

Comments on BEREC’s draft Work Programme 2012

by VON Europe, November 2011

Preliminary Remarks

The Voice on the Net Coalition Europe (‘VON’) welcomes the opportunity to comment on BEREC’s Draft Work Programme 2012 (hereafter ‘the WP’).

VON welcomes the fact that BEREC includes again the information on the deliverables it intends to produce and their deadlines in its Work Programme 2012, but suggest that it could be more clearly stated which of these deliverables will be open to consultation.

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

Detailed Responses

A. International Roaming (point 3.2 of the WP)

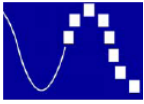
VON considers that BEREC should not limit itself to monitoring and reporting on the evolution of the market and the application of the Roaming Regulation,¹ but that BEREC should actively support the Commission in the task it has been asked to conduct under the Roaming Regulation,² in particular:

- to pay particular attention to Recital 49 which asks the Commission to “*consider the availability and quality of services which are an alternative to roaming (such as VoIP)*”; and,
- to take appropriate action in relation to Recital 40 which recommends that “*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*”.

VON encourages BEREC to take these elements into account in its future Benchmark Reports. Moreover, BEREC should also ensure that obstacles to substitutes and alternatives to roaming are taken into consideration and are being reflected in the emerging proposals flowing out of the legislative negotiations to extend the current Roaming Regulation after its expiration date.

¹ See the WP. p. 5

² 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.



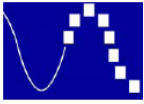
There is after all no evidence that the Regulation has led to a single market for roaming, and little evidence that it has led to enhanced consumer protection, cheaper prices, or competition. Indeed, retail roaming prices remain high and consumer choice, either in mobile voice roaming or perceived alternatives, are not obvious.

Therefore, VON considers that the many dysfunctions in place in the mobile market would benefit from a more horizontal and structural approach than the one put in place by the Roaming Regulation, in order to ensure that users are granted choice and can benefit from greater competitive alternatives. However, should such a structural approach not be adopted by the Commission, then at the very least the Roaming Regulation should be kept in place after 30 June 2012 in order to ensure that the main objective of aligning national and roaming charges by 2015 can be achieved.

VON believes thus that the regulatory efforts around roaming deserve continued attention. We believe this is particularly important to deliver more choice and alternatives to expensive roaming services. Indeed, VON would like to remind BEREC that cross-border VoIP has been one of the first true examples of a translation into practice of the concept of a single market – one of the key objectives of the European Union and Commissioner Kroes’ Digital Agenda –. The use of VoIP-based applications can hence in theory deliver alternatives to users calling in an international roaming context. However, the abusive behaviour of certain access operators – that either block, degrade or charge a subscription fee for third-party VoIP on top of the data package already paid for by the user – creates multiple barriers to entry, hence stifling the advance of alternatives for mobile international roaming, and this to the detriment of all European citizens.

It is the blocking, degradation and/or discrimination by network operators against a number of Internet applications, services, and protocols – such as VoIP or even more broadly peer-to-peer – occurring across Europe that broadly affects the potential of VoIP providers to deliver a true alternative for mobile international roaming (and hence the possibility for European citizens to benefit from it). BEREC notes for example in their response to the European Commission’s consultation on the open Internet and net neutrality in Europe (p. 3)³ that “*blocking of VoIP in mobile networks occurred in Austria, Croatia, Germany, Italy, the Netherlands, Portugal, Romania and*

³ BEREC. (2010). *BEREC Response to the European Commission’s Consultation on the Open Internet and Net Neutrality in Europe*. p. 3. Retrieved at, http://erg.eu.int/doc/berec/bor_10_42.pdf.



Switzerland” and also remarks that albeit “some operators in some countries allow the usage of such VoIP services” that “this is provided at an extra charge”. VON can therefore only (and sadly) agree with the Commission’s statement in its Consultation of the Roaming Regulation that “a lack of (or substantial imperfections in) roaming substitutes (...) means that customers have had no effective means of substituting for the roaming service”.⁴

This statement does not however seem to translate in a clear action point for BEREC and national regulators to remedy the observed abusive behaviour of mobile network operators even though, in VON’s opinion, these practices breach the end-to-end connectivity principle of the Telecoms Package enshrined in Article 5 of the Access Directive (2009/140/EC)⁵, the principles set out in Article 8.4.g of the Framework Directive, Recital 28 of the Universal Service Directive (USD) (2009/136/EC)⁶ as well as Recital 40 of the Roaming Regulation (Regulation (EC) No 544/2009)⁷ itself. The lack of a clear plan to remedy these abuses is in stark contrast with Commissioner Kroes’ statements at her hearing as Commissioner-designate for the Digital Agenda before the European Parliament that “[t]he core issue is that internet providers ‘shouldn’t be allowed to limit the access to service or content out of commercial motivation but only in cases of security issues and spamming’”⁸. She reiterated this position in her speech at the ARCEP Net Neutrality Conference, stating that “discrimination against undesired competitors (for instance, those providing Voice over the Internet services) should not be allowed”⁹.

⁴ European Commission. (2010). Public Consultation on a Review of the Functioning of Regulation (EC) No 544/2009 (the “Roaming Regulation”). p. 3. Retrieved at, http://ec.europa.eu/information_society/policy/ecom/doc/library/public_consult/roaming/roaming_consultation.pdf.

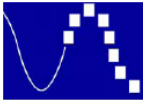
⁵ It must be noted however that Article 5 applies to “access and interconnection” issues, which would not cover many issues faced by content, service or applications providers faced with abusive behaviour by an ISP or mobile operator.

⁶ “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 (...).”

⁷ “(...) 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.”

⁸ European Parliament. (2010, 14 January). *Summary of hearing of Neelie Kroes – Digital Agenda*. Retrieved at, <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-RESS&reference=20100113IPR67216&language=EN>

⁹ Kroes, N. (2010; 13 April). *Neelie Kroes Vice President of the European Commission Commissioner for the Digital Agenda – Net neutrality in Europe Address at the ARCEP Conference (L’Autorité de Régulation des*



VON therefore urges BEREC to emphasize the need to take appropriate measures to guarantee the development and growth of competitive alternatives to mobile international roaming in order to ensure consumer choice. After all, the Commission itself recognises in its interim Report on the state of development of roaming services within the European Union that *“technological developments and/or the alternatives to roaming services, such as the availability of VoIP or WiFi, may render the EU roaming market more competitive”*.¹⁰ BEREC should hence, in light of this statement and the objective set under Recitals 40 and 49 of the Roaming Regulation, stress the need to address urgently the obstacles faced by alternatives to mobile international roaming.

In view of BEREC’s Report on a methodology for the benchmarking of mobile broadband prices (point 4.4 of the WP),¹¹ VON would also like to highlight the issue of retail prices for data roaming services, as the Commission remarks in its interim Report that the *“average retail prices still present a substantial margin over the [falling] wholesale rates”*.¹² It is undeniable that the difference between national retail prices (which are themselves so high as to deter take-up) and international data roaming retail prices is staggering and clearly unjustified, and a major hindrance to consumers’ take-up and use of the Internet while abroad.

B. Consumer Empowerment & Network Neutrality (points 3.4 & 3.5 of the WP)

VON considers that BEREC’s Public Consultation on draft guidelines on net neutrality and transparency misses an essential component, namely the identification of which traffic management practices are acceptable and which ones are not.

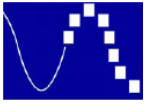
Article 20 of the Universal Service Directive explicitly states that information must be provided by undertakings as regards to *“any other conditions limiting access to and/or use of services and applications, where such conditions are permitted under national law in accordance with Community law”*. That latter part, which would infer that no limitations should be in place unless explicitly

Communications Electroniques et des Postes) Paris, 13th April 2010. Retrieved at, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/153>.

¹⁰ European Commission. (2010) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the interim report on the state of development of roaming services within the European Union* [COM/2010/0356 final]. p. 13. Retrieved at, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0356:FIN:EN:PDF>.

¹¹ See the WP. p. 13.

¹² European Commission. (2010). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the interim report on the state of development of roaming services within the European Union* [COM/2010/0356 final]. p. 13.



allowed by law – for instance for legal or security reasons – seems to be left aside by BEREC in their Public Consultation, hence missing a crucial element of the problem in this transparency exercise.

VON is also worried at the fact that BEREC may be seen to imply that Article 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 her/his freedom of choice?). VON considers the latter interpretation to be the only correct one in terms of the spirit of the Directive.

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*”.¹³

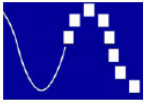
VON would like to point out that such application-blocking practices are not just ‘problematic’ for “*customers using this application*”, they are a threat to the continued survival of the companies that created and offered these applications (in many cases for free and to the benefit of customers). VON therefore considers these practices not merely as ‘problematic’ but as a direct breach of net neutrality and Article 8 (4) of the Framework Directive. VON would also 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. BEREC should state this same understanding clearly, through guidelines that would set out the boundaries of what is acceptable (and hence requires transparency) and what is unacceptable (and hence should be prohibited).

C. Next Generation Networks – Access (point 3.6 of the WP)

In the event that BEREC should provide an opinion to the Commission’s draft guidelines on State Aid,¹⁴ VON would suggest to BEREC to encourage that the Commission continues to rely primarily on market forces to achieve universal service and broadband deployment goals. Targeted public funding

¹³ BEREC. (2011). *Draft BEREC Guidelines on Net Neutrality and Transparency: Best Practices and Recommended Approaches*. p. 19. Retrieved at, http://berec.europa.eu/doc/berec/consultation_draft_guidelines.pdf.

¹⁴ See the WP. p. 10.



should hence only be used to promote broadband deployment and availability in areas where otherwise a competitive roll-out of NGA would not be possible.

Moreover, VON considers that State aid beneficiaries should be obliged to comply with a set of ‘open access’ requirements on the beneficiaries’ entire networks to safeguard that access to the open Internet is ensured at both the wholesale and retail levels.

In practice, this implies that measures should be taken to ensure that State aid is conditional upon the obligations that:

- wholesale access is provided to ducts, poles and antenna sites, to the passive-layer (*i.e.* copper, coax, fibre, etc.), and to the transmission layer (*i.e.* Layer 2 Ethernet), that spectrum-sharing is implemented, and that there is provision of non-capacity constrained backhaul, etc.;
- retail level requirements are implemented to ensure access to third party Internet content, services and applications (*e.g.* VoIP) for all customers; and,
- an any-to-any connectivity obligation is being imposed on the State aid beneficiary.

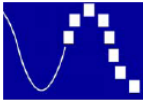
VON believes that State aid beneficiaries should be obliged to comply with these obligations on their entire networks, not only on the State aid funded parts, be it the existing copper network or the next generation access fibre based network part. The same holds true for wireless networks. In particular, because the State aid funded networks rolled-out in underserved areas interconnect to the rest of the beneficiaries’ networks. Therefore, VON urges BEREC to reflect this need to impose such a set of ‘open access’ requirements on the beneficiaries’ entire networks to ensure that the obligations listed above are meaningful.

D. Promotion of Broadband (point 4.5 of the WP)

While BEREC emphasizes *“the important role of broadband networks in the further development of the economies of Europe and the benefits that they can bring to its citizens”*,¹⁵ VON would recommend BEREC to take a more balanced approach towards promoting investments in its planned report on different mechanisms towards the promotion of broadband.

The communications ecosystem, and the way users experience it, is such that services, content and applications running over the networks – over the Internet in particular – are at least as important as

¹⁵ See the WP. p. 13.



the pipes they go through, if not more because they stimulate demand (hence, return on investment) for the networks in the first place, and are a key contributor to the wider socio-economic benefits derived from broadband rollout. Focusing exclusively or predominantly on any one component of that ecosystem risks jeopardizing the development of other critical components.

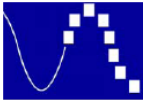
In this light, VON fears that the lack of explicit net neutrality provisions – which would ensure the viability, innovative potential, and diversity of the content, applications and services layer – and the nascent development of so-called ‘walled gardens’ could have potential adverse effects on the widespread uptake of high-speed broadband. If ISPs continue to set up roadblocks to certain content, applications and services this will be reflected in the consumer’s (un)willingness to pay for high-speed broadband and subsequent slow adoption. The abundance of content, applications and services on the Internet is in fact the main driver for broadband adoption, and in the end this will enable ISPs to recoup their infrastructure investments. We would point BEREC in this respect to at least two studies published recently by experts regularly consulted by national regulatory authorities, which confirm the importance to the entire ICT ecosystem of an open Internet.¹⁶

Therefore, VON believes that focusing on maintaining an open Internet is the best means of promoting investments across the entire Internet ecosystem and paramount to the EU’s future economic and social welfare. To quote the European Commission, the end-to-end principle, a key architectural feature of the Internet, *“is considered by many to have been a key driver of the growth of the Internet to date, and to have facilitated an open environment conducive to the spectacular levels of innovation seen in online applications, content and services networks”*.¹⁷

VON also considers that the fast-moving vertical and horizontal integrations and the commercial dynamics exemplified within the converging telecommunication and Internet ecosystem (from hardware equipment, to infrastructure provision, to content and service provision, etc.) by such phenomena as ‘bundling’ (*i.e.* triple or quadruple play bundling voice, broadband Internet, TV and

¹⁶ See Marcus, J. S., & Monti, Alessandro. (2011). *Network Operators and Content Providers: Who Bears the Cost?*. Bad Honnef: Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste (WIK). Available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926768, and Williamson, B., Black, D., & Punton, T. (2011). *The Open Internet – A Platform for Growth: A Report for the BBC, Blinkbox, Channel 4, Skype and Yahoo!*. London: Plum Consulting. Available at, http://www.plumconsulting.co.uk/pdfs/Plum_October2011_The_open_internet_-_a_platform_for_growth.pdf.

¹⁷ European Commission. (2010, 30 June). *Questionnaire for the public consultation on the open Internet and net neutrality in Europe*. p. 5. Retrieved at, http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/net_neutrality/index_en.htm.



mobile), and the purchase of exclusive content rights, could accelerate the trends towards serious harmful and other undesirable discriminatory practices, which would have a negative impact for innovation, consumer choice, trade, etc.

VON believes that BEREC should recommend to national regulators to guarantee that end-users have access to and can use the Internet services, content, and applications, as well as the devices of their choice. Therefore all attempts, whether regulatory, technical or commercial (be it by prohibiting it or unduly asking for additional subscription fees), to block or hinder unfettered access to and use of VoIP (or similar technologies), and in general all legal Internet content, applications, and services, including their underlying technologies, should be prevented.

This task should be motivated by the fact that *“Internet application services can be provided by carriers or by many other application providers on the Internet and can be placed at many locations within the Internet”* and that *“Internet application services usually have fixed costs that are small relative to incremental costs, and thus there is usually a low barrier-to-entry, which leads to a competitive market with a large number of application providers”*.¹⁸

It should then be acknowledged that *“network neutrality preserves the innovation incentives at the edge of the network and prevents ex post opportunism by network operators”*.¹⁹ (our emphasis added)

E. Cross-border and demand side related issues (point 4.7 of the WP)

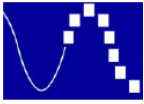
Accessibility to ECS for disabled citizens

Regarding the *“accessibility to ECS for disabled citizens”*,²⁰ VON agrees that Member States should take measures to ensure that PATS services are accessible to disabled end-users. However, such measures should be technology-neutral and the non-voluntary measures should only be applicable to PATS services.

¹⁸ Jordan, S. (2011). Should Users be Entitled to Run the Applications of Their Choice on Wireless Networks? *IEEE Conference on Wireless Communications and Networking (WCNC)*, 28-31 March, Cancun, Mexico. Retrieved at, <http://www.ics.uci.edu/~sjordan/papers/wcnc2011.pdf>.

¹⁹ Economides, N. (2010). Why imposing new tolls on third-party content and applications threatens innovation and will not improve broadband providers’ investment. In J. P. Martínez (Ed.), *Net Neutrality: Contributions to the Debate* (pp. 87-103). Madrid: Fundación Telefónica. p. 92. Retrieved at, http://www.stern.nyu.edu/networks/Economides_Imposing_New_Tolls.pdf.

²⁰ See the WP. p. 14.



In particular, obligations regarding access to emergency services for disabled end-users should remain technology-neutral. Moreover, such obligations should be harmonized in cooperation with international standards organisations focussing on this issue in Europe and elsewhere and should support the industry’s current developed process for self-declaration of accessibility features included in existing products and services. Service providers should have the flexibility to offer innovative solutions, even if those do not have the ‘look and feel’ of conventional access tools.

Caller location information

In light of BEREC’s work regarding the *“reliability and accuracy of caller location information in particular for emergency calls”*,²¹ VON would like to emphasize that the ‘technical feasibility’ should remain a criteria in terms of the provision of location information, in light of Recital 40 of the Citizens’ Rights Directive 2009/136/EC which stipulates that *“network-independent undertakings may not have control over networks and may not be able to ensure that emergency calls made through their service are routed with the same reliability, as they may not be able to guarantee service availability, given that problems related to infrastructure are not under their control. For network-independent undertakings, caller location information may not always be technically feasible”*. We would also encourage BEREC and its members to take into account (and not pre-empt) the ongoing development of standards that would enable the feasibility, more reliability and accuracy for emergency calling using IP technologies, notably within ETSI following a recommendation by the European Commission.

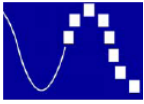
Furthermore, VON strongly encourages BEREC to focus regulators’ attention on ensuring the fullest possible retail price transparency and to remove the link between location information and geographic numbers. Let users choose their number(s), keep their number(s) wherever they are and use their number(s) on the device(s) or services of their choice!

F. Cooperation with RSPG and ENISA (point 4.8 of the WP)

In light of BEREC’s intentions to continue delivering insights on the impact of fixed-mobile convergence for spectrum management policies,²² VON would like to emphasize that:

²¹ See the WP. p. 14.

²² See the WP, p. 15.



- Radio spectrum is increasingly recognised as an important link in providing Internet access, especially to otherwise underserved areas, which represents new opportunities for innovation to the benefit of citizens, administrations, and the economy as a whole.
- Spectrum supports a multiplicity of technical solutions, making it an invaluable tool to enable a wide range of advanced and innovative electronic communications and information society services.

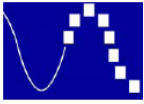
Hence, full – and preferably harmonised – utilisation in the Member States and across Europe of radio spectrum will be critical to deliver on Europe's growth and policy objectives in the Digital Agenda. The significance of adopting a consistent EU-wide approach to spectrum use cannot be overstated. However, it is also essential to be clear about the fact that, while VON welcomes harmonisation, we would also like to stress the importance of the principles of technological, network and service neutrality within a common regulatory framework, and the importance to permit new spectrum uses wherever there is no objective interference-related impediment (to be assessed on a scale which is less than nation-wide).

In our view this guarantees the greatest potential for citizens, consumers, businesses and Government at all levels to benefit from new services and innovative technologies. In order to preserve and promote competition, national authorities should thus act swiftly, including on the global stage if needed, to make additional spectrum available for Internet use.

VON deems that the analogue switch-off and the subsequent use and management of the digital dividend (not only 790-862 MHz, but also 470-790 MHz) is an important momentum to adopt policies promoting the most efficient and effective utilisation of unused spectrum.

In particular, VON sees the availability of licence-exempt spectrum for frequencies below 1 GHz as critical to the success of the collective use of spectrum. The propagation characteristics in the frequency bands below 1 GHz enable communications capabilities through obstructions and over long distances, which will be invaluable in inner city and rural areas where geographic obstacles prove too great for the use of other frequency bands.

VON Europe considers that BEREC should examine the increasing opportunities for unlicensed devices and innovative spectrum access models, making a maximum of spectrum available for broadband Internet access and improving the transparency of spectrum allocation and utilisation. Besides the often stated Digital Dividend, there are huge parts of the spectrum that remain rarely



used (defence for example does only need certain bands at specific times in specific locations). Governments have significant tools at their disposal in order to increase the effective and efficient use of spectrum, and BEREC could help by identifying these tools.

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.