APRITEL CONTRIBUTION ON BEREC GUIDELINES ON NET NEUTRALITY AND TRANSPARENCY

I.   GENERAL COMMENTS

APRITEL – the Portuguese Telecommunication Operators Association – welcomes the opportunity given by BEREC to comment on its Draft Guidelines on Net Neutrality and Transparency. APRITEL agrees with BEREC that transparency regarding the quality of the internet access service and of any traffic management techniques is important to support the openness of the Internet and ultimately allows consumers to decide which product best fits their needs.

This being said, APRITEL firmly believes that competition is the real key to guarantee that net neutrality issues do not arise or become a problem. As long as consumers are faced with different offers and service providers are able to freely differentiate their products by competing not only on the price but on the quality and features of the services offered, any risks to the openness or neutral nature of the net are mitigated.

Regulators should therefore focus primarily on making sure that competition and differentiation in the market is effective and sufficient.

Moreover, a debate on Net Neutrality should not lead to an increase of the remedies which have already been imposed in the electronic communications market.

In this regard, it is important to distance ourselves from the Net Neutrality debate in the United States (where it has its origins), where different competition, regulatory and geographic conditions require an entirely diverse approach that should not be transposed to the European Union. The level of information already available for end users in the European Union is highly recommendable and the amended regulatory framework already provides the necessary safeguards for preserving the open and neutral character of the internet, and is supported by ever-increased transparency requirements.

In the particular case of Portugal, not only is there no evidence of any market failure which would require further regulation – there is no evidence of Net Neutrality issues – but, in addition, the national regulatory framework contains exhaustive provisions on transparency and Net Neutrality (see chapter III below). Any additional measure taken on the basis of such provisions should not go beyond what is already imposed in the NRF.

On a final note, APRITEL stresses that the debate on Net Neutrality should include all actors of the Internet value chain, particularly content providers and their position in the EU and national regulatory policies.

In this context, it is paramount to take into utmost account the large investments undertaken by operators in the development of high-speed networks which have allowed innovative applications and access to new types of contents, available to everyone and largely benefited by content providers/web companies.

The efficient functioning of the internet requires a level playing field among all actors in the value chain, in such a way that market players should be able to implement the business models with the necessary return of their investments and a reasonable balance between the different actors in the internet value chain.

II. SCOPE

The draft guidelines focus primarily on transparency which is relevant mainly to residential customers. When it comes to business users, high-level quality of service parameters and commercial features are individually agreed directly with the customer. On the other hand, these business users typically possess the necessary technical expertise to ensure that the final solution is tailored specifically to their needs and demands. There is no asymmetry of information as in the consumer market. As such, business services should not be subject to specific transparency requirements.

Similarly, managed services should not be subject to such requirements. Operators must be able to make use of the networks they build to provide specialized services in addition to broadband Internet access service in order to receive a reasonable rate of return for their investment in network. Operators

making the primary investments in network infrastructure should have the commercial freedom to offer differentiated services.

In general, the information requirements should not be blind to the offers at stake, i.e. business and wholesale offers – which are oriented by specific negotiation processes between the ISP and the client.

- Finally, with respect to transparency, the principle of technological neutrality should take into account the characteristics of the different technological platforms and their ecosystems, as well as the status of their evolution.

III. THE CONTENT OF A TRANSPARENCY POLICY

Any transparency policy should be proportional and aimed at increasing understanding and awareness. The provision of information should be oriented to the user's experience and not so much to the technical aspects. Given the exclusion of the wholesale and business offers, the information requirements imposed on ISPs should not translate into an excessive burden. Rather, they should be designed to serve the clients' needs as a whole.

In this regard, APRITEL considers that Portugal constitutes a good example of the aforementioned goal. In fact, consumers in Portugal already benefit from a situation where the content of information to be provided by operators is already subject to extensive and detailed regulation by the Portuguese NRA.

On the one hand, a new substantially amended Telecommunications Act came into force on September 14, 2011, implementing the revised regulatory framework of the European Union. The Act empowers ICP-ANACOM to undertake new regulatory measures with respect to net neutrality if the industry does not ensure net neutrality itself. It also includes requirements for contracts to include information about the data transfer rate variation, amongst others.

Further to this, just recently on October 10, 2011, the regulator issued a determination requiring operators to provide consumers with a wide-array of specific and detailed information in even more transparent terms (ICP-ANACOM's

Decision on the content and form of information on the conditions of offer and use of electronic communications services to be made available to the public).

On the other hand, the Portuguese regulator has also set-up and launched a fully-operational comparison tool website, available to all customers, displaying and comparing a wide-set of many different offers on the market (COM.escolha was implemented in close cooperation with the main players on the market which contributed with information on their many offers. Said website allows consumers to compare the prices of products/services as well as their main features and characteristics, such as speed, traffic included, and underlying technology.

It is therefore clear that Portugal is in an advanced stage when it comes to transparency on Net Neutrality and already complies with a number of the recommendations now set forth by BEREC, such as:

-   Simplified tariff comparison: possible due to close cooperation between the regulator and most operators, which gives credibility to the information and mitigates problems of abuse of information, whilst alleviating the onus of provision of information on the part of the operators;
-   QoS comparison between the different ISPs, made by the NRA: notwithstanding said studies having some flaws which should be further complemented and discussed with operators, the same allow consumers an easier understanding of the available products. These studies would benefit from future BEREC guidelines and best practices.
-   Specific information requirements to end users on:
    o   Average and maximum speeds;
    o   Tools to measure instantaneous speed and average;
    o   Limitations to access and use of services and applicable conditions when the limitations are resolved;
    o   Traffic management measures employed to avoid congestion and indication on how such measures may reflect on the quality of the service;
    o   Information on the QoS provided, etc.

In some instances, the detail of information required to be passed-on to the end users ends up being excessive: information on estimated average speeds is clearly the type of information which is useless to the end user since ISPs do not have control over a number of relating important variables. The typical situation is that when providing such information, operators limit themselves to informing the consumer on estimated average speeds within their networks whilst warning the user that even that speed may depend on a series of external factors.

Having regard to the above, to impose further information requirements on operators in Portugal would prove excessive and burdensome and ultimately useless. In line with what BEREC seems to recognize, too much information can be as meaningless as no information. It is mandatory for NRAs to previously assess whether the information requirements they intend to impose upon operators shall have the desired effect (render consumers able to make more informed decisions) or, if, on the contrary it will "backlash" and cause more confusion within the consumers choice decision.

In this process, one should bear in mind that there are different market structures and differences in the emphasis given by the national regulators to information disclosure. These differences must be explicitly recognized by BEREC and, in the guidelines to be published, special attention should be given to the fact that the aim of market regulation is not to ensure that all Member States are subject to the same rules but rather that all Member States should have similar market conditions - an objective that may entail different levels of regulatory intervention depending on the idiosyncrasies of each national market.

IV. WHICH ENTITIES TRANSMIT THE INFORMATION

APRITEL believes that Portugal is a very good example of the implementation of both a Direct and Indirect Approach.

ISP's in Portugal have invested significantly in a transparency policy that informs end users, both in the service contracts and in agreed conditions, of any restrictions which may exist and of the network management policies employed. All information is provided in advance to end users.

In parallel, on the Indirect Approach, the NRA has launched COM.escolha, which serves as an observatory aggregating information of the products/services offered by most ISPs, as well as the also aforementioned comparative study it conducts on the quality of Internet services provided by Portuguese ISPs.

As such, APRITEL sees no need to introduce a third entity into the process. This would confuse end users, imply additional costs and there would be no guarantees of said third party's independence.

At any rate, in Portugal, Consumer Associations are very active on this market and frequently analyse the ISPs commercial and contractual conditions.

Thus, APRITEL reiterates its concern that any guidance issued by BEREC on these matters must explicitly refer to the need of an evaluation by the NRA on the sufficiency of existing measures prior to the imposition of additional ones.

A final note on this issue: opening the market for third party (excluding the NRA) comparison tools entails, in fact, an additional obligation for ISP's since the said third parties will need, most probably, additional and specific information that is not publicly available. APRITEL believes that such obligations are not proportional if publicly available sources of information with guaranteed independence already exist.

V.   METHODS TO PROVIDE TRANSPARENT INFORMATION

Regarding the most effective means to provide transparency on the service provided, APRITEL believes that the most effective method to inform the end users should be to provide information through an independent website (preferably implemented by the NRA) centralising the information.

The Portuguese example is a balanced and efficient solution with the NRA recently setting-up a website that has become an excellent information repository and comparison tool.

This is a first level of information which we believe is of paramount importance for a prospective client to assess its options. As for the ratios proposed in the BEREC

Draft Guidelines regarding comparable offers, APRITEL believes that these should not represent any prejudice towards the service itself, a fact which may result from the proposed coloring system[1].

The comparison should not be limitative of innovative solutions, especially in the current economic situation. Rather than connoting the information negatively, this process should aim to highlight transparency, informing of any restrictions that might exist, thus allowing consumers to make informed choices.

The proposed colouring scheme is aimed at allowing an on-the-spot evaluation by prospective clients of the service they are deciding to subscribe (or not), a fact which we believe demands greater care in the approach used. One must not forget that in the majority of the existing points of sale it will be viable to have a simplified leaflet with a harmonized description of the service that may prevent distortions of simpler approaches.

As for where the information should be made available, APRITEL agrees that the information should be made available in contracts and at operators' websites, besides existing points of sale (with the levels of information adjusted to the location). Notwithstanding, considering that operators are always introducing innovative aspects to existing offers, specific information that has a more dynamic nature should be made available on-line and at a central point of operators' websites, since this is the most proper way to ensure that this information is always updated and correct.

Also, in what regards making available specific tools to existing clients so they may assess, on line, their service quality, APRITEL believes there are some aspects to be accounted for, namely in what regards the proportionality and effectiveness of imposing additional obligations.

The information on the synchronisation speed (maximum access speed) is available on the CPE's graphical interface, and is usually visible to the customer, so no specific obligation should be imposed. It is important not to mistake the

---

[1] One must not forget that a service that has traffic limits is not necessarily worse than one with no limits if the client is not a heavy user and, due to the traffic limit, has access to a cheaper offer. Colouring such offer as red in terms of traffic limits would pass a negative image that does not have adherence to reality.

referred speed values with the speed obtained by the IP speed meters, which can be found anywhere in the world and for which there can be no guarantee of speed. It is important to clearly distinguish between access speed and IP speed measured, which at any given time depends on many factors, such as:

a) Processing capacity (CPU, hard-disk and video card of the PC) or from server that sets the tests;

b) Interface characteristics (Ethernet) of LAN connection;

c) Type and method of Operating System and IP stack in use configuration;

d) Number of applications that can be found running in the background on the users' PC;

e) Selected Web browser;

f) LAN traffic intensity at the testing time, and type of access used (wireless or wireline);

g) Router configuration;

h) Web Traffic to compete in the time of testing.

These kinds of tools, when not located at the ISP servers, will distort the user's perception and may distort end users' conclusions as to their service's quality.

APRITEL believes this is a complementary tool but should not be an obligation since it has too much pitfalls to be considered a credible approach.

Finally, customers and NRAs should acknowledge that information regarding maximum and average speeds are strongly influenced by terminals and software applications, especially regarding mobile broadband performance. Normally, suppliers of terminals and applications are not subject to transparency issues while ISPs are affected by the characteristics of these products. This may result in less transparency for users.

Therefore, BEREC should consider this externality caused by terminal and software suppliers on ISP's when setting the level of transparency that operators must communicate to their customers.

VI. SELF REGULATION HAS A FUNDAMENTAL ROLE TO PLAY

The debate on Net Neutrality has to take into account the way Internet evolved and what it is today: a powerful means of communicating, exchanging knowledge, creating new social relationships, a business and an innovative platform, with all its pros and cons.

Operators and ISPs have a crucial role in the development of networks and services, as sometimes they are on both sides of the net. Nevertheless, no one should ignore the important investments that are being made on access infra-structures, applications and services should not be negatively affected by the changes in Internet economy. That is why Net Neutrality and transparency in the relationship with users is one of the aspects of the overall global process of global communications and services. It is important not to focus only on this part of the problem leaving other subjects aside. Putting pressure only on ISPs is not the best way to create the conditions to reach the objectives of the Digital Agenda.

Without prejudice to the foregoing, APRITEL agrees with BEREC that the ISP Industry has a role to play, both in providing their customers with transparent information, and in cooperating with other ISPs to agree on industry-wide approaches to transparency.

Self regulation has a fundamental role to play and it is the best possible approach to respond to BEREC's concerns .Transparency standards may be developed by ISPs by way of self-regulation and this could avoid the adoption of more national measures, exceeding what is proportional.

APRITEL and its associates are prepared to assume their responsibilities and work for developing industry standards and net neutrality principles.

VII. FINAL COMMENTS AND CONCERNS

APRITEL believes that the BEREC Best Practices and Approaches will contribute greatly to the transparency policy on Net Neutrality. However, the outcome of these guidelines should be carefully analysed and no concrete measure should be adopted before a thorough assessment of the impact that such information obligations may have on ISPs, on consumer awareness (given the volume of information) and on innovation in the EU Single Market.

Any measures imposed on ISPs to respond to the principles of Net Neutrality must be assessed from an economic and operational standpoint. ISPs in Portugal are already subject to strong competition and regulatory constraints and have been investing largely in the upgrade of their networks in order to respond to the growing demand for bandwidth and innovative products from customers.

Operators must be permitted to offer tiered service plans and tailor service offerings to consumer demands as well as to employ reasonable network management techniques, which may include prioritization or differentiation of classes of traffic.

On the other hand, consumers should be able to run applications and services and access lawful internet content of their choosing, that do not harm an operator's network and also to access full disclosure of terms and conditions of their service plans, including the applicable rates.

In brief, APRITEL believes that transparency is an important asset to prevent net neutrality problems in the future but that it has to be implemented with caution, so it doesn't overwhelm the end user, and with due care to each national market' starting point. In the case of Portugal, APRITEL believes that the work that has been made by ANACOM should be taken into consideration by other Member States as a reference to an adequate level of transparency at all relevant contact points with the end user.

November 2, 2011