Comments on the BEREC's broadband promotion report

by VON Europe, January 2012

The Voice on the Net Coalition Europe ('VON') welcomes the opportunity to comment on the BEREC's broadband promotion report (hereafter 'the Report').

VON strongly believes that the deciding factor in securing widespread adoption of NGN/NGA will come from the availability of Internet content, applications and services that are attractive to users. The Internet ecosystem is indeed characterised by a virtuous cycle whereby all actors in the chain benefit:

- 'Over the top' Internet content providers (including users, public services, businesses across the economy, etc.) bring innovative content, information, applications and tools to the global public through the Internet;
- These innovations motivate continued and renewed consumer demand in (better, faster) broadband Internet access;
- This content-driven demand from consumers provides the return on investment for telecom operators, hence the basis for further investment in Internet-supporting infrastructure; and,
- Upgrades in Internet infrastructure provide new opportunities for over the top providers to develop new online content, apps and services, thus fuelling the cycle again.

As fibre and other next generation networks are rolled out across the EU, we welcome BEREC's recognition that encouraging user adoption is almost as big a challenge (and a priority) as rolling out the infrastructure. Several NRAs have noted recently that adoption of fibre was very slow. It is crucial to realize that without users themselves being attracted by compelling Internet content and applications, no one will take up fibre and speeds of 100Mbs and beyond.

The best and only way to encourage adoption of superfast broadband is to continue to promote 'over the top' innovation in content, services and applications – which will interest consumers and motivate them to take up superfast broadband. Indeed, it is what the Internet can do for people which is key in driving their use, and in maximising the impact of connecting as many of us as possible. In short, it's the applications one can make of the Internet, which count.

Many of these applications have already been major drivers for people to upgrade their Internet access; for instance, to switch from dial-up to broadband a few years ago. If useful content and

applications continue to be made available, without hindrance, people will want to connect, and they will benefit. there is a real potential thanks to 'useful' applications to draw people into the 'digital' world, which is increasingly key in social and citizen activities, every day, beyond (for example) simply entertainment or cheap, free and innovative communications.

The marketplace and/or the regulatory environment should therefore strive to enable compelling new Internet content, services and applications to be developed as easily as possible, which will inexorably attract consumers to upgrade to faster, better broadband. Key elements in realising this aim will therefore be policies and regulations that are actively pro-innovation and remove barriers to create a level-playing field for innovation on the Internet. Such policies and regulations should be built on two key premises:

1) the unambiguous and pro-active protection of the Internet as an open platform; and,
2) the preservation of the right to 'innovate without permission'.

Question 2 (sections 6 and 9): 2.2 Taking into account namely your assessment of the existing and potential obstacles to broadband adoption, what elements do you consider essential for the successful definition and implementation of NRAs' strategies, in particular from a demand-side viewpoint, to promote broadband?

The Report refers[1] to Art. 22 of the Citizens' Rights Directive (2009/136/EC) amending the Universal Service Directive. Therefore, VON would like to draw the BEREC's attention to the third paragraph of Art. 22 which stipulates that (our emphasis added): *"in order to **prevent** the degradation of service and the hindering or slowing down of traffic over networks, Member States shall ensure that national regulatory authorities are able to set minimum quality of service requirements on an undertaking or undertakings providing public communications networks"*. The use of the wording 'prevent' implies:

- that actions must be taken ex-ante instead of ex-post, as measuring the network capabilities of an offering could be rendered more difficult once unreasonable traffic management practices have already been put in place; and,
- that NRAs should be proactive, and not remain spectators when operators put out offers that only allow access to subsets of the open Internet, or comprise application-specific restrictions,

[1] See the Report, point 3.6. p. 24

hence seemingly accepting these as legitimate or normal, their only focus being on end-users' transparency.

VON considers that NRAs should thus ensure end-users get a fair deal, not just a transparent bad one.

Question 5 (section 10): In addition to the initiatives already taken by BEREC with regard to the promotion of broadband from a supply-side perspective, what other initiatives do you perceive it is important that BEREC develops in the future from that perspective?

On the supply-side, **first** the BEREC draws *"attention to the need for establishing transparent and effective migration processes between the legacy networks and the NGA networks"*[2]. Therefore, VON would like to encourage the BEREC to put in place safeguards to ensure the quality of Internet access, in order to avoid a 'dirt road' effect for Internet (delivered on a best effort basis), in parallel to the possibilities for operators to offer managed services. Such dirt road effects could notably result in network improvements favouring managed services only, whereas the 'best efforts', open Internet would remain stuck with older and less efficient infrastructure, or Internet access would become overpriced compared to managed services.

We also encourage NRAs to conduct periodic reviews of the market developments, to enable detection of unwelcome developments (*e.g.* severe reduction of competition and/or a severe deterioration for end-user interests) and, where appropriate, the possibility to accelerate the adoption of sets of remedies that are better suited for achieving the goals of the regulatory framework.

Second, the BEREC points to the application of State aid to *"incentivise the roll-out of broadband networks"*.[3] On this issue VON would like to emphasise that where State aid is considered, for example for the rollout of next generation networks in rural areas, the conditions for the beneficiaries of State aid should explicitly provide for wholesale access obligations at all levels and for a retail-level non-discrimination principle to safeguard that access to the open Internet is ensured at both the wholesale and retail levels. In practice, this implies that measures should be taken to ensure that State aid is conditional upon the obligations that:

[2] See the Report. p. 64.
[3] See the Report. p. 65.

- wholesale access is provided to ducts, poles and antenna sites, to the passive-layer (*i.e.* copper, coax, fibre, etc.), and to the transmission layer (*i.e.* Layer 2 Ethernet), that spectrum-sharing is implemented, and that there is provision of non-capacity constrained backhaul, etc.;
- retail level requirements are implemented to ensure fully unrestricted access to third party content, applications (*e.g.* VoIP) and services for all customers; and,
- an any-to-any connectivity obligation is being imposed on the State aid beneficiary.

VON considers that State aid beneficiaries should be obliged to comply with these obligations on their entire networks, not only on the State aid funded parts, be it the existing copper network or the next generation access fibre based network part as the State aid funded networks rolled-out in underserved areas interconnect to the rest of the beneficiaries' networks.. The same holds true for wireless networks. VON urges for a set of 'open access' requirements on the beneficiaries' entire networks to ensure that the obligations listed above are meaningful.

Moreover, putting in place such 'open access' requirements would be aligned with the BEREC's request to the Commission to ensure that "*subsidised network architecture and infrastructures are constructed as future proof and as pro-competitive as possible"* and that "*public investment decision (…) reflect the long-term social welfare considerations, in relation to the service provided and the ability of the architecture and infrastructure to enable competition"*.[4]

Third, the BEREC points out that *"the achievement of the broadband coverage target set out in the Digital Agenda could be assisted by the full implementation of the spectrum policy by the Member States, which notably includes the availability of spectrum, the rapid award of use rights and the existence of secondary trading"*.[5] VON would like to encourage the BEREC to ensure full – and preferably harmonised – utilisation at the national level and across Europe of radio spectrum and the introduction of more licence-exempt spectrum and spectrum trading, as this is the best approach to increase efficiencies in the management of spectrum.

Moreover, it is also essential to be clear about the fact that, while VON welcomes harmonisation, we would also like to stress the importance of the principles of technological, network and service neutrality within a common regulatory framework, and the importance to permit new spectrum uses

[4] See BEREC. (2011). *BEREC Response to the EC Questionnaire on the Revision of the State Aid Guidelines*. p. 5. Retrieved at, http://erg.eu.int/doc/berec/bor_11_42.pdf.
[5] See the Report. p. 66.

wherever there is no objective interference-related impediment (to be assessed on a scale which is less than nation-wide).

In our view this guarantees the greatest potential for citizens, consumers, businesses and Government at all levels to benefit from new services and innovative technologies. In order to preserve and promote competition, national authorities should thus act swiftly, including on the global stage if needed, to make additional spectrum available for Internet use.

VON considers that the BEREC should examine the increasing opportunities for unlicensed devices and innovative spectrum access models, making a maximum of spectrum available for broadband Internet access and improving the transparency of spectrum allocation and utilisation. Besides the often digital dividend, there are huge parts of the spectrum that remain rarely used (defence, for example, does only need certain bands at specific times in specific locations). Governments have significant tools at their disposal in order to increase the effective and efficient use of spectrum, and the BEREC could help by identifying these tools. In other words, large parts of the radio spectrum should be made available for use on an unlicensed basis, so as to promote innovative uses and to increase competition, in order to achieve ubiquitous affordable truly mobile access to the Internet.

This is vital in order to sustain and foster individual and collective expression, effective e-government, and economic development in the EU.

Question 6 (section 10): A list of potential measures was identified, in the present document, that could be adopted or reinforced in order to promote broadband from a demand side perspective.

a) Are there any identified demand-side measures that you consider inappropriate?

b) What other demand side measures, if any, would you consider particularly important to promote broadband?

Open access at the retail level

On the demand-side, **first** the BEREC remarks that one of the NRA's *"important instruments to promote consumers choice for broadband services is the promotion of competition as this will ultimately lead to greater choice among providers, better quality and lower prices, i.e. a better value*

proposition", and that *"related to this are measures to facilitate switching so that consumers do actually make use of their options"*.[6]

Therefore, VON encourages the BEREC to assess Art. 8 (4) of the Framework Directive, the objective for NRAs to *"promote the ability of end-users to access and distribute information or run applications and services of their choice"*, at a network level (*i.e.* does each access operator allow the end-user its freedom of choice) rather than at a market level (*i.e.* can end-users switch operators if they do not get choice with their current one).

Transparency: supporting meaningful consumer choice

Second, the BEREC remarks on the issue of choice between different broadband service providers that *"consumers often face difficulties in finding, understanding and using the information available on the market in order to make those consumption decisions that would optimally satisfy their needs and, thus, enable them to put an effective pressure on service providers"*.[7]

In light of this, VON considers that **information on traffic management should be provided in at least two different formats:**

1) **on the one hand, an easily understandable end-user fact sheet.** In this context, the key principle should be that "*information is definitely not communication, and information overkill leads to information not being read rather than readers trying to get to the bottom of it*";[8] and,
2) **on the other, a comprehensive and detailed technical fact sheet.** Indeed, the BEREC has rightfully pointed out in 2010 that *"as well as transparency for consumers, the transparency towards content/application providers should also be considered"*.[9] This is logical as access to detailed traffic management information can help service, content, and application providers assure that their offers are optimised to make the best and most efficient use of the network. It is therefore crucial that the BEREC addresses this second aspect and not only information for consumers.

This two-pronged approach would then result in meaningful information for all players.

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[6] See the Report. p. 68.
[7] See the Report. p. 70.
[8] See Van Eijk, N. (2011). About Network Neutrality 1.0, 2.0, 3.0 and 4.0. *Computers & Law*, 21(6), 11-14. p. 13. Retrieved at, http://www.ivir.nl/publications/vaneijk/CLM_2011_6.pdf.
[9] See BEREC. (2010). *Response to the European Commission's consultation on the open Internet and net neutrality in Europe*. p. 17. Retrieved at, http://erg.eu.int/doc/berec/bor_10_42.pdf.

Moreover, **the traffic management information available should conform with a minimum number of conditions, being: their ease of access in various formats** (*e.g.* on the operator's website, paper brochures, etc.); **its communication prior to subscription; the immediate notification in case of changes to them; the adoption of a comparable format amongst operators**, preferably agreed upon by the different relevant stakeholders including consumer groups and the online providers' community,[10] to allow all end-users to compare the different available offerings in an informed and user-friendly manner.

Driving adoption: Internet content, applications and services meet and stimulate demand, hence access to them should be unrestricted

Third, in order to *"render the use of broadband more attractive to end-users"*[11] VON would like to emphasise that the communications ecosystem, and the way users experience it, is such that content, applications and services running over the networks – over the Internet in particular – are at least as important as the pipes they go through, if not more because they stimulate demand (hence, return on investment) for the networks in the first place, and are a key contributor to the wider socio-economic benefits derived from broadband rollout. Focusing exclusively or predominantly on any one component of that ecosystem risks jeopardizing the development of other critical components. This should be reflected in a balanced approach towards promoting investments.

VON fears that the lack of detailed net neutrality safeguards in the EU – which would ensure the viability, innovative potential, and diversity of the content, applications and services layer – and the nascent development of so-called 'walled gardens' could have potential adverse effects on the wide-spread uptake of high-speed broadband. If ISPs continue to set up roadblocks to certain content, applications and services, this will be reflected in consumers' (un)willingness to pay for high-speed broadband and subsequent slow adoption. The abundance of content, applications and services on the Internet is in fact the main driver for broadband adoption. In the end this will enable ISPs to recoup their infrastructure investments. We would point the BEREC in this respect to at least two

[10] This broad participation is necessary to avoid the pitfalls of the approach taken in the UK, where a transparency code was put forward by the ISPs, without any involvement by other industry players nor consumer and advocacy groups. As a result it was met with very little support, including by the UK Minister Ed Vaizey, who concluded that the said code would need to be followed up with a 'chapter 2' outlining what constitutes acceptable traffic management and non-discrimination, with the full involvement of all relevant stakeholders from consumer groups, to content and application providers, broadcasters, and NGOs – a process now well in train.

[11] See the Report. p. 71.

studies published recently by experts regularly consulted by national regulatory authorities, which confirm the importance to the entire ICT ecosystem of an open Internet.[12]

Therefore, VON believes that focusing on maintaining an open Internet is the best means of promoting investments across the entire Internet ecosystem and paramount to the EU's future economic and social welfare. To quote the European Commission, the end-to-end principle – whereby any end-point connected to the Internet can connect to any other end-point, a key architectural feature of the Internet, "*is considered by many to have been a key driver of the growth of the Internet to date, and to have facilitated an open environment conducive to the spectacular levels of innovation seen in online applications, content and services networks*".[13]

VON also considers that the fast-moving vertical and horizontal integrations and the commercial dynamics exemplified within the converging telecommunication and Internet ecosystem (from hardware equipment, to infrastructure provision, to content and service provision, etc.) by such phenomena as 'bundling' (*i.e.* triple or quadruple play bundling voice, broadband Internet, TV and mobile), and the purchase of exclusive content rights, could accelerate the trends towards serious harmful and other undesirable discriminatory practices, which would have a negative impact for innovation, consumer choice, trade, etc.

It should be acknowledged that *"**network neutrality** preserves the innovation incentives at the edge of the network and **prevents ex post opportunism** by network operators"*[14] (our emphasis added).

VON believes that the BEREC should recommend to national regulators to guarantee that end-users have access to and can use the Internet services, content, and applications, as well as the devices of their choice in a meaningful manner.[15] Therefore all attempts, whether regulatory,

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[12] See Marcus, J. S., & Monti, Alessandro. (2011). *Network Operators and Content Providers: Who Bears the Cost?*. Bad Honnef: Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste (WIK). Available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926768, and Williamson, B., Black, D., & Punton, T. (2011). *The Open Internet – A Platform for Growth: A Report for the BBC, Blinkbox, Channel 4, Skype and Yahoo!*. London: Plum Consulting. Available at, http://www.plumconsulting.co.uk/pdfs/Plum_Oct11_The_open_internet_-_a_platform_for_growth.pdf.

[13] European Commission. (2010, 30 June). *Questionnaire for the public consultation on the open Internet and net neutrality in Europe*. p. 5. Retrieved at, http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/net_neutrality/index_en.htm.

[14] Economides, N. (2010). Why imposing new tolls on third-party content and applications threatens innovation and will not improve broadband providers' investment. In J. P. Martínez (Ed.), *Net Neutrality: Contributions to the Debate* (pp. 87-103). Madrid: Fundación Telefónica. p. 92. Retrieved at, http://www.stern.nyu.edu/networks/Economides_Imposing_New_Tolls.pdf.

[15] This task should be motivated by the fact that *"Internet application services can be provided by carriers or by many other application providers on the Internet and can be placed at many locations within the Internet"* and that *"Internet application services usually have fixed costs that are small relative to incremental costs, and thus there is usually a low barrier-to-entry,*

technical or commercial (be it by prohibiting it or unduly asking for additional subscription fees), to block or hinder unfettered access to and use of VoIP (or similar technologies), and in general all legal Internet content, applications, and services, including their underlying technologies, should be prevented.

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We thank you in advance for taking consideration of these views. Feel free to contact Herman Rucic, VON Europe, by phone (+32 (0)478 966701) or email (hrucic@voneurope.eu) should you need further information.

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About the VON Coalition Europe

The Voice on the Net (VON) Coalition Europe was launched in December 2007 by leading Internet communications and technology companies, on the cutting edge to create an authoritative voice for the Internet-enabled communications industry. Its current members are iBasis, Google, Microsoft, Skype, Viber and Voxbone.

The VON Coalition Europe notably focuses on educating and informing policymakers in the European Union and abroad in order to promote responsible government policies that enable innovation and the many benefits that Internet voice innovations can deliver.

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which leads to a competitive market with a large number of application providers". (see Jordan, S. (2011). Should Users be Entitled to Run the Applications of Their Choice on Wireless Networks? *IEEE Conference on Wireless Communications and Networking* (WCNC), 28-31 March, Cancun, Mexico. Retrieved at, http://www.ics.uci.edu/~sjordan/papers/wcnc2011.pdf.)