



To: BEREC

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ASIC comments on BEREC's Public Consultation on draft Guidelines on Net Neutrality and Transparency

The *Association des services internet communautaires (ASIC)* is the first association for the Web 2.0 sector. It aims to promote the 'new' Internet. It was created in December 2007 by AOL, Dailymotion, Google, PriceMinister et Yahoo ! and now represents 26 members in France and beyond in Europe.

General remarks

ASIC thanks BEREC for the opportunity to comment on its guidelines on net neutrality and transparency. ASIC strongly supports the view of the European authorities that the Internet is now '*central to people's lives... empowers citizens and brings a better quality of life ... is an engine for creating more growth and jobs... a platform for the delivery of public and private services*'¹.

Accordingly it is crucial that BEREC and national regulatory authorities throughout Europe develop measures and act in this field always with the primary aim in mind, as stated by the European Commission, to '*preserve the open and neutral character of the Internet*'². This is the ultimate goal that these transparency guidelines and subsequent work by BEREC and its members should strive to achieve, without delay.

1. There are problems with net neutrality in Europe already, which need to be dealt with urgently

As a starting point, it is important to recognise that it is less, as the draft guidelines suggest, "*the development of broadband and different quality of service demands from Internet applications*" (p. 6) that have brought a focus on the question of network and traffic management, but rather, the existence of severe discrimination against certain online applications and services, especially in the European Union. This is despite end-users' ability to access and distribute the information or run the applications and use the services of their choice on the Internet being a policy principle and objective set by the European legislator in the revised Framework Directive on Electronic Communications (Article 8.4.g).

Indeed, many mobile network operators, including all operators in several EU Member States including France, have decided to adopt technical, contractual or financially-prohibitive conditions preventing users from using VoIP and P2P applications, and certain other forms of utilisation are otherwise impeded or subject to unjustified additional retail tariffs, such as video, audio, tethering, streaming or newsgroups.

¹ European Commission. (2010, 30 June). *Questionnaire for the public consultation on the open Internet and net neutrality in Europe*,

http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/net_neutrality/index_en.htm.

² European Commission, *Ibid*.



2. Transparency (and competition) in isolation is not enough, and could act as a loophole

ASIC agrees strongly with BEREC's conclusion that "*transparency is a fundamental mean to achieve regulatory objectives*" but that "*other net neutrality aspects [...] **need** to be considered in complement to transparency*" (our emphasis). Indeed, even taken together with competition law, transparency will not be sufficient to preserve the open character of the Internet: other, behavioural constraints need to be put in place.

Without these additional constraints, there is a real risk that proposals which rely solely on transparency could have the opposite effect of what they are aimed at (promoting the open Internet), by creating a *de facto* loophole for operators to practice restrictions of their own volition - as long as they inform consumers. This could also lead to a situation wherein all ISPs are in a sense encouraged to tier their offers to provide comparable subsets, and whereby unrestricted Internet (without subsets) becomes de-facto the highest tier/most expensive option. Clearly, this should be actively avoided.

We are already witnessing the perverse effects of a sole reliance on transparency provisions in Sweden for example: until last year all mobile network operators offered access to the full, unrestricted Internet. But since the beginning of 2010 after regulator PTS suggested transparency as the main safeguard for the open Internet, both leading mobile operators introduced restrictions on users' ability to use VoIP³. The remaining two mobile operators announced in early 2011 to the Swedish media their intention to introduce similar restrictions⁴. (we understand and welcome that the Swedish authorities are currently looking into this)

In summary, as much as we think that ensuring that transparency requirements – clear, meaningful information to users – should be implemented properly and without delay, BEREC and its members should work urgently on designing and promulgating parallel measures to preserve net neutrality and the open Internet, centered around a non-discrimination principle. This should involve in particular defining "Internet access" and the scope of what is acceptable (or "reasonable") traffic management.

3. BEREC should define Internet access (vs managed services): either end-users access all of the Internet, or it's not "the Internet"

As set out by BEREC in Chapter II, section 3.b., either a network provider offers access to the Internet, or to different, so-called specialized services "*for which operators normally ensure a certain quality of service*". Net neutrality principles would normally apply in particular to Internet access, rather than to other services provided alongside it.

A recent report by Plum Consulting recommends that "*the term 'Internet access' be defined consistent with open internet norms and that use of the term in marketing be allowed only for those network access providers who abide by the stipulated set of open internet principles (rather than consumers having to*

³ See Telia Sonera's and Telenor's Terms and Conditions here : https://www.tewss.telia.se/privat/produkter_tjanster/mobilt/surfaimobilen/?sl=privat_produkter_tjanster_mobilt_surfaimobilen and <http://www.telenor.se/privat/abonnemang/tillaggstjanster/alla-mobiltjanster.html#C45-2100-P45-5468>.

⁴ 'Vagar inte blockera Skype', 2011-01-18, www.realtid.se



assess potentially complex and opaque information regarding network management and blocking)".⁵ It would indeed seem important in order to avoid consumer confusion and to ensure that transparency measures truly serve their purpose, that consumers are very clear whether what they are accessing is 'the Internet' or something else, of a more limited nature.

This same conclusion was reached by French NRA ARCEP who elaborated a definition of 'Internet access' in its 10 Recommendations of 30 September 2010 whereby any offer which is restricted, bar for reasons of reasonable traffic management, would not constitute, especially in the consumer's eyes, "the Internet"⁶. **An end-user should always be able to access the best efforts, global public Internet, whichever other / managed services they may also be subscribing to.** This would enable operators to innovate in their offerings, whilst ensuring that end-users are always able to enjoy all Internet content, applications and services whichever operator or package they subscribe to. The only exception, as we have already described, should be reasonable traffic management.

Consequently, we would strongly suggest that describing a service that has restrictions as 'the Internet' should not be allowed, as it would lead to significant consumer confusion. Anything that is not the whole of the Internet cannot be described as the Internet. Potentially misleading descriptors such as "web access", "surfing the web", "the best of the Internet" or "3G access" should also be discouraged. ISPs should make it clear in their information to consumers that any access service that gives access to less than all legal content, services and applications, is NOT Internet access; the only exception being for genuine traffic management reasons stemming out of technical, legal or security reasons.

In this respect, we would wish to caution that the "3 traffic lights" approach suggested by the *Technologia* study, described in pages 39-40, would likely create significant consumer confusion, as well as negate the net neutrality principles. On the one hand, having 3 tiers of offerings such as those mentioned by *Technologia* would likely end-up being too complex (Which 'internet' am I subscribing to? What will throttling P2P do for the services I use? Since the video-on-demand services of many broadcasters such as

⁵ See Plum Consulting. (2011). *The Open Internet – a Platform for Growth. A Report for the BBC, Blinkbox, Channel 4, Skype and Yahoo!*. p. 37. Retrieved at, http://www.bbc.co.uk/aboutthebbc/reports/pdf/plumbriefing_oct2011.pdf.

⁶ We encourage BEREK to define and distinguish Internet access and managed services along the following lines, inspired by ARCEP's proposals⁶:

- "Internet access: a service that consists of providing the public with access to online communication and information services and applications⁴. This service provides the public with the ability to send and receive data by using the IP communication protocol, from all or virtually all points from all of the interconnected public and private networks around the world that make up the Internet. "
- "Managed services: services providing access to content/services/applications through electronic means, marketed by the network operator which guarantees certain specific features thanks to the process it uses on the network it owns and operates. Some of the classic features include guaranteed reliability rate, minimal latency, jitter (variation in time between packets), guaranteed endpoint-to-endpoint bandwidth, security level, etc. According to the above definition, providing end users with access to the Internet does therefore not constitute a managed service. Some managed services can be governed by a contract with an ISV, and may also result from an offer made available to the end user, whether as a standalone offer or in the form of an option bundled with Internet access."

When it comes to managed services, were the operator to offer to prioritise certain Internet content, application or service, it should be on a fair and reasonable (FRAND) basis. Questions around the fairness and reasonableness of any exclusivity arrangements could be dealt with as they are today through competition and/or commercial law.



the *BBC iPlayer* and updates for the *World of Warcraft* game use P2P, will my user experience suffer, or are they just talking about ‘some’ P2P applications, etc etc.?). On the other hand, the two types of ‘Restricted offers’ proposed by *Technologia* (yellow and red traffic lights) would not actually constitute ‘access to the Internet’, since they would entail restrictions on access to (lawful) Internet content, applications and services.

In sum, consumers would be far better off with simply two classifications: either they are being provided access to the Internet, or not. The only differentiation within ‘Internet access’ could be on whether reasonable traffic management is applied, how, and why.

Further, NRAs should be cautious that, whichever categorization is recommended, the prices and availability of access to the (open) Internet do not evolve in such a way as to discourage anyone from paying for access to the full, open Internet, as opposed to cheaper, more heavily-marketed, access to ‘specialised’ services. This is particularly important as access to the full, open Internet should not become the preserve of only the wealthiest parts of the population: with the Internet increasingly a major element of social and economic inclusion, it would seem at odds with the current needs of European citizens and the *Digital Agenda* if regulators did not ensure that the digital divide in Europe is not further reinforced, between those that can afford access to the whole of the Internet, and those that are left behind.

4. To preserve the open character of the Internet and give stakeholders clarity, BEREC should define what is reasonable traffic management, based on the EC Directives and ARCEP’s work

Following on from these remarks about the need to inform consumers clearly whether or not they get access to the Internet, we also welcome that BEREC calls on ISPs to explain clearly how they deploy traffic management and why (p. 32); as well as BEREC’s intention to more clearly state what traffic management limitations are ‘reasonable’ (p. 33) or ‘not problematic’ (pages 24).

In tackling net neutrality problems, it is important to start from the right premise. So as it looks at the issue, we would encourage BEREC to define ‘net neutrality’ in the way most commonly referred to in the European discussions on this topic. Indeed, the vast majority of stakeholders are not demanding a strictly neutral treatment of traffic: there is an understanding that, *in exceptional circumstances*, different types of data may be treated differently. This corresponds to the FCC Principles and the EU Framework Directive article 8.4.g whereby net neutrality could best be described as the principle that: “*end-users’ should have the ability to access and distribute the information or run the applications and use the services of their choice on the Internet, subject to reasonable traffic management*”.

With this understanding, BEREC and its members can then most effectively tackle the issue, by clearly scoping what is and is not reasonable or acceptable traffic management. It will give all stakeholders regulatory clarity and certainty, enabling in particular network operators to manage traffic flexibly while adopting the right kind of behaviour in line with the EU’s stated goal of preserving the open character of the Internet.

We would also point BEREC to the work in this area by French regulator ARCEP, whose scoping of the appropriateness of traffic management should be replicated at European level in order for all stakeholders to have clarity on what is or not acceptable traffic management: "*[ARCEP] recommends that the traffic management practices that ISPs employ to ensure Internet access remain exceptional and comply with the general principles of **relevance, proportionality, efficiency, transparency and non discrimination***"⁷ The details it gives on each qualification are also very helpful to scope what practices are acceptable. In particular, 'non-discriminatory' "*means that streams with comparable technical properties must be treated in an equivalent fashion. The particular goal is to prevent an ISP from favouring its partners' content/services/applications (or its own if it is vertically integrated) over those supplied by others, as this type of preferential treatment must be reserved for managed services only, and cannot apply to Internet access.*"⁸

We would add that beyond considerations solely related to traffic management, arbitrary discrimination against certain applications and protocols should not be deemed legitimate. As ARCEP noted, "*within specific technological environments, and particularly on mobile networks, although the overall goal must prevail, it nonetheless seems acceptable for mobile operators to restrict access to certain sites or applications for objective, non-discriminatory and justified reasons [...] this type of constricting practice must nevertheless only be possible when it satisfies real technical imperatives, and can never involve banning or blocking an application or a protocol (including voice over IP, peer-to-peer or streaming), nor must it act as a substitute for investing in increasing network capacity, which is the solution that must prevail in the medium term.*"

5. Transparency should be done both in easy and clear format for end-users; and in a more detailed version that can be analysed by content and app providers, consumer groups and regulators

We agree that consumer information can be significantly improved. The proposal to ensure that some 'key facts' understandable by the "man in the street" are made available next to more detailed, including technical, information, seems appropriate.⁹ This would enable consumer 'alpha' to understand what access they are buying (how much bandwidth they can consume, how much speed they can expect etc.) so that they can compare it easily with other offers.

The longer section would enable the end-consumers to find out more detail on specific points if necessary, for instance to verify how traffic management techniques are deployed. But crucially this longer section should also enable other stakeholders involved, from consumer associations to regulators and online content, application and service providers, to verify how operators respect the open and neutral character of the Internet in practice, how they manage their networks and offer their services.

In conclusion

⁷ ARCEP consultation *Discussion points and initial policy directions on Internet and network neutrality*, May 2010, English version; http://www.arcep.fr/uploads/tx_gspublication/consult-net-neutralite-200510-ENG.pdf.

⁸ ARCEP, *Ibid*, page 18.

⁹ Examples include the UK Financial Services Authority's practice: when buying a financial product, consumers are presented with both a simple, usually one-page-long 'Key Facts Illustration' with easy to understand main details of the offering, followed by an in-depth brochure detailing the terms and conditions.



BEREC correctly concluded already in 2010 that “*there are some limitations on the effectiveness of transparency as a measure remedying network neutrality issues*”.¹⁰ This point was also acknowledged in the April 2011 Communication issued by the Commission on the open internet and net neutrality in Europe, which states that “*transparency and ease of switching are key elements for consumers when choosing or changing internet service provider but they may not be adequate tools to deal with generalised restrictions of lawful services or applications*” [our emphasis added].

We would thus recommend that in order to protect effectively the open, neutral character of the Internet, the guidelines should be finalized so that:

- the term ‘Internet’ (or ‘Internet access’) is clearly defined, and that offers which do not entail access to the open Internet may not be marketed as ‘Internet’; and not including access to the global public Internet in broadband access offers would be an unwelcome step backwards;
- it is made clear that, as ARCEP determined in its initial policy directions, blocking or otherwise hindering specific types of Internet content, services and applications like VoIP is not a legitimate practice.
- transparency makes a clear distinction between what is access to the Internet, and what is not (specialized services); having “access to the Internet” should clearly mean access to all of the Internet, rather than a subset of it, except for traffic management in genuine and time-limited cases of network congestion, or for purely legal or security reasons;
- limitations to end-users’ ‘Internet access’ should only concern download speeds or volume caps (as clarified by the Commission in 2009¹¹); and that
- transparency concerning limitations to end-users’ access should not be mistaken for a loophole enabling by-the-backdoor discrimination of specific services, applications, technologies, sources or destinations, except for genuine legal or technical reasons.

ASIC would be delighted to have the opportunity to discuss all these points in more detail with BEREC, and can be contacted through : president@lasic.fr.

Yours sincerely,

L’Association des Services Internet Communautaires (ASIC)

¹⁰ See BEREC. (2010). *Response to the European Commission's consultation on the open Internet and net neutrality in Europe*. p. 10-11. Retrieved at, http://erg.eu.int/doc/berec/bor_10_42.pdf.

¹¹ European Commission statement on the telecom package, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/219&format=HTML&aged=0&language=EN&guiLanguage=en>