



Response to BEREC Consultation

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1. Introduction

European Digital Rights (EDRi) is an association of 32 privacy and digital civil rights associations from 20 European countries. EDRi's objectives are to promote, protect and uphold fundamental human rights and freedoms in the digital environment. Examples of such fundamental human rights are freedom of expression, access to knowledge, data protection and privacy. To this end, we monitor, report and provide education about threats to civil rights in the field of information and communication technology. EDRi welcomes BEREC's commitment to provide further guidance on net neutrality in order to maintain an open and competitive internet in Europe and to address the increasingly urgent question of how digital technology can be kept free and open.

EDRi therefore welcomes this opportunity to respond to BEREC's three guidelines on Quality of Service (BoR 32), IP-interconnection (BoR 33) and differentiation practices (BoR 31).

Failures to maintain the openness of the Internet have already been demonstrated by both Respect My Net¹ and by BEREC² itself. As a result, BEREC, the European Commission and national advertising regulators should be acting to stop these breaches and to ensure that services that fail to maintain open access to the Internet should not be able to refer to themselves as Internet access services.

2. Guidelines for Quality of Service in the scope of Net Neutrality

2.1 Net neutrality: Maintaining innovation

EDRi welcomes the generally insightful and thorough analysis in BEREC's consultation papers. We regret, however, the lack of urgency being displayed by most European regulators which probably reflects the incoherence, inconsistency and indecision being displayed by the European Commission and Member States on the issue. The regulatory task is clear and NRAs should finally move from analysis to action in order to safeguard the openness of the Internet.

EDRi welcomes BEREC's definition of network neutrality which "is the principle that all electronic communication passing through a network is treated equally." The recognition by BEREC³ that the "Internet's success is based on its openness and non discrimination features" must remain at the forefront of all policy-development in this area. Experimentation with the Internet is possibly irreversible experimentation with its social and economic value for Europe and the world. This point is self-evident yet somehow consistently overlooked.

The internet was created with an architecture that is open, neutral and minimalist. This principle has made the internet robust, flexible and successful both on a social and economic level. We must now ensure that it is passed on to future generations. It is also crucial for both communications regulators and advertising regulators to recognise that, as openness and non-discrimination are core to the definition of the "Internet", no service which breaks with these concepts can be marketed as Internet services.

However, while we would agree to a point that that "Net Neutrality is mainly a principle in the interest of the end-user," it is worth pointing out that this principle has also permitted the creation of huge new markets for the very operators who now campaign against it. In other words, net neutrality is of immense value for *all* parts of the value chain, even if this is simply not (yet)

¹ [Http://respectmynet.eu](http://respectmynet.eu)

² http://erg.eu.int/doc/consult/bor_12_30_tm-i_snapshot.pdf

³ http://berec.europa.eu/doc/consult/bor_12_31_comp_issues.pdf

understood by all of them.

Last December, European Commissioner Kroes said that the Arab Spring has been “a wake-up call” to increase the positive role of technology in the spread of democracy. In the open and neutral internet, users can all freely communicate, fully express themselves, access information and participate in the public debate, without unnecessary interference by gatekeepers or middlemen. It is a “single market” for communication and for business, it is the kind of borderless market that Europe has been trying to build for decades.

European policy makers have understood the value of the open internet for society and for the economy. However, the safeguards that have allowed internet services and applications to flourish are under growing assault. The very nature of the internet is being affected by unnecessary traffic restrictions and limitations that are putting this value at risk.

In 1999, Prof. Laurence Lessig explained what the Internet architectural principle of ‘end-to-end’ means for innovation: “This end-to-end design frees innovation from the past. It’s an architecture that makes it hard for a legacy business to control how the market will evolve. You could call it distributed creativity, but that would make it sound as if the network was producing the creativity. It’s the other way around. End-to-end makes it possible to tap into the creativity that is already distributed everywhere.”⁴

Issues such as freedom of speech and access to information and knowledge cannot be considered as separate to BEREC’s considerations such as competition, innovation and harm to end-user’s interests – they are inevitably interlinked. The fact that citizens are participants challenges conventional economic view of the debate: Today, users are co-producers of services (blogs, social networks, search engines, wikis etc.) and innovation is encouraged by interoperability and open access; it is typically both user-driven and user-distributed.

In its opinion in October 2011, the EDPS stated that “additional legislative measures may be necessary” since “ISPs’ increasing reliance on monitoring and inspection techniques impinges upon the neutrality of the Internet and the confidentiality of communications. This raises serious issues relating to the protection of users’ privacy and personal data.”⁵

Communications policies have unquestionably an impact on fundamental rights of citizens as well as on the public welfare for end-users. EDRI understands that these issues are not the centre of this consultation, but emphasises that these issues cannot be left to national legislation but must be considered at a European level. BEREC as well as national NRAs need to realise that issues surrounding net neutrality are not “just” of crucial importance for the economy in a time of crisis, they are also hugely significant for shared European values of free speech and privacy.

Experimentation with non-neutral networks puts the economic and social value of the Internet at risk
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2.2 EDRI's 6 key principles for Net Neutrality

BEREC's guidance on net neutrality should therefore be based on the following principles:

1. The Internet must be kept and open. “Reachability between all end points connected to the Internet, without any form of restriction”⁶ must be maintained.
2. All forms of discriminatory traffic management, such as blocking or throttling should be

⁴ Laurence Lessig, *Architecting Innovation*, 14 November 1999.

⁵ http://ec.europa.eu/bepa/european-group-ethics/docs/activities/peter_hustinx_presentation_%281%29_15_rt_2011.pdf

⁶ http://berec.europa.eu/doc/consult/bor_12_32_guidelines.pdf

prohibited.

3. Traffic management should only be allowed as narrowly tailored deviations from the rule. This must be either technically necessary or to address a transient network management problem which cannot otherwise be addressed.

4. Use of deep packet inspection (and re-use of associated data) should be reviewed by national data protection regulators to assess compliance with the EU's data protection and fundamental rights framework. By default only header information should be used for traffic management.

5. Accessible, complete information on traffic management practices and justifications must be published.

6. Non-neutral treatment of traffic for "voluntary" law enforcement by intermediaries purposes must be prohibited unless there is a legal basis in country where the restriction is being implemented.

In light of the growing problem of "voluntary" blocking, being used by large ISPs in several EU Member States as a stepping stone towards broader anti-competitive non-neutral practices, BEREC should adopt an Opinion on this topic as part of its tasks under section 3.m of Regulation 1211/2009. BEREC's references to "lawful" content in this consultation are, therefore, inappropriate, confusing and entirely contradictory. If there is a legal basis for non-neutral treatment of content, then it falls outside the scope of an NRA's activities. If there is no legal basis, then neither the ISP nor the NRA can know whether the content is "lawful" or not. A "normally apparent" legal justification (as described on page 50 of document BoR (12)32 is *not* adequate – without a legal basis. Such measures are clearly prohibited by Article 52 of the Charter on Fundamental Rights. It would appear naive to believe that it is a coincidence that the access providers that are most opposed to net neutrality are also the ones that have been most eager to implement "voluntary" measure to block content for ostensible public policy reasons.

What are your views on:

1. The criteria proposed for the assessment of degradation of Internet access service as a whole? (Ref. chapter 4)
2. The criteria proposed for the assessment of issues regarding individual applications run over the Internet access service? (Ref. chapter 5)
3. The aspects proposed regarding the conditions and process for regulatory intervention? (Ref. chapter 6)
4. To what extent are the scenarios described in these guidelines relevant with respect to your concerns/experience? Are there additional scenarios that you would suggest to be considered?

Our starting point on these issues has always been the same, namely that traditional competition tools, the enhanced transparency requirements and other relevant tools of the regulatory framework are insufficient to address degradation of service. The basic inertia that always exists in such markets, the time and financial cost of moving services and so on are such that generalised restrictions on certain products or services would not lead to increased consumer churn. We are not aware of any indication that the widespread blocking of content thought to be illegal, content presumed legal⁷ and privacy enhancing tools⁸ in the UK by mobile operators has led to any churn at all. While a restriction, as in the case of the blog service blocked by Orange in the UK may represent an inconvenience for the fraction of Orange users that may have wished to access the service, it represents the loss of 100% of the Orange customer base for that service.

The wording of Article 22 on QoS is particularly vague and Member States are forced to interpret the criteria for reporting requirements, even if there are powers to require minimal QoS standards. However, Article 22.3 Of the Universal Service Directive⁹ gives NRAs the option to *prevent* degradation and slowing down of traffic. The generic reference to "traffic" would logically also cover protocols such as peer-to-peer – as the legislator would otherwise have referred to services.

⁷ <http://gigaom.com/europe/orange-censors-all-blogs/>

⁸ <http://www.ispreview.co.uk/story/2012/01/24/uk-mobile-broadband-operators-block-access-to-the-tor-project-website.html>

⁹ [Universal Service Directive 2002/22/EC as amended by the Citizens' Rights Directive \(2009/136/EC\)](#)

As long as an access service is marketed as an Internet access service, NRAs should carry out ongoing monitoring in order to ensure that that non-neutral treatment of traffic is avoided. The alternative is to risk an online economy where launching a service incurs an automatic risk of delay until the blocking/throttling has been identified by the company itself, confirmed by the regulator and any remedies have been put in place by either the regulator or competition authority. This risk alone, even if the examples identified by BEREC and Respect My Net did not (yet) exist, would depress online innovation.

BEREC should urgently issue guidance on protection of the open Internet. Experience shows that it would simply be reckless to rely on “transparency,” the ability to change providers and competition law to protect free speech and the online economy.

2.3 Assessing degradation

EDRi has no major concerns regarding the criteria described in the BEREC consultation document. Our core concern is that there be no discrimination between services of a similar type or between protocols, beyond technically appropriate (treating time-sensitive traffic differently from non-time sensitive data, as long as use of the non-time-sensitive service is functionally identical).

BEREC's guidelines should be based on the factors of application-blindness, user choice and innovation without permission – as guidelines for evaluating behavior provides clear answers regarding which types of differential treatment should be prohibited or not.

As throttling of bandwidth for particular applications and services is much harder to identify than outright blocking, NRAs must be vigilant and undertake comprehensive proactive testing to avoid reckless experimentation with the functioning and value of the open Internet.

Under no circumstances should contractual terms be permitted to enable degraded services being provided to end-users.

BEREC should develop guidance for NRAs to ensure consistent and proactive testing of all Internet access services under their jurisdiction.

2.4 Addressing application blocking

It is beyond question that the legislator intended the Framework Directive to prohibit the blocking or throttling of specific applications and protocols. This is made clear in Article 8.4 of the Framework Directive. The point was reinforced by the European Commission Declaration in 2009 which referred generically to the “slowing down of traffic” rather than just “services”.

Any functionally defensible traffic management implemented in this context must be non-discriminatory, proportionate and not noticeably interfere with the ability of the end user to avail of the application.

We believe that the Truphone/T-Mobile case in the UK – although not directly a net neutrality issue - shows the unique nature of some anti-competitive practices by operators and the problems of applying competition law. T-Mobile refused to terminate calls from Truphone. Even though T-Mobile had an approximately 20% market share, this action would have had the effect of preventing Truphone from entering the market, as a telephony service which cannot reach 20% of mobile subscribers would be unmarketable. Ultimately, an injunction was imposed by the High Court to force T-Mobile to open its market.

2.5 Conditions and process

EDRi has no particular concerns regarding the conditions and process

3. IP interconnection in the context of Net Neutrality

EDRi has no comments to make on the classifications proposed by BEREC.

The relevant industry players in these markets traditionally have a strong antipathy to regulatory intervention which, with adequate monitoring and feedback mechanisms, should be leveraged by NRAs, individually and in cooperation (such as through BEREC) to maintain open and competitive IP interconnection markets. Attention should be paid to obtaining feedback from SMEs so that any failures are identified as early as possible.

4. Differentiation practices and related competition issues in the scope of Net Neutrality

We would broadly agree with the main findings detailed in the BEREC document. However, in paragraph 26, the harm to end users is approached wholly from the perspective of non-availability of existing services. The ever-richer experience of Internet access for users has come about due to the any-to-any nature of the best-effort Internet. Restrictions, such as those described in paragraph 26 of the BEREC document are therefore doubly negative from an end-user perspective – the up-front inability to access existing services and the decreased incentive for innovators to create new services in the future.

We would also point out that regulatory interventions to open markets, such as local loop unbundling, were fiercely opposed by telecommunications operators but ultimately greatly benefited them. It may therefore be somewhat misleading to imply that net neutrality will not ultimately benefit them.

We vehemently disagree with paragraph 27 of the competition can be effective in deterring anti-competitive practices. We know from experience that competition is not enough. We know this based on the analysis in the implementation reports on the telecoms package from the first half of the last decade, we know that it is not enough from the necessity of introducing specific regulation on mobile roaming and data roaming and we know this from research on consumer behaviour in the mobile market.

Similarly, experience shows both that telecommunications operators have a miserable history when it comes to transparency and that transparency is inadequate to ensure choice on the part of the consumer. Traditional ISP bad practice on transparency is best illustrated by ongoing battles to persuade them to advertise their connection speeds truthfully.

Mobile phone billing has to be transparent, but it is still so confusing that Billmonitor.com (approved by OFCOM and run by Oxford academics) showed that British consumers waste five billion pounds per year (195 pounds per person) by choosing the wrong billing model for their usage characteristics and only 24% of mobile users were using a billing scheme appropriate for them.¹⁰

Transparency and competition cannot be relied upon to protect the openness of the Internet.

The approach towards resort to minimum quality of service in paragraph 30 of the findings appears completely out of synch with the social and economic value of the Internet, as described in BoR

¹⁰ <http://www.guardian.co.uk/technology/2011/apr/11/mobile-phone-users-wasting-5bn>

(12)32. It appears to start from the premise that minimum QoS may not be an appropriate regulatory tool at all ("might also be effective"). Contrary to the clearer statements in BoR (12)32, it argues that degradation of end-user connections "might" discourage innovation before concluding that, contrary to the possibility of working to prevent problems arising, QoS would only be considered after assessing the failure, assessing the market and assessing the tool – during which time markets get foreclosed and end-users' access is degraded. This approach is not acceptable and incoherent both in its own right and compared with BEREC's other analysis.