



Response to the BEREC public consultation on draft Guidelines on Net Neutrality and Transparency

Summary

This response is submitted on behalf of the following companies: AT&T, BT, Cable & Wireless Worldwide, Orange Business Services and Verizon Business. All our companies welcome the consultation on the draft *BEREC Guidelines on Net-Neutrality and Transparency*, as we believe that increased, meaningful transparency is critical for consumers.

The newly adopted provisions in the Citizens' Rights Directive clearly aim to offer increased consumer protection and to provide consumers with increased awareness and choice. We are, however, concerned that the draft consultation document does not make any distinction between different types of "end-user" or "customer". With regard to Internet access, the needs of consumers (i.e., residential users) and large business customers differ considerably. In particular, the asymmetry of information that may exist in the consumer context does not arise in the case of contracts that are heavily negotiated with informed enterprise customers following competitive tendering processes. Therefore, regardless of the eventual approach adopted to promote transparency for mass-market consumers and small businesses, we believe Member States and regulators should not apply NN transparency provisions to large business users.

In addition it is essential that the transparency provisions of the revised EU Regulatory Framework are implemented in a consistent and harmonised manner across the European Union to avoid causing unnecessary complexity and inefficiency for providers of pan-European players and creating barriers to the development of the Single Market. This means that our requested exclusion of large business service providers from the scope of the proposed Guidelines must be uniformly applied across all Member States.

With specific regard to transparency requirements enabling customers to monitor their Internet access service, the final BEREC Guidelines should also make clear that such provisions are not relevant in the case of large business users. Meaningful transparency requirements for consumers can not be compared to the needs of large enterprise users who benefit from customised and advanced tools offered as part of a specific business product or service.

NN transparency requirements should not apply to enterprise services

The consumer protection provisions of the EU Regulatory Framework have been largely defined to address the characteristics of mass-market services provided to consumers and SMEs, i.e., generally standardised services provided under common terms and conditions, on a mass market basis, to users who may have limited technical knowledge and, compared to larger business customers, less bargaining power.



Considering the specificities of business service providers (see our earlier joint position paper attached at Annex 1), the transparency provisions envisaged in the draft Guidelines make little sense and create a substantial risk of harmful effects on innovation and investment if applied to business service providers. Large enterprise customers can and do exercise buying power. Their contractual provisions differ considerably from those of consumers.

In addition, transparency is already fully addressed through extensive, bi-laterally negotiated, individual contracts between the network provider and each large business customer. These contracts already include extensive detail on quality levels, service transparency and technical characteristics, as well as penalties for non-compliance. The protections and transparency arrangements offered in individually negotiated contracts with business customers may often exceed those available to individual consumers, but do so in a way tailored and targeted to the needs of the business customer. Additional regulatory obligations are not therefore necessary and indeed would skew the bilateral nature of the individual contract negotiation.

The extension of obligations from mass-market services to high-end business markets is, given the characteristic of the high-end business customers and services, unnecessary and irrelevant.

Mandating transparency requirements for business customers may very well harm innovation and the development of the market since it would undermine the drive towards differentiating products for businesses. It could lead to a “least common denominator” sort of phenomenon where offerings all tend to coalesce around the requirements government demands. Encouraging competition in the business market helps all providers innovate and provide services that help business customers compete more successfully too.

In addition, the draft consultation does not define what is meant by "Internet Access". Not only are the products different, but the services purchased by businesses are often differentiated services tailored to the needs of particular customers.

Products provided to large business (enterprise-level) customers run mainly on private IP networks (PIP), which are distinct from the public Internet. PIP services ride proprietary dedicated networks and generally involve a high degree of traffic management to meet customer's demands and needs.

When it comes to the provision of IP based services, network management is critical to a network provider's ability to comply with the service levels agreed upon with the business customer, and as such, traffic shaping tools are required to comply with contractual obligations.

Although many corporate customers also purchase and use “Internet access”, this access is typically embedded in broader data communication products, in a secure manner and with quality of service requirements often dictated by the business customer.



It is therefore essential to distinguish what is meant by “Internet access” products to avoid confusion between high-quality data products providing dedicated access and best effort Internet access provided through a simple xDSL line.

Harmonisation is key for cross border services

From the perspective of pan-European service providers, the consistent application of regulation across Europe is critically important to the efficient delivery of services and to the ability to ensure effective compliance. This pro-harmonisation view applies to the application (or when it comes to business services, non-application) of the net neutrality provisions. This means that it is crucial to have a consistent approach of excluding large business communications services providers from consumer NN transparency requirements across Europe. This should be made explicit in the proposed BEREC Guidelines.

Specific comments on the proposed transparency regime

Although we believe that the NN transparency provisions should not apply to business operators for the reasons highlighted above, we nevertheless would like to comment on the following questions raised by the draft consultation document.

- Content of a NN transparency policy

As outlined previously, business users mostly require PIP services that ride proprietary dedicated IP networks. Although corporate customers may also purchase and use “Internet access”, such access is typically embedded in broader data communication products.

We are particularly concerned about Chapter III, section 3.b of the consultation document regarding the provision of specific tools enabling customers to monitor their access service. This is not only irrelevant in the case of business providers but would also interfere with the current commercial practice in which custom monitoring services are sometimes offered as an extra add-on service to business users. The provision of these monitoring services is not only a competitive differentiator for providers, but also business critical for some high end corporate customers to control their IT infrastructure. It also is important to realise that the usefulness of the various monitoring tools varies from user to user.

In addition, meaningful transparency needs of consumers can not be compared with the needs of highly qualified IT departments being in charge of business critical IP systems and applications of their enterprises.

- Who transmits the information

We believe that ISPs should continue to be the main providers of transparency related information to their users. Not only do ISPs already provide information to their users, they are also best place as they have the knowledge and understanding of their product and services and what their users require.



- Self-regulatory approach

As highlighted in BEREC's consultation document, self-regulation should play a key role in this process.

An increased and comprehensive focus on transparency, included in promoting the creation and adoption of best practices and guidelines by industry, would be fundamental to enable well-informed consumer choices. Internet has thrived in part because of its model of self-governance. A self-regulatory approach brings the required flexibility and market knowledge necessary in such a fast paced industry. Both business operators and users are best placed to define and tailor their requirement according to specific needs.

Conclusion

We believe that the NN transparency provisions included in the revised eCommunications Regulatory Framework should not be construed to apply to high-end business services and products.

As business providers we are concerned that some of the identified provisions mentioned previously are not only irrelevant but also disproportionately burdensome and costly to implement.

We call on BEREC to reflect that business providers should not fall within the scope of the NN transparency provisions of its proposed Guidelines.

BEREC should also take into consideration that the implementation of the revised EU Regulatory Framework, including the new transparency requirements introduced by the Citizens' Rights Directive, is still ongoing in some Member States. In addition, the EC's fact finding exercise is still underway and is expected in early 2012. It would be premature to contemplate any further, prescriptive transparency measures until the new Framework is fully implemented and a meaningful assessment can be made of the industry's performance against transparency policy objectives.

November 2011