

## Comments on BEREC’s Public Consultation on draft Guidelines on Net Neutrality and Transparency

by VON Europe, November 2011

### Preliminary Remarks

The Voice on the Net Coalition Europe (‘VON’) welcomes the opportunity to comment on BEREC’s Public Consultation on draft Guidelines on Net Neutrality and Transparency (hereafter ‘the Consultation’).

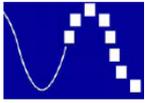
**VON considers that the discussion on Transparency initiated by BEREC through this consultation misses an essential component, namely the identification of which traffic management practices are acceptable and which ones are not.**

Article 20 of the Universal Service Directive explicitly states that information must be provided by undertakings as regards ‘any other conditions limiting access to and/or use of services and applications, where such conditions are permitted under national law in accordance with Community law’. That latter part seems to be left aside by BEREC, hence making most of this transparency exercise as set out in the document missing a crucial element of the problem.

**VON is also worried at the fact that BEREC seems to imply that art 8 (4) of the Framework Directive’s objective for NRAs to ‘promote *the ability of end-users to access and distribute information or run applications and services of their choice*’ is to be assessed at a market level (*i.e.* can end-users switch operators if they do not get choice with their current one) rather than at a network level (*i.e.* does each access operator allow the end-user its freedom of choice?). VON considers the latter interpretation to be the only correct one in terms of the spirit of the Directive.**

VON therefore urges that BEREC seeks a path that recognises the symbiosis which exists between the users (including the Internet players) and the companies that control the access network infrastructure and provide transmission services at the access network level; and balances interests in a way that serves the interests of end-users, network operators, and content, application and service providers by taking the following steps, which only make sense if taken in conjunction:

- **First**, the explicit endorsement of the widely-accepted principles that end-users have the right to send and receive the content of their choice, as well as access and use the Internet content,



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applications and services of their choice, and to connect hardware and use software of their choice that does not harm the network.

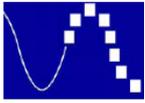
- **Second**, the provision of a transparency standard requiring network operators to provide all end-users (*i.e.* consumers, but also service, content and application providers, including the media and cultural industries and governments at all levels) with clear, precise, and relevant information on the content, applications and services accessible through their network operator, the traffic management practices on the networks, and any quality of service limitations.
- **Third**, there is a need for a behavioural standard intended to prohibit network operators from putting in place discrimination that is anticompetitive, creates barriers to innovation, or harms end-users, and it should bar conduct violating the other core principle of the open Internet: user choice on the Internet (see our first bullet point). VON agrees that regulation should not limit network operators’ efforts to fairly use network management to overcome genuine technical challenges and maintain a high quality Internet service for their customers. But, this freedom to manage the network should not be a licence for network operators to engage in anti-competitive and other harmful conduct, such as blocking legitimate content and applications or unreasonably degrading services that users have paid to access. In general, all network management practices should not discriminate between applications or types of applications.

VON notes that the European Data Protection Supervisor (EDPS) also points out in a recent Opinion on net neutrality, traffic management and the protection of privacy and personal data that *“increasing use by ISPs of traffic management policies could possibly limit access to information. If this behaviour became common practice and it was not possible (or highly expensive) for users to have access to the full Internet as we know it, this would jeopardise access to information and user’s ability to send and receive the content they want using the applications or services of their choice”*.<sup>1</sup> Therefore, the EDPS concludes that *“a legally mandatory principle on net neutrality may avoid this problem”*.<sup>2</sup>

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<sup>1</sup> See EDPS. (2011). Opinion of the European Data Protection Supervisor on net neutrality, traffic management and the protection of privacy and personal data. p. 4. Retrieved at, [http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-10-07\\_Net\\_neutrality\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-10-07_Net_neutrality_EN.pdf)

<sup>2</sup> See EDPS. (2011). *Ibid.* p. 4.



Finally, VON would welcome the opportunity to interact directly with the relevant BEREC project teams, in order to discuss the current obstacles faced by online communications applications with regards to net neutrality and how to best protect net neutrality in practice.

More details can be found in VON’s responses below.

## Detailed Response

### Comments to BEREC’s Guidelines and Proposed Approach

#### 1<sup>st</sup> PRINCIPLE: SETTING THE BOUNDARIES OF WHAT IS ACCEPTABLE AND WHAT IS UNACCEPTABLE IN TRAFFIC MANAGEMENT PRACTICES

#### **The real issue: setting guidelines identifying the thin line between ‘legitimate’ and ‘harmful’ traffic management**

Reading through the BEREC Proposed Guidelines, one cannot but feel that an initial document is missing in the stream of documents that BEREC proposes to publish in the area of Net neutrality, namely Guidelines that would set out the boundaries of what is acceptable (and hence requires transparency) and what is unacceptable (and hence should be prohibited). In their current wording, BEREC guidelines could be interpreted as actually endorsing restrictions on the open Internet, which clearly runs against the European Commission’s focus to “*preserve the open and neutral character of the Internet*”,<sup>3</sup> as set out in its 2010 Public Consultation on the open Internet and net neutrality in Europe.

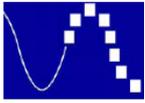
Regarding traffic management practices BEREC refers to ‘problematic’ and ‘non problematic’ practices, remarking for instance that “*the blocking of an application is obviously a problematic traffic management measure for customers using this application*”, while “*security related measures, such as blocking of denial-of-service-attacks, can be considered as non-problematic traffic management measure*”.<sup>4</sup>

VON would like to point out that such application-blocking practices are not just ‘problematic’ for ‘customers using this application’: they are a threat to the continued survival of the companies that

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<sup>3</sup> See European Commission. (2010). *Questionnaire for the Public Consultation on the Open Internet and Net Neutrality in Europe*. p. 2. Retrieved at, [http://ec.europa.eu/information\\_society/policy/ecomm/doc/library/public\\_consult/net\\_neutrality/comments/nn\\_questionnaire.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/net_neutrality/comments/nn_questionnaire.pdf).

<sup>4</sup> See the Consultation, p. 19.



created and offered these applications (in many cases for free and to the benefit of customers). VON therefore considers that these practices are not merely ‘problematic’ but are direct breach of net neutrality and art 8 (4) of the Framework Directive. We refer you to our opening statement as regards our views on this Article.

We would also like to point out that the definition of net neutrality as cited in the Guidelines<sup>5</sup>, based on a quote of Professor Tim Wu, does not fit well with the general understanding of the concept among stakeholders, which focusses on ‘users’ ability to access and distribute information and to run applications and services of their choice’ on the Internet, subject to reasonable traffic management.

We would instead wish to highlight that net neutrality could best be described by borrowing from the FCC’s 2005 Principles or the Citizens’ Rights Directive Recital 28, cited below in our response. These definitions do not prohibit traffic management per se but provide that traffic management should only be used for reasonable purposes, namely to enhance user experience in periods of network congestion, or for legal and security reasons.

VON would thus like to emphasize that it sees traffic management for the purpose of combating spam, network security or punctual exceptional measures to alleviate congestion as useful and these have never been contested as such, as long as they remain proportional and not harmful.

However, academic research shows that the security rationale is *“often used to justify practices that block traffic”*, and therefore *“this rationale should be divided into two categories — traffic management to address traffic potentially harmful to the user versus network management techniques employed by broadband Internet access providers to address traffic harmful to the network”*.<sup>6</sup>

At the same time, this same research highlights that the congestion rationale *“is often used to justify ISP traffic shaping on file-sharing traffic”*, but *“if the practice involves blocking without user choice”* this should then be classified *“as unreasonable”*.<sup>7</sup>

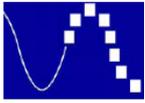
VON would simply like to add that traffic management for commercial motivations based on the exploitation of a bottleneck, or discrimination between services, content, and applications of similar

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<sup>5</sup> See the Consultation. p. 7.

<sup>6</sup> See Jordan, S. (2010). A Framework for Classification of Traffic Management Practices as Reasonable or Unreasonable. *ACM Transactions on Internet Technology*, 10(3), 1-23. p. 15. Retrieved at, <http://www.escholarship.org/uc/item/3ng6r1fw>.

<sup>7</sup> See Jordan, S. (2010). *Ibid*, p. 17.



nature decreases choice and switches the control from the end-user to the access operator acting as gatekeeper.

The figure below exemplifies that the services, content and applications running over the networks, such as VoIP in this example, are at the mercy of the companies controlling the access network infrastructure.

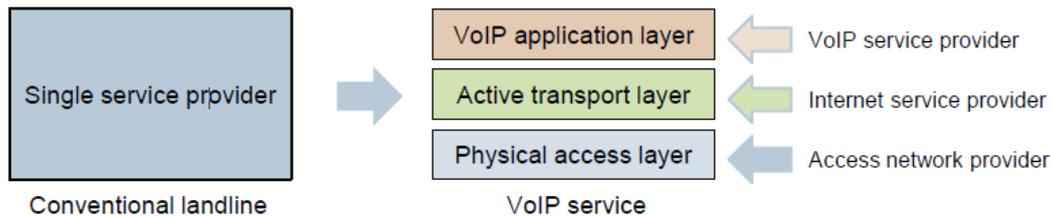


Figure 1: Comparison of VoIP and conventional landline service delivery models

(Source: Ofcom / Analysys Mason<sup>8</sup>)

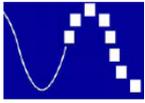
Harmful traffic management practices breach the end-to-end connectivity principle of the Telecoms Package enshrined in Article 5 of the Access Directive (2009/140/EC),<sup>9</sup> the principles set out in Recital 28 of the revised Universal Service Directive (USD) (2009/136/EC)<sup>10</sup> as well as Recital 40 of the Roaming Regulation (Regulation (EC) No 544/2009).<sup>11</sup>

<sup>8</sup> See Analysys Mason. (2011, 28 June). *Report for Ofcom – Assessment of VoIP location capabilities to support emergency services*. Retrieved at, <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/emergency-voip-location.pdf>. p. 7.

<sup>9</sup> It must be noted however that Article 5 applies to ‘access and interconnection’ issues, which would not cover many issues faced by content, service or applications providers faced with abusive behaviour by an ISP or mobile operator.

<sup>10</sup> “End-users should be able to decide what content they want to send and receive, and which services, applications, hardware and software they want to use for such purposes, without prejudice to the need to preserve the integrity and security of networks and services. A competitive market will provide users with a wide choice of content, applications and services. National regulatory authorities should promote users’ ability to access and distribute information and to run applications and services of their choice, as provided for in Article 8 of Directive 2002/21/EC (Framework Directive). Given the increasing importance of electronic communications for consumers and businesses, users should in any case be fully informed of any limiting conditions imposed on the use of electronic communications services by the service and/or network provider. Such information should, at the option of the provider, specify the type of content, application or service concerned, individual applications or services, or both. Depending on the technology used and the type of limitation, such limitations may require user consent under Directive 2002/58/EC (Directive on privacy and electronic communications).”

<sup>11</sup> “(...) there should be no obstacles to the emergence of applications or technologies which can be a substitute for, or alternative to, roaming services, such as WiFi, Voice over Internet Protocol (VoIP) and Instant Messaging services. Consumers should be provided with this information, thereby allowing them to make an informed choice.”



**A starting point in the approach to traffic management and net neutrality should thus be the desire and duty to preserve and promote the open Internet, a goal that is now mandated for NRAs under the revised Framework Directive in Art. 8.4 Par. G.<sup>12</sup>**

VON would also like to draw BEREC’s attention to Art. 22.3 of the Citizens’ Rights Directive (2009/136/EC) amending the Universal Service Directive which stipulates that (our emphasis added): “In order to **prevent** the degradation of service and the hindering or slowing down of traffic over networks, Member States shall ensure that national regulatory authorities are able to set minimum quality of service requirements on an undertaking or undertakings providing public communications networks”. The use of the wording ‘prevent’ implies that actions must be taken ex-ante instead of ex-post, as measuring the network capabilities of an offering could be rendered more difficult once unreasonable traffic management practices have already been put in place. The use of the wording ‘prevent’ indicates that NRAs should be proactive, and not remain spectators when operators put out offers that only allow access to subsets of the open Internet, or comprise application-specific restrictions, hence seemingly accepting these as legitimate or normal, their only focus being on end-users’ transparency. NRAs should make sure end-users get a fair deal, not just a transparent bad one.

**Transparency related to net neutrality cannot just be about “transparency about the technical and economic conditions of the provision of Internet access services”.<sup>13</sup>**

BEREC briefly refers to the fact that blocking and throttling practices raise concerns “in relation to the effective exercise of fundamental rights and freedoms”<sup>14</sup> and also summarizes the scope of Art. 20 of the Universal Service Directive as mandating “ISPs to specify in the contracts *inter alia*:

- Information on any other conditions limiting access to and/or use of services and applications;
- The minimum service quality levels offered by ISPs;
- Any procedures put in place by the ISPs to measure and shape traffic so as to avoid filing or overfilling a network link, and information on how these procedures could impact upon service quality; and,
- Any restrictions imposed by the ISPs on the use of terminal equipment supplied”.<sup>15</sup>

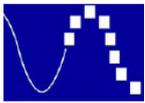
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<sup>12</sup> “(...) promoting the ability of end-users to access and distribute information or run applications and services of their choice.”

<sup>13</sup> See the Consultation. p. 13.

<sup>14</sup> See the Consultation. p. 9.

<sup>15</sup> See the Consultation. p. 10.



VON therefore considers that the scope of transparency that needs to be put in place through the Guidelines BEREC is proposing is much broader than merely looking at ‘technical and economic conditions’, especially if one considers that one of the ultimate goals of such transparency is to ensure that users can make informed choices.

**Application specific practices do not have their place on the Internet**

In its document, BEREC states that “application-agnostic and application-specific traffic management techniques should be clearly distinguished”<sup>16</sup>. It even refers to a Technologia study that proposes a visualisation of limitations to offers as illustrated in Figure 2 below.

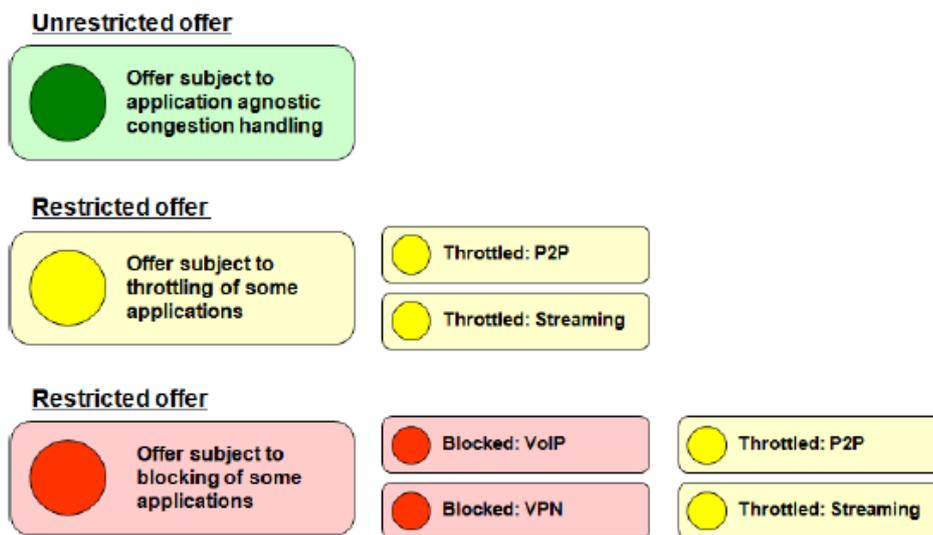


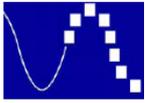
Figure 2: illustrative Summary of an offer's limitations

Figure 2: the Consultation, p. 40.

Such statements and the fact that BEREC feels the need to analyse which transparency mechanisms would best reflect such traffic management practices seem to imply that BEREC considers application-specific traffic management practices on the Internet as acceptable. **VON disagrees, as this runs counter to the very basic net neutrality principle that end-users should be able to access all legal content, applications and services.**

For VON, policymakers and regulators should ensure that end users and consumers can continue to use the Internet applications, services and devices of their choice. Regulators and policymakers

<sup>16</sup> See the Consultation. p. 4.



should resist any attempts, whether regulatory, commercial or competitive, to block or hinder unfettered access to VoIP (or similar technologies) and more generally to all legal Internet content, applications and services, including the underlying technology, and that prevents it from being utilised to its full potential.

VON therefore considers that BEREC should embrace a standard that would prohibit ISP discrimination that is anticompetitive, creates barriers to innovation, or harms end users and consumers while allowing other legitimate traffic management for an ISP’s own managed services. Such an approach provides an alternative to extremes on either side – a blanket ban on all discrimination by ISPs vs. a wholly “hands off” approach – and would enable deployment of innovative new managed services by ISPs as well new services by application/service/content providers.

Finally, VON considers that in looking at the balance between Internet access – or synonymous wording employed in operators’ marketing such as ‘3G’ or ‘web’ which consumers would normally believe to mean ‘the Internet’ – and managed services, safeguards must be put in place to avoid a ‘dirt road effect’. Such dirt road effects could notably result from network improvements favouring managed services only, or Internet access becoming overpriced compared to managed services.

**2<sup>nd</sup> PRINCIPLE: TRANSPARENCY & COMPETITION ARE PART  
OF THE ANSWER BUT DO NOT PROVIDE THE FULL SOLUTION**

**Transparent traffic management: only one element of the Open Internet equation**

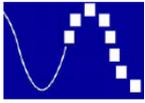
VON considers that transparency is just one element of the equation, seeing that even those markets which European regulators deem to be competitive (*e.g.* the mobile retail markets) do not in fact exhibit the market dynamics leading to unrestricted access to the Internet.

The dysfunction of the mobile market has been exemplified with the need for the introduction of the Roaming Regulation(s)<sup>17</sup> and the Mobile Termination Recommendation,<sup>18</sup> after the European

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<sup>17</sup> European Commission. (2007). Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (Text with EEA relevance). *Official Journal of the European Union*, L 171, 32-40.

European Commission. (2009). Regulation (EC) No 544/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Text with EEA relevance). *Official Journal of the European Union*, L 167, 12-23.



Commission’s ‘wait and see’ approach had failed. VON fears a repetition of this scenario with regards to net neutrality and Internet access.

**Competition implies much more than having several players on the market**

VON does not fully agree with BEREC’s assumption that transparency “*will contribute to greater levels of competition on the market*”.<sup>19</sup> Transparent information tells consumers about the terms and conditions of their package, but does not offer them real choice nor unrestricted Internet access if operators mimic each other’s behaviour – as experience in Europe demonstrates. Therefore, VON believes the essence of the problem to address is better summarised by BEREC’s statement, namely that for transparency to be effective, it implies that “*the market is not wholly restricted (i.e. all competing providers offer similarly restricted services)*”.<sup>20</sup>

VON would also wish to express its concerns as regards possible interpretations of BEREC’s approach to transparency. So far Internet access on fixed broadband has historically been the default service available to all. However, BEREC’s position could legitimise a trend towards Internet access becoming the premium service, with bundles that offer only ‘a selection’ or ‘subset’ of the Internet or even ‘mimic’ certain Internet properties becoming the norm, hence creating a new form of ‘Digital Divide’ not based on access options but on individual wealth: can you afford to access the Internet or will you be condemned to see what your operator chooses as fit for you (and themselves)? This cannot be the intention and should hence be clarified in BEREC’s final set of Guidelines.

**3<sup>rd</sup> PRINCIPLE: INTERNET SHOULD REMAIN THE INTERNET  
AND MARKETING ‘TRICKS’ SHOULD NOT BE LEFT UNGUARDED**

**The risk of ‘marketing’ as a tool to bypass regulatory safeguards – What’s in a word?**

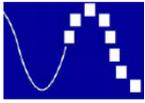
VON would like to emphasize the marketing practices that operators have put in place, such as the fact that a number of operators are already packaging their offers as something else than ‘Internet’. Mobile operators in various Member States already advertise their offers as giving access to ‘3G’, ‘the ability to surf to Facebook, Twitter and Netlog’ or other similar creative terms. To a large extent, consumers are likely to believe that this means they can access the Internet (all of it).

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<sup>18</sup> European Commission. (2009). Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU. *Official Journal of the European Union*, L124, 67-74.

<sup>19</sup> See the Consultation, p. 8.

<sup>20</sup> See the Consultation, p. 9.



Such marketing practices should not be interpreted as meaning that these operators are hence only offering some type of ‘managed services’ that do not need to comply with the minimum requirements of Internet access, and proper safeguards to this effect should be put in place by BEREC and NRAs.

Therefore, BEREC should clearly define Internet access (or synonymous wording employed in operators’ marketing such as ‘3G’ or ‘web’ which consumers would normally believe to mean ‘the Internet’) as opposed to managed services, as ARCEP has done for example, and ensure that operators make it transparent to users whether they are accessing the Internet, or not.

### **The shrinking limits of unlimited**

The mobile world in particular (but slowly also the fixed world) seem to have a comprehension of the word unlimited that does not totally coincide with the traditional dictionary definition, which normally defines it as:

- “1. lacking any controls: unrestricted. Illustration: unlimited access.*
- 2. boundless, infinite. Illustration: unlimited possibilities.*
- 3. not bounded by exceptions: undefined”.*<sup>21</sup>

Considering that mobile operators are the first to point out that their networks are constrained in terms of capacity, we will consider that their use of ‘unlimited’ should probably not be interpreted as meaning ‘infinite’. But the other definitions equally seem not to fit the use made of the term by mobile operators.

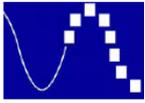
In Belgium, for example, mobile operator Mobistar offers the pre-paid option ‘TempoTribe’<sup>22</sup> which gives so-called unlimited access to a ‘walled garden’ of websites (*i.e.* Facebook, Twitter, Netlog). While the offer is being advertised as so-called ‘unlimited’ the terms and conditions<sup>23</sup> actually stipulate that ‘unlimited’ equals a maximum data volume of 1GB, which can be considered as far from unlimited. Moreover, using other applications or reaching other websites is not included in this ‘unlimited’ offer thus making it limited by essence. Finally, the terms and conditions of this offer imply that the users accessing websites and applications outside of the proposed walled garden face very high retail prices with the implied risk of bill shocks.

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<sup>21</sup> See <http://www.merriam-webster.com/dictionary/unlimited?show=0&t=1319113028>

<sup>22</sup> See <http://www.mobistar.be/fr/offre/mobile/cartes-rechargeables/tempotribe>.

<sup>23</sup> See <http://www.mobistar.be/fr/offre/mobile/cartes-rechargeables/tempotribe#tab-1>.



**Going back to the basics: calling a spade a spade**

The abovementioned practices need to then be assessed in light of BEREC’s own statement that *“Lack of transparency (the ‘end-user transparency problem’) may mean that consumers do not find it easy to make informed decisions and compare services. This may be because the information does not exist or is deceptive. It might also be because the information consumers are presented with is complex, not easy to interpret and/or set out in a number of different places, which makes it difficult to interpret and/or compare. **Transparency problems can be generated and amplified by a variety of factors, including the increasing number and diversity of offers, the complexity of tariff plans, the bundling of services and the deficient presentation of information by service providers.**”*<sup>24</sup> [our emphasis added].

The recent Plum Consulting report on ‘the open Internet – a platform for growth’ suggests 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 assess potentially complex and opaque information regarding network management and blocking)”*.<sup>25</sup>

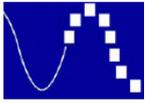
This is in line with the earlier recommendation formulated by the French regulator ARCEP in its 2010 Public Consultation document on discussion points and initial policy directions on Internet and network neutrality, which states that:

- *“In the case of offers of partial access to the services available on the Internet, due to the blocking (outside the scope of regulatory obligations) of certain services, websites or protocols, which is generally the case on mobile networks today, operators cannot qualify these offers as ‘Internet access’ so as not to mislead end users. Only an offer that has all the characteristics of ‘Internet access’ (...) may employ this;*

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<sup>24</sup> See BEREC. (2010). *BEREC Report on Best Practices to Facilitate Consumer Switching (BoR (10) 34 Rev1)*. p. 74 Retrieved at, [http://erg.eu.int/doc/berec/bor\\_10\\_34\\_rev1.pdf](http://erg.eu.int/doc/berec/bor_10_34_rev1.pdf).

<sup>25</sup> 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](http://www.bbc.co.uk/aboutthebbc/reports/pdf/plumbriefing_oct2011.pdf).



- *the term ‘unlimited’ cannot be used to describe service offerings that include ‘fair use’ type limitations that restrict consumption over time”.*<sup>26</sup>

In light of this ARCEP pointed out that: “(...) *even in data offers that are not qualified as ‘Internet access,’ it does not seem legitimate to block voice over IP services (such as Skype) since that they not consume more bandwidth than other services that are currently accessible via mobile networks”.*<sup>27</sup>

In VON’s view, BEREC hence correctly concluded earlier in 2010 that “*there are some limitations on the effectiveness of transparency as a measure remedying network neutrality issues”.*<sup>28</sup> 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**”<sup>29</sup> [our emphasis added].*

We would therefore recommend that:

- (i) the term ‘Internet’ (or ‘Internet access’) be clearly defined, and that offers which do not entail access to the open Internet may not be marketed as ‘Internet’; and,
- (ii) make clear that as ARCEP determined in its initial policy directions, blocking or otherwise hindering VoIP is not a legitimate practice.

#### **4<sup>th</sup> PRINCIPLE: TRANSPARENCY NEEDS TO BE USEFUL TO ALL AFFECTED PLAYERS**

VON considers the disclosure of traffic management information as a critical resource for NRAs, service, content, and application providers, end-users, and consumers in order to allow them to determine whether operators are engaging in anticompetitive behaviour or putting in place harmful practices at the level of Internet access services.

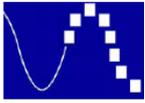
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<sup>26</sup> See ARCEP. (2010). *Discussion points and initial policy directions on Internet and network neutrality*. p. 33. Retrieved at, [http://www.arcep.fr/uploads/tx\\_gspublication/consult-net-neutralite-200510-ENG.pdf](http://www.arcep.fr/uploads/tx_gspublication/consult-net-neutralite-200510-ENG.pdf).

<sup>27</sup> See ARCEP. (2010). *Ibid.* p. 33.

<sup>28</sup> 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](http://erg.eu.int/doc/berec/bor_10_42.pdf).

<sup>29</sup> European Commission. (2011). *The open internet and net neutrality in Europe*. p. 9. Retrieved at, [http://ec.europa.eu/information\\_society/policy/ecomm/doc/library/communications\\_reports/netneutrality/comm-19042011.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/library/communications_reports/netneutrality/comm-19042011.pdf).



It should be noted that traffic management practices cover rather technical details, which can seem incomprehensible or even frightening for mainstream end-users (not only individual consumers, but also small businesses and administrations, etc.). Then again, oversimplification of this information can be misleading; as often, the devil lies in the details.

Hence, VON considers that information on traffic management should be provided in at least two different formats:

- 1) on the one hand, an easily understandable end-user fact sheet. In this context, the key principle should be that *“information is definitely not communication, and information overkill leads to information not being read rather than readers trying to get to the bottom of it”*;<sup>30</sup> and,
- 2) on the other, a comprehensive and detailed technical fact sheet. Indeed, BEREC has rightfully pointed out in 2010 that *“as well as transparency for consumers, the transparency towards content/application providers should also be considered”*.<sup>31</sup> This is logical as access to detailed traffic management information can help service, content, and application providers assure that their offers are optimised to make the best and most efficient use of the network. It is therefore crucial that BEREC addresses this second aspect and not only information for consumers.

This two-pronged approach would then result in meaningful information for all players.

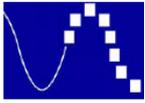
Moreover, the traffic management information available should conform with a minimum number of conditions, being: their ease of access in various formats (*e.g.* on the operator’s website, paper brochures, etc.); its communication prior to subscription; the immediate notification in case of changes to them; the adoption of a comparable format amongst operators, preferably agreed upon by the different relevant stakeholders including consumer groups and the online providers’ community,<sup>32</sup> to allow all end-users to compare the different available offerings in an informed and user-friendly manner.

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<sup>30</sup> See Van Eijk, N. (2011). About Network Neutrality 1.0, 2.0, 3.0 and 4.0. *Computers & Law*, 21(6), 11-14. p. 13. Retrieved at, [http://www.ivir.nl/publications/vaneijk/CLM\\_2011\\_6.pdf](http://www.ivir.nl/publications/vaneijk/CLM_2011_6.pdf).

<sup>31</sup> See BEREC. (2010). *Response to the European Commission’s consultation on the open Internet and net neutrality in Europe*. p. 17. Retrieved at, [http://erg.eu.int/doc/berec/bor\\_10\\_42.pdf](http://erg.eu.int/doc/berec/bor_10_42.pdf).

<sup>32</sup> This broad participation is necessary to avoid the pitfalls of the approach taken in the UK, where a transparency code was put forward by the ISPs, without any involvement by other industry players nor



## VON Europe – Comments on BEREC’s Public Consultation on draft Guidelines on Net Neutrality and Transparency

VON regrets that although BEREC states in its document that *“the focus of the guidelines is on end users as they are defined above, which also includes application/content providers”*, it goes on to add *“however no specific requirements are analysed with respect to this category”*<sup>33</sup> (i.e. the application/content providers). VON considers that hence more work should be done by BEREC to address this dimension and that a specific action item should be added to BEREC’s 2012 Work Programme.

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We thank you in advance for taking consideration of these views. Feel free to contact Herman Rucic, VON Europe, by phone (+32 (0)478 966701) or email (hrucic@voneurope.eu) should you need further information.

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### **About the VON Coalition Europe**

The Voice on the Net (VON) Coalition Europe was launched in December 2007 by leading Internet communications and technology companies, on the cutting edge to create an authoritative voice for the Internet-enabled communications industry. Its current members are iBasis, Google, Microsoft, Skype, Viber and Voxbone.

The VON Coalition Europe notably focuses on educating and informing policymakers in the European Union and abroad in order to promote responsible government policies that enable innovation and the many benefits that Internet voice innovations can deliver.

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consumer and advocacy groups. As a result it was met with very little support, including by the UK Minister Ed Vaizey, who concluded that the said code would need to be followed up with a ‘chapter 2’ outlining what constitutes acceptable traffic management and non-discrimination, with the full involvement of all relevant stakeholders from consumer groups, to content and application providers, broadcasters, and NGOs – a process now well in train.

<sup>33</sup> See the Consultation. p.8.