



**Position of the Net Users' Rights Protection Association
(NURPA)**

on

BEREC's Guidelines on Net Neutrality and Transparency

Net Users' Rights Protection Association

Identification number in the register: 80339855034-02

This information is also available on our website: <http://nurpa.be>

About

The Net Users' Rights Protection Association (NURPA) highly appreciates the opportunity to comment on BEREC's Guidelines on Net Neutrality and Transparency ('the Guidelines').

The NURPA is a Belgian advocacy group which promotes and protects digital rights and the founding principles of the Internet. Since technologies increasingly influence our lives as citizens, consumers, artists and professionals, the NURPA defends fundamental rights and freedoms in the networked world wherever they might come under attack. As a non-profit organization, the NURPA is dedicated to the protection of online freedom of expression, privacy, digital rights and civil liberties.

As such, the NURPA welcomes the efforts of the BEREC and its commitment to enhanced transparency and consumer protection in relation to net neutrality. However, the NURPA has several serious concerns regarding BEREC's statement that transparency is a crucial tool to achieve regulatory objectives.

Net Neutrality and Transparency

According to Prof. Benkler, the Internet developed into a robust, end-to-end neutral network *"as Lessig showed, this was because the telephone carriers were regulated as common carriers. They were required to carry all traffic without discrimination."*¹

Net neutrality is not only essential for innovation and competition, but also for guaranteeing fundamental rights such as the right to freedom of speech and the right to privacy. The principle of net neutrality has contributed to build the Internet as we know it today. It has become a valuable asset for our society and a unique platform with regard to the free flow of information and the ability to share knowledge.

However, the Internet as we know it is more and more threatened. In several European countries, blocking measures have been introduced and ISPs have their own incentive to block applications or throttle services. In many cases, these measures have been introduced in a transparent manner by governments, operators themselves are transparently discriminating and end users as well as content providers are frequently and publicly reporting violations of net neutrality. Even if transparency can be very helpful in certain cases, it will not provide the necessary guarantees for a neutral Internet.

Competition and transparency may both have important roles in protecting consumers, but these two elements do not prevent operators to engage in non-neutral practices and do not lead to sufficient protection for end users. As we will show below, there are numerous restricted offers that provide only limited access to the Internet.

Our contribution addresses the importance that transparency is required only in the case of exceptional and temporary management. According to the French regulator ARCEP, traffic management practices need to *"remain exceptional and comply with the general principles of relevance, proportionality, efficiency, transparency and non discrimination."*² *"Problematic management"* is contrary to the principle of net neutrality and should not be accepted. Illegitimate or *"problematic"* traffic management should therefore be prohibited

1 Benkler, Yochai, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. New Haven, Conn: Yale University Press 2006, (p.399) http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf

2 ARCEP's "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

by narrowly-tailored regulatory measures.

There is no need for transparency if, in a neutral Internet, end users get access to the Internet as it was advertised by the operator. Any offer that does not provide full access to the Internet should not be labelled as “Internet access” according to the findings of a French parliamentary report.³

Transparency as a Loophole

BEREC's Guidelines do not define the terms of problematic and non-problematic traffic management and consider that transparency is needed on any kind of traffic management. However, where a neutral Internet is guaranteed, full transparency is only necessary with regard to unforeseeable, temporary and exceptional traffic management.

The NURPA fears that transparency leads to the creation of a permanent loophole for operators to introduce restrictions as long as they inform their customers, as we can already see it happening today. Choice and information on the differences between commercial offers do not necessarily help end users access the services, applications and content that they want:

- In France, VoIP and P2P are not permitted on certain mobile contracts and transparently indicated: “VoIP, P2P and Newsgroups are forbidden”⁴
- In Belgium, there is no real competition between ISPs since Belgacom has around 40% of the market share. Belgacom transparently blocks port 25, no other SMTP service than Belgacom's are allowed in order “to protect its clients”. Therefore, Belgacom customers cannot host their emails services themselves⁵
- The recent DNS blocking of 10 domain names of the Pirate Bay in Belgium has also been introduced in a very transparent manner. The NURPA has already warned that DNS blocking carries unintended consequences and explained its dangers regarding the respect of fundamental rights in a response to the European Commission's consultation on online gambling.⁶
- Mobistar contracts offers unlimited access to three specific websites (Twitter, Facebook and Netlog) through mobile access in Belgium. By doing so, it creates an artificial incentive to use these particular websites instead of others that might compete with the latter.⁷
- In Belgium, Proximus offers on its website a questionnaire in order to find the right price plan for mobile telephony. This questionnaire helps the customer transparently choose between a total of 33 price schemes. In many cases, transparency is a solution to help customers better understand their more complicated choice between almost countless contracts.⁸ [8]
- In the United Kingdom, a study has shown that 76% of UK mobile subscribers wasted £4.899 billion on the wrong mobile contracts in 2010.⁹

3 Net and network Neutrality, Proposal N°5 : “Reserve the “Internet” trade name solely for offer that respect the principle of neutrality”. http://www.assemblee-nationale.fr/english/dossiers/net_and_network_neutrality.pdf

4 Orange Contract Terms “Peer to Peer et Newsgroups sont interdits”, p. 3:
<http://boutique.orange.fr/doc/contrat2497.pdf>

5 Belgacom, FAQ : <http://postmaster.belgacom.be/?c=faq&l=fr#port25>

6 http://nurpa.be/resources/downloads/NURPA_20110731_online-gambling-consultation.pdf

7 Mobistar Contract details <http://www.mobistar.be/fr/offre/mobile/cartes-rechargeables/tempotribe>

8 See Proximus “Price Shaker” on the website <http://customer.proximus.be/en/ShakerPrice/index.html>

9 National Billmonitor Report 2010 <http://www.billmonitor.com/national-billmonitor-mobile-report>

Conclusion

A free digital society needs a neutral Internet. BEREC should not make the mistake to rely solely on transparency requirements and to leave safeguarding the Internet to market forces. Transparency could too easily be mistaken as a loophole for discrimination. It does not ensure quality of service for end users and will only worsen the situation for them. Transparency will neither protect nor empower end users.

A neutral Internet is essential for sharing knowledge freely in a democratic society. ISPs all over Europe are already taking measures to block, degrade or throttle traffic. As we have shown, transparency alone is not sufficient to protect consumers against discriminatory traffic management practices.

Detecting discriminatory practices is notoriously difficult and puts a significant enforcement burden on national regulatory authorities. It is thus essential to introduce narrow regulation of net neutrality from the start.

BEREC should take into account that it is often difficult to prove unfair treatment and that redress mechanisms should be put in place by NRAs.

As a logic consequence of our above mentioned concerns, the NURPA urges the BEREC to promote the adoption of immediate regulatory measures and to monitor the quality of Internet offers and access in Europe.

We would welcome the opportunity to discuss the elements of our position on BEREC's Guidelines in more detail with the BEREC, the European Commission and the European Parliament.

You can contact us at: contact@nurpa.be

Thank you for your consideration.