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## **ZDF comments on draft of BEREC Guidelines on Net Neutrality and Transparency**

### **Transparency indispensable but not sufficient**

ZDF welcomes the opportunity to comment on the draft BEREC Guidelines on Net Neutrality and Transparency. In the view of the broadcasters, transparency is one of the important aspects determining Net Neutrality. However since there are other indispensable and decisive aspects to the discussion, we are looking forward to the announced BEREC guidelines on quality of service, competition and discrimination issues as well as IP interconnection market situation.

In general, ZDF can agree with BEREC's analysis on transparency. For the broadcasting industry, transparency from the point of view of the consumer is important since it is an enabling factor for his or her access to our services. Therefore it is also part of the access to information and hence important for media pluralism.

### **ZDF is reaching an ever increasing number of user/viewer via the Internet**

Public service broadcasters like ZDF as much as other media/content providers use the Internet to create, distribute and make available their audiovisual and other services, to reach their audiences/users and to fulfil their particular public service mission. The openness of the Internet and the acknowledgement of net neutrality foster the free-flow of information, universal access and the plurality of media content and providers.

The importance of the Internet for public service broadcasters and other media companies will increase, as part of an overall trend and as non-linear consumption in particular of audiovisual content will grow substantially while, at the same time, new technologies such as hybrid broadband broadcasting, bringing together television and the internet on the TV screen in a truly convergent manner, are currently introduced into the market.

In Germany, 73, 3% of the population or 52 Mio citizen are online, this is an increase of 2,7 Mio citizens compared with 2010. 68 % of the users are watching audiovisual content. 29 % are watching catch-up TV whereas 21% are watching live TV in the internet. All together, around 19 million people are watching TV via the Internet.<sup>1</sup>

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<sup>1</sup> ARD/ZDF-Onlinestudie 2011, Media Perspektiven 7/8/2011

## **Increasing demand for bandwidth and network congestion**

The transmission of audiovisual content requests a broad bandwidth. In general, we are witnessing a significant growth in data traffic over the internet which demands appropriate measures.

Network operators argue that growth in traffic, especially with regard to audiovisual content, adds to congestion and overload in the web, a problem that needs to be addressed by introducing new traffic management practices. Offerings of broadcasters and other media organizations could be degraded because of network congestions and traffic management practices applied by the network operators. This is particularly significant in case of live programmes, e.g. coverage of popular sport events.

The downgrading in quality, including throttling of services have resulted in consumer confusion and frustration, since for audiovisual services, throttling has the same effect than blocking the content. Furthermore this technical restriction is very often combined with insufficient transparency about these practices.

However it is important to underline that traffic management does not represent a solution to network congestion in the long term. The only sustainable solution to this problem is sufficient capacity.

## **Transparency on traffic-related information**

The transparent provision of traffic-related information to the consumer is necessary but, in our view, is currently insufficient in relation to traffic management. Significant further effort from across the industry is required to improve consumer transparency. Any information provided to the consumer should make clear what traffic management practices are in place and what it means for the users. In order for information to be meaningful for the users, it needs to be comparable and up-to-date so that it can be factored into purchasing and switching decisions. It is essential that subscribers – particularly of mobile networks – are empowered to differentiate between different broadband packages and any restrictions placed on accessing content, services or applications.

In this respect it is interesting to highlight a recent court ruling in Germany. The Landgericht Bonn ruled that some advertising of German Telecom would be misleading since it gives the impression that they do not reduce the bandwidth even in cases of congestion (LG Bonn, court ruling from 19.09.2011 – 1 O 448/10). This recent court ruling confirms other rules on the same problem (see: BGH, Anforderungen an Preisangaben in Werbung für Telefon-Tarif oder Internet-Flatrate, GRUR 2010, 744).

## **General transparency requirements for providers for the benefit of consumers**

ARD and ZDF fully support effective competition between ISPs for the benefit of consumers. However the mere existence of a number of providers does not mean, that consumers can fully benefit of the switching opportunities. Inter alia, bundling of services and often onerous terms of contract provisions mean that consumers do not de facto easily switch between ISPs. Effective competition will never exist without full transparency of information.

We agree with BEREC that the following set of minimum information should be provided for all users: all relevant details of subscription contracts, including declared Quality of service parameters and any limitations, information concerning any traffic management practices and the reasons for their application, availability of monitoring tools and user guidance, parameters of actually delivered services (e.g. bandwidth, throughput, packet loss, latency, jitter, incidents). This information could also be a

more realistic basis for billing (i.e. instead of the subscribed maximum speed which is normally used at present).

**Net neutrality must be preserved**

ZDF is of the opinion, that clear transparency rules are important but not sufficient. In order to safeguard the openness and neutrality of the Internet, including freedom of information and of speech, we need clear rules requiring that in principle the transport of content/services must be made on a non-discriminatory basis. Exceptions to this rule should only be allowed in order to protect important societal objectives. The rules should be applied in principle for both fixed and mobile networks. The burden of proof to demonstrate that adequate minimum obligations for the quality of a service are respected must lay with the network operators. Compliance must effectively be monitored by regulators.