EUROPEAN
DIGITAL
RIGHTS

Response to
BEREC Guidelines on Net Neutrality and Transparency:
Best practices and recommended approaches

European Digital Rights

2 November 2011

1. European Digital Rights (EDRi) is an association of 28 privacy and digital civil rights associations from 18 European countries. EDRi's objectives are to promote, protect and uphold fundamental human rights and freedoms in the digital environment. Examples of such fundamental human rights are freedom of expression, access to knowledge, data protection and privacy. To this end, we monitor, report and provide education about threats to civil rights in the field of information and communication technology. EDRi welcomes this opportunity to respond to BEREC's Guidelines on Net Neutrality and Transparency ('the Guidelines'). EDRi welcomes BEREC's commitment to exploring the subject of transparency in relation to net neutrality. However, our main reservations about the Guidelines outlined in this response relate to the assumption that transparency is a major tool to achieve the regulatory objective of maintaining an open and competitive Internet.

2. As the European Parliament's Industry, Research and Energy Committee recently stated, net neutrality is crucial for fundamental freedoms, innovation, and competition. In a neutral net, end users face no access limitations to applications, content and services beyond those included in existing TCP/IP design. Likewise, there is no discrimination against the source, destination or content of the information transmitted over the network. The principle of net neutrality is at the core of the economic and societal success of the Internet as we know it today. However, there is a growing number of threats to it, such as blocking of applications and degradation of services. These experiments with the essence of the Internet have sometimes been transparently declared by operators themselves and reported by end users and content providers, while at other times consumers' services have simply been restricted, without notification or explanation. Not only do operators have incentives to seize more control over internet traffic, they are also increasingly under pressure from vested interests to take measures which run counter to their role as a mere conduit. As we will explain, transparency on service restrictions will lead neither to sufficient protection nor to empowerment of end users.

3. In the light of numerous transparent and non-transparent violations of the principle of net neutrality, EDRi is deeply concerned by the Guidelines' apparent acceptance of restricted offers that provide limited access to the Internet. The French regulator 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."[1] BEREC's Guidelines however are not based on the same premise - that illegitimate traffic management should be prohibited except in truly exceptional circumstances.

4. A tangential point that also needs to be raised is the fact that ISPs are seeking to create a de-facto non-neutral Internet and gain political support to restrict access to content that either they or a third party[2] deem to be "illegal" or "harmful".[3] BEREC should be very conscious of this threat; which actively seeks to undermine the powers of regulators to maintain an open and competitive Internet.

> As a starting point, our contribution considers that transparency is a useful and essential tool only in cases where traffic management is short-lived and exceptional due to unforeseeable congestion problems that exceed the capabilities of the traffic management functionality of TCP/IP. All references to "transparency" in this document should be understood in this context.

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1 ARCEP "Discussion points and initial policy directions on Internet and network neutrality," May 2010, p. 17, www.arcep.fr/uploads/tx_gspublication/consult-net-neutralite-200510-ENG.pdf

2 PCPro "Britain's broadband censors: a bunch of students", 17 October 2011 http://www.pcpro.co.uk/news/broadband/370561/britains-broadband-censors-a-bunch-of-students

3 The Guardian, "Biggest four UK ISPs switching to 'opt-in' system for pornography", 11 October 2011 http://www.guardian.co.uk/society/2011/oct/11/pornography-internet-service-providers

In brief, EDRi concludes as follows:

- Through our answers we outline that transparency policies do not provide all the necessary guarantees for a neutral and competitive Internet, which implies the necessity to support immediate regulation and to promote net neutrality as an objective for regulatory authorities.
- Full transparency should only be necessary in the case of legitimate traffic management in order to deal with temporary, unforeseeable and exceptional congestion or network security threats. Acceptance of other traffic management will damage free speech, competition and the elements of the Internet that are of most value for our society and the economy.
- The current regulatory framework cannot rely on transparency and competition. While both have roles in protecting consumers, they do not effectively prevent operators from adopting non-neutral practices. If transparency and competition failed to protect consumers in relation to mobile roaming, for example, there is no reason for this approach to work on net neutrality
- Even if it is assumed that switching barriers from one provider to another are negligible, the openness of the Internet will be diminished if only transparency obligations are imposed – a choice between the lesser of two evils is not a choice that European citizens should face.
- It is notoriously difficult to assess the veracity of ISP claims (as shown by the years-long problem of inaccurate claims regarding connection speeds) and places a significant enforcement burden on NRAs to detect discriminatory practices. Therefore, a narrow regulation of net neutrality from the outset is essential.
- Relying on transparency solely would create a loophole for operators to introduce restrictions as long as they inform their customers (see examples under point 10).

> The Internet is based on a TCP/IP architecture that was developed in the early 1970s. This fundamental structure of the Internet is based upon the original protocols TCP and IP which enable communication through a set of predefined communications. Most computer operating systems in use today include a TCP/IP implementation. TCP/IP has two built in agnostic management mechanisms in order to control congestion: "Slow-Start" and "Congestion Avoidance". In the following, we will refer to "traffic management" as supplementary practices by operators to the already existing TCP/IP architecture.

Role of transparency with regard to net neutrality

5. BEREC correctly identifies on page 3 of its consultation document that *"transparency alone is probably not sufficient to achieve net neutrality"*. EDRi agrees that transparency is not sufficient and thus not a fundamental means to guarantee a neutral Internet.

6. Even though the Guidelines distinguish between problematic and non-problematic traffic management (p.19), they fail to give a clear definition of these terms. Where net neutrality is provided for by regulatory measures, it is only necessary for the operator to be fully transparent on temporary, unforeseeable and exceptional traffic management. Exceptional traffic management would, for instance, be necessary to preserve the integrity and security of networks and services and it should be pointed out that automatic traffic management provided for by the TCP/IP protocol is not an issue and covers most, if not all, of the excuses given by operators for non-neutral traffic management. Any exceptions to the main rule should be explained and taken into account in BEREC's future reports and guidelines.

7. If transparency is the main tool, there will be nothing to prevent operators starting to discriminating between the origins and destinations of traffic as long as this is being made transparent. Transparency will therefore not suffice to protect Internet users or potential entrants to the market.

8. Even though transparency policies have the aim of improving conditions for switching and to help the consumer make informed choices, it should be noted that switching also depends on other factors and is in some cases nearly impossible. Serious switching barriers exist for instance where operators offer triple play, such as Internet, TV and phone, or email-addresses that customers would not want to lose. A press release by Ofcom on consumer switching from last year highlighted that nearly half of consumers are put off by switching communications providers.[4]

9. The revised EU telecoms framework establishes specific requirements relating to quality of service and transparency of information to consumers (Articles 20 and 22 of the revised Universal Services Directive 2002/22/EC). However, these provisions are unlikely to provide consumers with sufficient safeguards since measures, such as blocking, degrading or throttling traffic, have not been explicitly prohibited in the recently amended Universal Service Directive. Therefore, it is very unlikely that end users can successfully lodge a claim against such practices. It will often be difficult to prove, for instance, that the degradation of a service at the initiative of the provider would significantly restrict competition in the access market. Moreover, it is almost impossible for end users or businesses to prove that this can be considered unfair treatment or abusive, especially since these practices could be (very dubiously) argued to be implicitly allowed under the Universal Directive. The impact on competition in markets that have never developed due to barriers to entry created by non-net neutrality will also be impossible to measure.

10. Concerning terminology, advertised and actual speed, end users should get access to the Internet as it was advertised by the operator in a neutral Internet. Transparency on Internet access should be ensured by reserving the "Internet" label only to offers that respect the neutrality principle as suggested by a recent French Parliament report.[5] Misleading offers should be discouraged (like "3G access" or "web access" or "24/24 3G mobile websurfing").

11. The following non-exhaustive list of examples provides an overview of infringements in Europe where transparency is not a sufficient safeguard for net neutrality:

- In 2007, T-Mobile publicly refused to interconnect with mobile VoIP provider Truphone in the UK. It blocked calls made to numbers owned by Truphone that allow users to make VoIP calls using Wi-Fi and GSM roaming. Just a few months earlier, in March 2007, Ofcom announced limitations for interconnection charges underlining that these fees should be *"fair and reasonable"* and *"transparent"*.[6] However, this applied to mobile networks and appeared to leave the possibility for operators to block offers that they did not consider as "real" mobile offers.
- PlusNet, an ISP in the UK, has a very transparent guide with comprehensive documentation of its network management and discriminatory practices on its website.[7] PlusNet uses deep packet inspection (DPI) to identify traffic and to establish different priority levels. It offers six (gold, titanium, silver, bronze, best effort and "gold plated") levels

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4   Ofcom Press Release, 10 September 2010 http://media.ofcom.org.uk/2010/09/10/nearly-half-of-consumers-put-off-by-switching-communications-provider-2/

5   Report on Net and Network Neutrality , Proposal N° 5, April 2011, p.70, http://www.assemblee-nationale.fr/english/dossiers/net_and_network_neutrality.pdf

6   Ofcom Press Release, 27 March 2007 http://media.ofcom.org.uk/2007/03/27/price-reductions-in-the-mobile-market/

7   PlusNet: All about traffic management,
     https://www.plus.net/support/broadband/speed_guide/traffic_management.shtml

of service covering 66 different possible billing options – making 396 possibilities in total.

- According to a Billmonitor study in 2011, British consumers waste £4.899 billion on the wrong mobile contracts per year.[8] The tariffs are transparent but, as with PlusNet, they are transparently incomprehensible to an average user.
- Until 2010, all Swedish network operators offered unrestricted access to the Internet when the regulator PTS pronounced itself in a report in favour of transparency as the only safeguard for net neutrality which lead to the introduction of discriminatory practices against VoIP. This resulted almost immediately in restrictions by Telenor: "IP telephony is not available in this offer."[9]
- As part of a service to inaccessible rural areas in Germany, Vodafone offers fixed Internet access and discriminates very transparently against VoIP and P2P. In its terms and conditions stipulate that usage of these services is not permitted on this tariff and users have no other operator to choose from.[10]
- In 2010, BT and TalkTalk declared their willingness to prioritise certain streaming video services depending on who pays. UK's two biggest ISPs were very transparent on this priority plan for specific Internet applications or services.[11] Such an approach will increasingly create massive new barriers to entry in the online environment, decimating the Internet's innovative potential for European companies.

12. Case studies in other sectors show that transparency is not sufficient:

- In September 2010, ERGEG published draft recommendations and recommended on its website that information should be easily accessible to the public, updated in a user-friendly manner and free of charge and asks that operators transmit all relevant data to the information platform. However, in October 2011 it was found that energy companies give conflicting advice on fixed-price tariffs to customers when being asked for the cheapest tariff. UK's six major energy supplier fail to give understandable and accurate information.[12] This failure of transparency is costing citizens and businesses significant amount of money in a time of economic crisis when they can ill afford such practices.
- In 2008, E.ON, one of the biggest energy suppliers in the UK, even blamed regulators for failing to impose better practices on them. E.ON suggested that the regulator should "discourage" tariff complexity by requiring a high standard of explanation in all communications to consumers.[13]

13. These examples show that BEREC's finding on page 10, that consumer choice and information on the differences between offers "help end users obtain the services that they want" is frequently incorrect. In order to safeguard the open Internet and net neutrality in Europe, transparency should not be considered as an effective means to achieve agreed regulatory objectives.

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8   The Guardian: Mobile phone users 'wasting nearly £5bn a year', 11 April 2011
 http://www.guardian.co.uk/technology/2011/apr/11/mobile-phone-users-wasting-5bn ; National Billmonitor report
     available at http://www.billmonitor.com/national-billmonitor-mobile-report
9   Telenor: Terms and Conditions http://www.telenor.se/privat/abonnemang/telenor-surfa/index.html
10 C'T Magaazin: Schmalspur, August 2011 http://www.heise.de/ct/artikel/Schmalspur-1216729.html
11 PcPro: TalkTalk, BT: we'd put iPlayer in the slow lane, 28 September 2010
     http://www.pcpro.co.uk/news/broadband/361501/talktalk-bt-wed-put-iplayer-in-the-slow-lane
12 The Guardian: Energy firms' tariff advice slammed, 13 October 2011
     http://www.guardian.co.uk/uk/feedarticle/9892864
13 Probe remedies, Response by EON http://www.ofgem.gov.uk/Markets/RetMkts/ensuppro/Documents1/Response
     %20from%20Eon%20to%20Energy%20Supply%20Probe%20-%20proposed%20retail%20market%20remedies.pdf

Conclusion

14. EDRi fears that relying solely on transparency requirements and on market forces will lead to the development of a multiple-tier Internet, to the detriment of citizens' rights and the competitive online marketplace. Few would be able to access premium managed services and many would be left in the slow lane with a low quality and restricted access to the Internet.

15. In the light of the above, EDRi recommends that BEREC a) take into account that full transparency is essential with regard to temporary and exceptional traffic management and b) promote the adoption of specific regulations to protect net neutrality and the open Internet's core characteristic as a unique platform for innovation and freedom of expression defined by end user control.

16. BEREC should closely monitor the market situation, in particular related to blocking and throttling of or excessive price for VoIP and file sharing.

17. EDRi urges BEREC to design regulatory tools for national regulatory bodies to ensure that traffic management practices do not unsettle the Internet ecosystem.

18. BEREC should also create an Internet quality watchdog to measure the quality of Internet access provided by operators, in order to gain a better understanding of the effects of the operators' practices on Internet quality, especially in terms of routing, traffic management and interconnection.

19. Given the importance of net neutrality, and given the fact that transparency alone will not suffice, BEREC should promote narrowly-tailored measures to safeguard the open Internet.