

Reasons for Net Neutrality

Fundamental Rights

Following the EU´s four freedoms we believe, that the proposed changes on net neutrality are in conflict with those freedoms.

The First Freedom - Free Movement of Goods[2]

The European Union is also a customs union. The overall purpose of the duties is

> *"to ensure normal conditions of competition and to remove all restrictions of a fiscal nature capable of hindering the free movement of goods within the Common Market"*

There are several companies offering their products on a digital marketplace in the Internet. Their goods are digital (i.e. the content of an online newspaper, or a virtual car offered for a computer game in an digital marketplace). Following the first freedom, the EU and its 27 member countries have to grant the free movement of those goods. Allowing ISP to block certain services within their network, or to charge additional fees for the movement of those digital goods is a clear restriction hindering the free movement of goods, and therefore a breach of this article.

The Third Freedom - Free Movement of Services[3]

The free movement of services and of establishment allows self-employed persons to move between member states in order to provide services on a temporary or permanent basis.

In a virtual market with virtual services the free movement of services has to be granted in the Internet as well. Following the third freedom, the EU and its member countries have to grant the free movement of those. Blocking certain services, or throttling their bandwidth, or charging different fees for the transportation of such on an individual choice by ISPs is in direct conflict with this freedom.

Data Protection and Privacy

The establishment of different treatment of services in the Internet automatically results in a differentiation of bytes transmitted via the network. To do so, ISPs, mainly private organisations, have to distinguish the bytes they transport and therefore to look deep into the data transmitted ("deep packet inspection").
As stated and argued in detail by the European Head of Data-protection Peter Hustnix:

> *"By inspecting communications data, ISP may breach Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the*

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[2]   Art. 28-37 TFEU

[3]   Art. 56 TFEU

'ECHR') and Article 7 and 8 of the Charter of Fundamental Rights of the European Union (the 'Charter'). Confidentiality is further protected in secondary EU legislation, namely Article 5 of the ePrivacy Directive."[4]

Avoidance of Censorship

The possibility for ISPs to block or slow down certain services on their choice or to charge differently for special services may lead to a political influence for ISPs, which cannot be in the interest of the EU. The arbitrary throttling or blocking of content and documents may also violate Art. 38 ECHR and ART. 42 ECHR:

> *"Union bodies shall ensure a high level of consumer protection"[5]*

> *"Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions agencies; in whatever form they are produced."[6]*

ISPs may use the possibilities given to block or extra charge for services or content which is against their political interest. This factor is very crucial in areas where the customer has no choice between several ISPs (last mile in rural areas) and the only ISP available is often a (partly) state owned telecommunication company (like the Austrian Telekom A1 which is public property by one third).

Given such a directive, politicians may have the indirect possibility to block, slow down or overcharge the access to newspapers or blogs criticizing their work. As online newspapers and blogs do have a very important role in democracy and this importance is even rising due to the change in media habits from classic media to online media, this issue becomes even more delicate. Especially in the context of user generated content like blogs or social media, this may also be in conflict with Art. 11 ECHR:

> *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media shall be respected"[7]*

The establishment of transparency in such cases is not sufficient to avoid such a development, when consumers do not have a choice. And the establishment of transparency through third parties may even be averted as the ISPs may use their position to block the content of the third parties.

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[4]   http://bit.ly/uX5W69
[5]   Art. 38 ECHR
[6]   Art. 42 ECHR
[7]   Art. 11 ECHR

Avoidance of Discrimination

The possibility for an ISP to block or extra charge for certain services may lead to a situation, in which companies are working as direct competitors in other fields of competition, where the ISP is also offering services, that may be discriminated.

For example, ISPs offering access to the Internet as well as video on demand (VoD) may block the VoD service from their competitors on their own network.

Raising Data Volume is no Reason Against Net Neutrality

The discussion about net neutrality and further on about transparency arose from the point that ISPs stated that they could no longer finance the immense growth of data transmitted via the Internet. Their argument is that they would need to charge extra fees for special services.

This argument cannot be followed reasonably.

Today ISPs charge content-, and service-providers for bandwidth and volume transmitted over the Internet, as well as private users for the bandwidth and volume transmitted. In other words they charge on both ends of the line. The more data is transmitted, the more money can be charged – to the companies offering the service as well as to the customer consuming the service. For the transport of data it makes no difference for the ISPs, if they transfer a byte of an email, a byte of a movie, a byte of a newspaper article or a byte of a vote during an online election. A byte is a byte. Hence there is no reason to establish an additional kind of charge distinguishing the type of content transported.

Discussion of Net Neutrality

The draft *of BEREC Guidelines on Net Neutrality and Transparency*[8] mentions at several places its focus on transparency and the explicit exclusion of the discussion of net neutrality itself, e.g.:

> *"The purpose of this report is not to define net neutrality, but rather to provide guidance about the information that needs to be brought to the attention of end users and the public in the context of the net neutrality debate."*[9]

The *draft* admits that transparency alone is not sufficient for achieving net neutrality:

> *"[...]we underline that transparency alone is probably not sufficient to achieve net neutrality[...]"*[10]

The authors of this statement share BERECs point of view that transparency is important in relation to net neutrality. Although BEREC acknowledges that transparency alone might not be sufficient, the main focus of the *draft* is on transparency. We are convinced that transparency alone will not guarantee net neutrality and that it is therefore necessary to discuss other factors that could – alongside with transparency – create net neutrality for the European end users.

Therefore the authors disagree with this choice of focus, because from our point of view transparency is merely a tool of discussion and monitoring of net neutrality.

The *draft* deals with this fact by proposing the thesis of establishing net neutrality though a competitive market and regulated transparency:

> *"But at the same time, the existence of competition in a market is a prerequisite for transparency to have an effect."*[11]

> *"Therefore, the regulatory remedies to promote efficient competition, available to sector- specific regulators and competition authorities, are fundamental in the context of net neutrality."*[12]

This assumption in BERECs *draft* is doubted by the authors of this statement, for reasons the *draft* itself argues for:

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[8]   Draft of *"BEREC Guidelines on Net Neutrality and Transparency: Best practices and recommended approaches"*, further on referenced as *"draft"* in this paper.
[9]   *draft*, page 7, paragraph 10
[10]   *draft*, page 3, paragraph 3
[11]   *draft*, page 9, paragraph 1
[12]   *draft*, page 9, paragraph 3

> *"[...]even if there is competition, there still remains a possibility that the levels of quality of service offered by the market are considered insufficient with regards to the demands and expectations of end users and the wider society."*[13]

However, this problem, admitted by the *draft*, is not addressed directly, it rather points back to transparency and its monitoring:

> *"It is important to be aware of this variety of concerns. However, they will not be directly tackled in this paper, as we will only focus on achieving transparency in the field of net neutrality and on setting out the best ways to ensure transparency and to monitor how information is being provided by ISPs."*[14]

In the authors' opinion this approach is not sufficient and BERECs *draft* is required to focus also on net neutrality itself to satisfy the importance of the topic.

Net neutrality is a matter of public interest and fundamental rights. From the authors' point of view, the *draft* needs to incorporate results from the previous consultation on open Internet and net neutrality[15], especially coming from NGOs and academic sources, which are more likely to be expected to represent public interests and fundamental rights.

It is worth to discuss whether or not complete transparency is needed at all when a minimum requirement for net neutrality is regulated by the legislator. The legislator can intervene in competition and impose principle regulations on the ISPs. By doing so, the end user might have certainty that the ISPs act within a tight but fair framework. Such principle regulations could relate to

- the speed to pass data
- the rules of privacy (ISPs are not allowed to read)
- the definition whether or not all bytes have to be treated in the same way

This point reaches the heart of the discussion on net neutrality. It needs to be discussed whether or not there are bytes that – at least at a certain given time – should be treated with priority without extra charging of any player (ISP, end user, third party).

Example 1: E-government products versus products of the entertainment-industry.
In case of state emergency, at least public broadcasters have to inform the public by every possible media means – radio, TV and Internet.

Example 2: Importance to provide good education via Internet
Good education of its citizens is of high relevance for all EU member states. The internet is one of the most important tools to offer the possibility of good education to almost everyone. Therefore it should be discussed whether or not at least academic providers of education should be treated with some kind of priority.

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[13]   *draft*, page 9, paragraph 1
[14]   *draft*, page 9, paragraph 6
[15]   http://bit.ly/uRRfau

Roles in Context of Net Neutrality

The *draft* discusses three major roles participating in the context of transparency:

- ISPs
- NRAs
- third party organizations (in the context of providing transparency)

As soon as the scope of the *draft* is expanded from transparency to cover net neutrality as such, these three roles are not enough any more and the following two roles must be taken into consideration additionally:

- Content Providers / Application Services Providers
- End-users / Consumers

End-user and Consumer

As already discussed, the role of the end-user is currently moving from a sole consumer towards a content producing role. This change has to be considered if the focus of the *draft* is to be extended to deal with net neutrality as such.

A standard product profile of unlimited Internet access (see following section) should explicitly define upstream traffic requirements both in a quantitative and in a qualitative way also. Furthermore, a minimum standard for Internet access products which can be considered to meet all fundamental rights and the EU's four freedoms should be defined on a multinational level.

Content Providers on the Example of Media Industries

As the authors' professional backgrounds are founded in the media industries, the implications of net neutrality are treated on the example of this industry sector.

For broadcasting media net neutrality is crucial. The distribution of TV-content via Internet is getting increasingly important – for the Internet-user as well as for the broadcaster. The traditional system of broadcasting via cable or over the air is getting more and more obsolete, while the Internet is progressively used to transport the content.

If ISPs prioritize content for companies which are willing to pay for it that could lead to the end of consumers freedom of choice and – even more frightening – to the end of freedom of the press.

Traditional broadcasters are controlled by media-laws and ethical rules for journalism. None of the media laws are directly steering the ISPs – they are just transmitting the message. In a future without net neutrality ISPs could decide which message is valuable enough to be

delivered to the customer. Without net neutrality it is up to the ISPs to decide what is important information and what is not.

ISPs want to manage network-traffic and decide in which quality the data will be delivered and who is using their bandwidth. The ISPs would be the "gatekeepers" of any important information – a role usually is taken by professional journalists at traditional medias. ISPs have no obligations at all to the freedom of the press. Furthermore they do not have any moral or legal obligation to objectivity in any way.

The main reason for carrying content for ISPs is not the content by itself, but who is willing to pay the highest price for doing so. Huge and wealthy companies could be favored against smaller and financially weak media enterprises. Companies like Google could easily destroy comparatively small European public broadcasters by simply entering the market and paying higher fees to ISP for content delivery.

There is a strong wish of ISP to find a business model for prioritizing information. Who is going to pay for it? Either the Internet-user or the media organizations. Rising prices for information leads to a limitation of choice.

The majority of media organizations still has not found a sustainable business model for internet-sites. Most of the information at the Internet is still for free. If ISPs charge for a prioritized access (or discriminate other services), important information will be limited to wealthy citizens. If an average European citizen should have access to any point of view and nonprofit news-organizations should be able to freely promote their opinions and messages, then net neutrality as such is a precondition and must not be questioned.

ISPs should be allowed to control Internet traffic to solve possible technical troubles with their network. They own the infrastructure. But they do not own the content. ISPs need content to keep their customers hooked to the Internet. Media organizations need the Internet to deliver their content. Network-management should not be used as an argument to block some services or to prioritize others.

As stated earlier in this paper, a huge number of telecom companies were former state-owned and some of them still are bound up with the government. ISPs could easily be forced to prioritize data-traffic and decide what is important for the user and what is not. Political influence could lead to censorship.

No company should be given any right to prioritize web content at all, whether it is based on political orientation, financial interests or the ownership of content.

Reliability of Information and Independence of Organizations

The BEREC-*draft* discusses in depth the types of information that should be presented to the customer, which roles can provide what kind of information and which ones can aggregate and simplify them in order to make them understandable for the average customer. However, the implementation is left to the NRAs at national level by the *draft*.

To provide a common level of transparency for all member states, it is necessary to define certain standards and controlling instruments at multinational level which must be satisfied and implemented by the national authorities.

Standards are needed on how NRAs are going to control the accuracy of information, e.g. by monitoring and measuring the product characteristics. This can be done by NRAs themselves or by independent controlling organizations. Monitoring and measuring requirements and constraints should be defined on a multinational level to provide cross-border comparability of measurements.

Whenever information is provided or processed by third party organizations, their commercial and financial independency from all involved ISPs must be warranted. A possibility to achieve this and making it transparent to the customer would be a certification for neutrality and accuracy of those organizations provided by the NRAs. This certification process could also include standards for processing and unified aggregation methods of information to even make the data provided by those organizations comparable at a global level.

Regardless of the level of detail a product description contains, the strategy should always be to define exceptions from an unlimited access profile which should then be defined on a multinational level, too.