BEREC Net Neutrality and Transparency Guidelines

SFR Response

November 2011

SFR thanks BEREC for giving it the opportunity to express its opinion on its draft guidelines regarding the implementation of transparency as regards Net Neutrality. SFR shares the opinion that transparency is a necessary and fundamental element that will allow consumers to make enlightened choices and it participates, to this end, in the smooth operation of competition between the players. That being said this must not be restricted to operators alone, but should concern all the players in the value chain.

Although the discussion regarding the definition of Net Neutrality is not the heart of the subject for this consultation, the definition proposed by BEREC does give rise to a few comments. In fact, given that this is a subject that has caused many disputes, it would be preferable for BEREC to abstain from providing a definition of the concept or to return to a more structured definition that the one proposed.

If the second solution should be chosen, the following precision would be welcomed: "A*ll electronic communication passing through a network is treated equally **in analogue conditions"***

It would be even better to re-use the definition proposed by Nicolas Curien "equal access to all internet content, services and applications"[1] .

BEREC starts by highlighting the importance of transparency, which they claim is a necessary prerequisite, although it is not sufficient to guarantee net neutrality. Other elements are essential in order to make transparency useful in the long term, such as, for example, the preservation of competition. This must pass via an effective implementation of the European regulatory framework, including on fibre networks, with these not being allowed to become a new opportunity for a monopoly the established operators on the local loop. On the contrary, this must allow a new distribution on the market maps and make it easy to change operator thanks, *inter alia,* to the one-day switching possibility.

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[1]   CURIEN, Nicolas, WINSTON, Maxwell, Net Neutrality, *Coll. "Repères", la Découverte*, 2011, 113 p

The Scope of the Guidelines

BEREC proposes that the scope of the guidelines be limited to the transparency of internet access for end users. SFR wonders whether professional users are included in this framework or not. In fact, given the specific relationships and means of communication between the operators and their professional clients, and company clients in particular, it is not certain that the detailed guidelines on the implementation of the general provisions may be effectively applied to commercial relationships for which individual negotiation and tailor-made offers are the norm. It would therefore be preferable for these guidelines to focus on the services provided to the residential consumer.

It would also seem important to highlight that most fixed alternative operators depend to a very great extent on the wholesale offers provided by the fixed incumbent. The level of transparency on the retail market depends directly on the information offered on the fixed wholesale market by the incumbent operator. Therefore all retail-related transparency policies must ensure that the necessary conditions for transparency exist on the fixed upstream wholesale market. What is more, the new framework enables the NRA to monitor both the transparency on the retail market and the QoS on the wholesale market[2]. It should be noted that the Commission has just launched a public consultation on the implementation of the non-discrimination principle which should enable this type of problem to be detected and solved. It would be good for BEREC to highlight the point on this occasion.

What is more, if the SMP issue is excluded from the scope of these guidelines, it could still be good to examine the cases of the ever-increasing number of actors vertically integrated on the whole value chain (between the transit, ISPs and service providers, for example). In fact, better transparency regarding the relationships between the different entities could benefit the overall transparency of the market and avoid competition distortions that are hard to bring to light.

The operators are not the only actors whose practices influence the user experience. It could be a good idea, therefore, to expand good transparency practices to the service providers and terminal suppliers, etc. In fact the content broadcasting chain, the applications or the services involve numerous players, with the operator being only one among many. Thus, the quality of a video may depend on the content suppliers choice of format, the encoding carried out by the video service provider, the CDN that transports it or the transit agent that routes it, etc.

Thus better transparency of the data gathered by the applications and/or terminals, geolocation data, in particular, and on the processing of same should also enable the user to make more enlightened decisions. Likewise the information on the use of various services or applications may be provided by the supplier for the service. The BEREC guidelines should address this point even if these players do not figure directly in the European framework.

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[2] cf. Article 9 of the Access Directive 2002/19/EC.

Finally, we, for the most part, share BEREC's opinion that fixed and mobile services should be subject to identical principles, even if the implementation details then differ owing to the very different technical reality of the two services. The information regarding speed, service access restrictions or speed reductions (throttling) after a certain usage volume does not have the same stakes.

The Information Provider

The legal obligations set by the new framework and their knowledge of both the clients and the network, mean the operators must continue to be the main suppliers of useful information for clients.

It is of utmost importance that the client be apprised of any usage restrictions for a service or an application and the level of quality they can expect from it before they use same. The operators may publish a clear list of the managed services available on their network, included in the basic offer or subject to a premium rate, subject to the consent of the service providers in question. The non-discrimination principle should then apply – a service provider who consents to publish information regarding a particular service with one operator shall not be allowed to refuse to publish the same information for one of the said operator's competitors.

To this end, the arrival of connected television sets is a source of concern for SFR, not as competitors to its own offers, but owing to the ever greater volumes that they are likely to generate on the network and the risk of user confusion. In fact, this service is currently commercialised by the manufacturers without any interaction with the operators. In the absence of an agreement between the manufacturers and the operators, the connected TVs shall only benefit from the internet best effort quality whereas the users could be expecting IPTV-equivalent quality. This level of quality requires that the TV streams towards the connected TV be managed as per the same model as the operators' IPTV, which can only happen in the case in which an agreement has been made between the two players. It is therefore essential that the distributors of connected TVs provide pertinent information on the QoS level that the user may expect.

To be as efficient as possible, these transparency rules must therefore not be confined to operators, but should be applied to all the players involved, since the operators only manage a small part of the chain between the client and the service.

Beyond the question of the perimeter of the actors who should be concerned by the supply of such information, the question of the method of publication itself arises. The publication of service quality indicators for fixed telephony in France highlighted the difficulty of defining comparable indicators between operations with very different internal structures. Such indicators must be defined with a detailed method and enable strict comparability of the services and the offers proposed so as to not induce harmful collateral effects, as regards both the operators concerned and the end user.

Finally, the publication of the information by third parties could be an interesting supplement to that provided by the operators, on the condition that it does not impose additional obligations on the

latter and that it be neutral and non-discriminatory if it is comparative. A list of NRA-approved third parties could be studied.

The Content of the Transparency Policy

The 5 criteria proposed by BEREC do indeed appear to be the ones that should be chosen. However, it will not be easy to find the right balance between these criteria. For example, the combination of accuracy and pertinence may be the source of numerous misunderstandings and divergent interpretations. As regards the concept of accuracy, this must be understood in relation to the update deadlines which must not be too short (at the risk of producing technical problems for the operators and also legal risks in the event of too frequent updates).

The main information may be effectively gathered onto a single page, as per the French FIS[3] model - which is easy to access on the operator site - and which corresponds to each type of offer in a bid to improve transparency. This information may possibly be presented in table format in order to facilitate better comparability.

It is highly unlikely that most clients will actually be interested in the technical data, such as jitter, packet loss or latency. Some ISPs however, already make this information available to interested users on the TV box and on the internet, enabling the client to follow the evolution of the performance of their connection.

The information for the different steps of the contract life cycle is a technically pertinent procedure that aids user understanding. The BEREC proposals do, however, give rise to two comments. The information on the line speeds on subscription should on the one hand be accompanied by the *caveat* in that it is not the real speed and will not be possible in the event of the construction of a line. Furthermore, the tools that enable real-time performance measurement *ex-post* are already available on the market.

The categories described by BEREC for traffic management practices are pertinent and in line with reality. Concentrating on the practices that affect user experience would, without doubt, be the most pertinent thing to do in order to provide the client with useful and understandable information. The operator may thus explain the methods of coexistence of the different services, whether managed or not, and which one takes the priority. The blocking of some services, on mobiles, in particular, must not be seen as something negative *per se*, but must be highlighted as an important characteristic of the offer in order to guarantee the best possible transparency for the users.

The distinction between problematic practices and non-problematic practices does not, however, appear to be necessary and could have side-effects which have yet to be assessed, in terms of consumer perception, in particular. If a practice is not banned, it should not be said to be problematic since such a qualification is likely to throw doubt on its pertinence and its legality and *in*

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[3] "Fiche d'Information Standardisée" i.e. Standardised Data Sheet

fine cause it to disappear. Concentrating on the practices that have an impact and on the description of this impact for the client's experience, more than on the description or the qualification of practices, would seem to be the way to go.

The development of common terminology is a task that should be carried out collectively. Work has, furthermore, been started in France (cf. the "Fiche Octet", in particular); this is a long-term task of which the complexity must not be underestimated. Such work has enabled the relevance of the term internet, in particular, to be highlighted since it is the only concept perfectly understood by the users, including for the offers for which some services will not be accessible. Likewise the definition of common metrics to all the players would be advantageous since it would improve comparability and avoid competition distortions between the players (e.g. in communications regarding speed or the definition of what constitutes a very high speed offer).

Comparable work has been carried out on "disruptors" or elements likely to disrupt the client's connection to the internet (Wi-Fi, computer equipment, anti-virus and other software, etc.).

Audits could be carried out to verify the pertinence and veracity of the information published. These must not, however, be carried out with the aim of publishing an operator ranking.

The multi-tiered targeted approach is interesting for data transmission. Standardised visual representations, however, are to be avoided, since the operators must be allowed the necessary flexibility and such representations are likely to focus user attention on the blockings or features highlighted in red, even if these are not fundamental to their individual experience.

Co-Regulation

Co-regulation between all the players (operators, software developers, online content providers, consumer associations, etc.) under the auspices of the public authorities would be a good solution for enabling the application of the new transparency rules to be specified.

The combination of all these solutions should establish a protective and flexible system that is able to promote innovation. It does not appear desirable to strictly define the terms and practices authorised, for example, in that the internet and internet services are evolving very rapidly. Defining specific rules as regards the current situation would, in practice, be the same as promoting existing players to the detriment of future services or innovative players, by freezing the economic models currently in force and placing all the benefit on the side of the most powerful players who are already well-established in the power relationship.

Self-regulation may also find its place in this extremely changeable world; it could be conducted in coordination with the public authorities, the Commission, BEREC or even the Competitor's CEO, etc.; such procedures may enable the pragmatic and reactive solution of matters that could easily pass as standards-related measures. A code of practice regarding transparency has also been published by OFCOM in the United Kingdom.

The BITAG initiative, launched in the USA by all those involved in the debate (operators, major service providers and manufacturers) would be worth examining. European industry could follow the example of this cooperation between experts in order to come up with codes of good practice with a technical scope, as regards the use of resources in particular (encoding rules, etc.) or even the implementation of network management practices.