BEREC Guidelines on Net Neutrality and Transparency: best practices and recommended approaches

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Introduction

Optimus – Comunicações S.A. [OPTIMUS] welcomes BEREC's public consultation on best practices and recommended approaches on Net Neutrality (NN) and related transparency issues.

The NN issue in Europe, though with not the same urgency as in the United States, is sufficiently important to demand a special attention from all stakeholders in the electronic communications sector and OPTIMUS firmly believes that transparency is a key element in tackling this issue.

For the current analysis, OPTIMUS believes to be relevant to establish the main differences, regarding this debate, between Europe and the United States. These are not only due to a more politicized economy in the latter but, also, because of the greater success of the liberalization model implemented in the former.

The liberalization model followed in Europe, having led to a more competitive market, has enabled European citizens to have a wider array of choices in terms of (i) providers, (ii) type of services made available to them and of (iii) service levels (QoS) when in comparison to US citizens.

This existing competitive dynamic has prevented opportunistic behaviors by larger players to occur and, consequently, minimized or even eliminated the emergence of NN issues, both at the end user level as well as along the value chain of the Internet Economy. In short, stakeholders have shown a greater will to compromise and to have a balanced approach than in the United States.

OPTIMUS believes that, in the current economical turmoil that the majority of European countries face, this competitive dynamic must be protected and further encouraged at all costs, so that the electronic communications market' role as a catalyst of economic growth may be maximized.

In this context, OPTIMUS considers that, following the requisite of effective competition, transparency is the main issue with which National Regulatory Authorities (NRAs) should concern themselves.

However, this concern should bear in mind the following crucial points:

1. Information is important but, if not balanced, it may become irrelevant or, even, a menace for the objectives underlying its creation;

2. The aforementioned balance has two sides: one, regarding the volume of information to be made available. Too much information will disperse end users from the key elements

relevant to their choice and may lead to confusion and, thus, to irrelevance of the information made available.

3. The other, regards the way the information is conveyed. It is essential that the relevant information is passed on to the end user in a clear and understandable way. If not, it will again end as irrelevant for the purpose to which it was created.

4. European markets are at different levels of development. Thus, BEREC must not fall to the temptation of ensuring harmonization of regulatory measures in detriment of harmonization of competitive conditions. The priority must be to ensure that in the same set of conditions, NRA's will not differ in the choice of rules to apply and not to expect that, in reality, the rules applied across Europe will be the same. This, at this moment, is not possible, due to the already mentioned differences between competitive levels of each national market.

5. Information can only be provided to end users if the provider has access to it. This principle, though it may seem obvious, must not be taken as granted when the said provider uses wholesale offers from a dominant or SMP operator. Any transparency requirement must have its viability ensured at the wholesale level.

6. Transparency of information as a purpose: to ensure that end users have the right information to make their choices. This means that it should not be mandatory for services that belong to different markets to divulge the exact same information, if objective reasons that justify any type of difference in treatment exist. This is relevant to the debate on fixed versus mobile transparency obligations.

It is against this backdrop that the current document comments BEREC's proposals, hopefully providing additional insight, not only on the current state of the Portuguese market in these aspects but, also, given OPTIMUS experience as a pioneer in the launch of broadband offers (first player in the Portuguese market to launch ADSL 2+, mobile broadband and an FTTH based offer), on approaches to ensure the right information level to end users so they may be able to choose the offers that best fit their needs.

I. Scope of the guidelines

OPTIMUS believes that there should be a clear distinction between residential, business and wholesale offers.

This results from the following:

1. Business clients have specific needs which are subject to detailed discussion with the potential provider. This negotiation process implies that the reliance of these clients on generic information is extremely limited, thus severely reducing the importance of the standardized information that is discussed in the guidelines under discussion.

2. The aforementioned reasoning is even more relevant when one takes into consideration wholesale offers, where the technical aspects of each offer are discussed with a level of detail even greater.

3. As for residential clients, it is quite clear that it is at this level that standardized information is most relevant. This is due to the fact that (i) the level of know-how of prospective clients is, on average, much smaller than in other segments; (ii) the need of special care with the terminology used is of paramount importance to ensure the client's awareness regarding the characteristics of existing offers; and (iii) the multiplicity of offers allied with the reliance on advertisement to attract clients lead to a potential of misunderstanding by the prospective clients which warrants a special attention in what regards the support of the buyer's decision.

Taken the above in consideration, OPTIMUS considers that the proposed guidelines should be targeted to the residential segment and exclude the business and wholesale offers.

Additionally, the guidelines should have a clear statement regarding the need to reflect, in the obligations to be imposed, differences in services that are objectively justified. This means that, the **transparency requirements (in terms of the specific content of the information to be made available) must provide for flexibility in the treatment of offers belonging to different markets, as it is the case between mobile broadband and fixed broadband offers**, where there are technical differences that objectively justify the said difference in treatment.

In the case of mobile broadband services, when comparing with fixed ones, there are external parameters which influence the service's performance and justify the aforementioned differentiated treatment (e.g. to indicate the average estimated speed does not make sense for mobile networks since speed may depend, at any given moment, on the cell that serves the end user, and this may depend on the number of users covered by said cell – a fact which cannot be controlled by the mobile operator).

II. Content of the proposed transparency policy

In the following section the issues regarding comparability, accessibility, meaningfulness and understandability will be discussed.

In the first section, starting from a description of the contact points with the end user, the issues on how to best ensure comparability and accessibility of information are tackled.

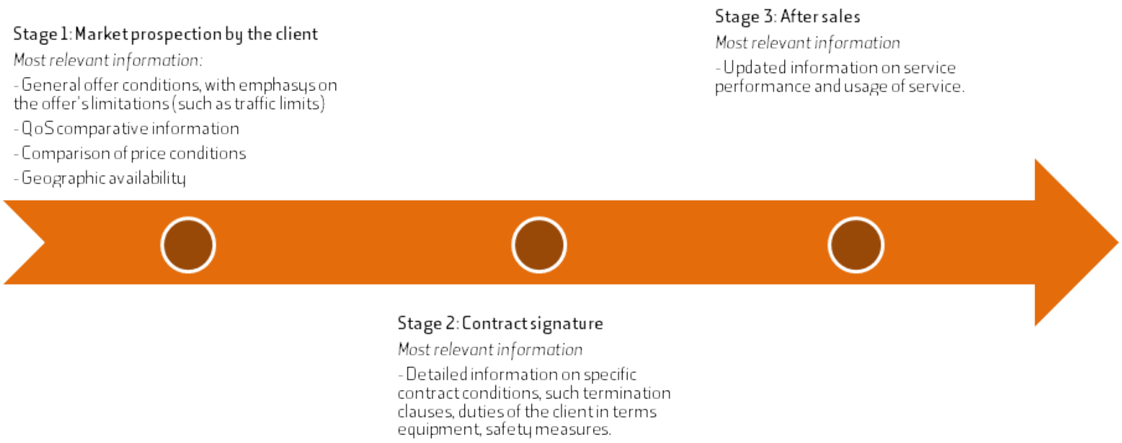
In the second section, ways on how to best achieve meaningfulness and understandability of the information provided are covered.

Comparability and accessibility

Optimus fully agrees with BEREC's approach that advocates different levels of information in the information (both in terms of depth and content) to be provided to the end user depending on the contact point in which the prospective client is at each moment.

Figure 1 describes the three main contact points that OPTIMUS envisages during the client's lifetime, starting from the moment in which he still hasn't acquired the service to the stage where he is already a client and has an established relation with a specific ISP.

Figure 1 – Contact points throughout the client's lifetime



OPTIMUS believes that this is one of the main aspects where each country' specific conditions should be taken into account. In what regards the Portuguese market, it is a clear situation of a possible case study for other Member States.

Taking into consideration the above mentioned *stage 1*, there are currently in place three very important tools that ensure the comparability of offers. The first is a comparison tool that covers both price and other conditions (e.g. traffic limits), which was launched by the regulator, comprising the information on all bundled and non-bundled Internet offers of the Portuguese market.

This “search engine” enables clients to make searches of offers which are best adjusted to their usage profile, with different methods of rankings the results (http://www.anacom.pt/tarifarios/PaginaInicial.do?languageId=0&channel=graphic).

Complementing this website, ANACOM also launched a consumer portal (Portal do Consumidor, found at http://www.anacom-consumidor.com/), where it details the kind of questions that clients should ask and special precautions that they should take whenever they analyze a specific offer (be it a bundle or a stand-alone offer).

The third tool, is an annual report by ANACOM (http://www.anacom.pt/render.jsp?contentId=1056551&languageId=1) on the quality of the Internet offers currently available in Portugal which, though with some caveats that, in our opinion, may bias the client’s analysis, gives the means for assessing the quality of the services provided taking into consideration different types of usage (video streaming, peer to peer, browsing, etc.).

In this last case, OPTIMUS believes that there is an extremely important role for BEREC to define specific guidelines on the best QoS comparison methodologies, as to maximize the usefulness of such a tool.

All in all, the information provided in these tools answers the needs that client’s will have at *stage 1*. The fact that ANACOM is the promoter of these tools is a most relevant detail: the involvement of the NRA not only provides additional credibility to the referred tools but it also ensures a greater confidence both to ISP’s and end users regarding the unbiased nature of the information provided. Additionally, it also minimizes the burden to ISP’s regarding the data they are obliged to manage and pass on to ensure the quality of the information service provided.

In what regards the second stage of the contact point process, the new Telecommunications Act that came into force last September, defines a very specific set of requirements regarding the information to be supplied to the client.

These, in truth, end up to be a transformation into biding law of an already existing recommendation by ANACOM, regarding information to be included in the contracts.

Further to this, last October, the regulator issued a decision that details the aforementioned legal obligation, requiring operators to provide consumers with a wide-array of specific and detailed information in even more transparent terms (ANACOM’s Decision on the content and form of information on the conditions of offer and use of electronic communications services to be made available to the public, available at http://www.anacom.pt/render.jsp?contentId=1101420&languageId=1).

These measures include aspects ranging from quality of service KPI's, eventual restrictions to service usage, contractual conditions, etc..

Taken this into consideration, OPTIMUS believes that the type of information already ensured to the end user completely meets the concerns expressed by BEREC.

As for the third stage, it is already common for ISP's to make available tools to measure the access speed of the connections provided (the so called speed meters), as well as on line tools to monitor traffic consumption, namely when traffic limits exist.

One must take into consideration the limitations of this kind of tools, especially when they are located outside the ISP's network, since the performance measurement will be affected by the quality of third party connections and may bias the conclusions. This is why OPTIMUS believes that this kind of tools should be provided by the ISP and not by third parties.

The same kind of reasoning applies to BEREC's proposal regarding the information of the average speed of the service provided: this kind of information is misleading since the performance is influenced by third party' decisions and, thus, should not be mandatory. To cover this concern, the kind of study on QoS described earlier regarding the first stage is more relevant (provided that the methodology is developed with care so the problems already identified are avoided).

Taking the above in consideration, OPTIMUS believes that the Portuguese situation is an excellent example of a balanced approach to the transparency concerns raised in the net neutrality debate. There is still scope for further improvement, but mainly in what regards the understandability aspects of the information which, as will be discussed later in this paper, should be left first to self regulation by the industry and, only if the result is deemed unsatisfactory, should any additional intervention be considered.

Understandability and meaningfulness

BEREC's proposed a colored scheme for ensuring a first level of information regarding the relevant offers.

OPTIMUS believes that the proposed scheme is not adequate, since the usage of the proposed green, yellow and red markings will mislead the clients since these colors have intrinsic to them an evaluation on the merits of the offers which does not necessarily correspond to their true value. For example, an offer that does not ensure a good quality for VoIP services would be marked as red (with the inherent depreciative appraisal) when, in truth, for a client that does not value this service it could very well be the best choice.

Any scheme to be developed should aim to highlight transparency, informing of any restrictions that might exist, thus allowing consumers to make informed choices. This can be done with a simple leaflet at the point of sale without the dangers of the proposed colored scheme, using a standardized set of information and terminology that should be the focus of self regulation by the industry. In this regard, OPTIMUs believes that self regulation has an essential role to play.

In this regard, OPTIMUS also believes that the information to be provided should always be oriented to the client's experience and not to the technical aspects. This, combined with a special care not to overwhelm the end user with too much information, should be the focus.

In what regards specific tools as the ones proposed by BEREC, OPTIMUS considers that their proportionality and effectiveness should be carefully evaluated. As examples one may give the following:

a. Maximum access speed: this information is available on the CPE's graphical interface, and is usually visible to the customer, thus eliminating the need for any specific obligation;

b. The already mentioned speed meters: the results of these tests are influenced by elements that are outside the control of the ISP. At a first level, by the type of equipment and software the client uses and, at a second one, by the congestion of the connections outside the control of the ISP. Thus, any kind of tests that are not resident at the ISP network cannot be used as a reference for the service provided.

Having discussed our generic views on the content issues, there is a specific concern that should be taken into consideration: the impact of transparency measures at the wholesale level. NRA's must ensure that the regulated offers are fully compatible with the measures imposed. ISP's that are supported in regulated wholesale offers must have access to all the relevant information that is required for them to comply with the defined transparency requirements, which may entail the revision of information disclosure obligations currently in place for SMP operators.

III. Who should be involved?

In the last section, we have identified three different contact points with the end user and identified the relevant information to be provided in each. It is also important to address the issue regarding who should ensure the information already identified.

OPTIMUS agrees with the principle that two different levels are useful: a direct and an indirect one.

Regarding the three stages identified earlier, OPTIMUS believes that both at stage 2 and 3, the ISP should assume its obligations since it is in direct contact with the customer. An indirect approach, based on third parties at this level, is only relevant in very specific cases, such as the monitoring by the end user of the QoS that it is provided to him when in comparison with the service of other ISP's. For this, and taking the specific case of the Portuguese market, ANACOM's study on quality of service is an important element, and no other is deemed as necessary.

As for stage one, the indirect approach assumes a special importance. **However, OPTIMUS disagrees with BEREC on the role that independent third parties (besides the regulator) may assume in this case.**

The NRA has a set of characteristics that are not replicated by other third parties and avoids several problems that the latter will entail, such as:

1. Independence: if private entities assume this kind of role, there will always be a question regarding the eventual bias of the information provided by them. This will entail additional costs regarding the supervision of these entities which can be avoided by a NRA based approach.

2. Content: by enabling the participation of other entities besides the NRA, it will require a supervision regarding the terms of the information disclosure. This will require a constant supervision to avoid that changes on how the information is made available (in particular, regarding the five key characteristics identified by BEREC - accessibility, understandability, meaningfulness, comparability and accuracy) affect the desired outcome.

3. Burden upon ISPs: the emergence of multiple entities providing this kind of generic information will put an unjustified burden on ISPs, to ensure that they provide to each entity, the information in the right format and with the right scope.

Thus, OPTIMUS firmly believes that the preferred entity to assume the indirect approach should always be the NRA and that, only if there are objective obstacles for the NRA to assume that role (which, at this moment we cannot foresee), should other entities be considered.

IV. Conclusion

OPTIMUS agrees with BEREC regarding the importance of transparency as a complement to effective competition to deter the emergence of net neutrality issues.

In Europe, and more specifically in Portugal, these issues have not yet arisen, thus justifying a proportionally lightweight approach to this issue. More specifically, when analyzing **the specific situation of Portugal, one must conclude that there are already in place strong mechanisms to ensure adequate information to the end user on the offers available in the market.** These may be yet complemented by an additional work of the industry in what regards a common approach for communicating the more critical aspects of the existing offers.

In this regard, BEREC should give priority to self regulation and only envisage a specific intervention if the industry is unable to provide a proportionate answer to this need.

Finally, OPTIMUS urges BEREC to concentrate on guaranteeing that the results in each individual European market are the same and not in ensuring that the same specific rules apply to all national markets: the latter may not be a correct approach given the different stages in which each national market is in what regards transparency. **Leeway for different approaches that ensure the same level of results should be given.**

This flexibility should also be taken into consideration when assessing transparency requirements in offers that belong to different markets and which have objective technical differences, as is the case of mobile and fixed broadband.

For any inquiries on this subject, please refer to the following contacts:

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