
RESPONSE OF REDTEL TO BEREC'S PUBLIC CONSULTATION ON THE "DRAFT GUIDELINES ON NET NEUTRALITY AND TRANSPARENCY: BEST PRACTICES AND RECOMMENDED APPROACHES"

On 3 October 2011, the Body of European Regulators for Electronic Communications (hereinafter "BEREC") opened a public consultation on the "Draft Guidelines on Net Neutrality and Transparency: Best practices and recommended approaches" (hereinafter "Draft Guidelines")¹. Transparency is one of the four aspects that the BEREC is analysing as regards net neutrality along with quality of service, effects on competition and IP interconnection agreements. REDTEL, the Spanish Association of Telecommunications Operators, whose members are ONO and the Spanish branches of Orange, Telefónica and Vodafone, appreciates the opportunity given by the BEREC to provide, through this response, comments on the "Draft Guidelines".

GENERAL COMMENTS

Overall, REDTEL's opinion on net neutrality results from a reality where, lacking any issues at European level and in view of the recent reinforcement of the provisions of the Regulatory Framework for Electronic Communications, it seems logical to focus the efforts on their implementation and assess the results before proposing any other possible measure. Our position is clearly to preserve the open nature of the Internet, applying reasonable network management measures in order to offer the differentiated services that users themselves demand. We believe that the debate has often been confused and deviated from its core aspect which is to guarantee the Internet's sustainability and, in this sense, we consider that the BEREC can and must play an important role in helping to focus the debate and move forward in this direction.

REDTEL shares, regardless of the remarks expressed below, the objective of promoting through transparency measures the users' options to choose the access provider and offer they prefer in view of the conditions of service offered by operators. We agree with the European Commission's opinion that transparency is not negotiable since it is an essential tool for maintaining both an efficient competition in the electronic communications market as well as customer confidence. Consumers have a right to choose their Internet access service provider based on adequate information about the service characteristics. According to that information, users are free to choose among a series of different offers the one that best adapts to their consumption pattern within a competitive market.

On the other hand, we find it very useful that, regarding a matter as general and widely debated as net neutrality, a European body such as the BEREC provide a comprehensive analysis of the different possibilities for achieving transparency. In this sense, we share the concern recently stated by the Vice-President of the European Commission and Commissioner for the Digital Agenda, Neelie Kroes, regarding the risk of premature regulation by some countries, such as the recent regulation provisions introduced by the Netherlands that have unilaterally decide to regulate this matter on a national level².

¹ BoR (11) 44.

² Neelie Kroes' speech on 3 October 2011: "Investing in digital networks: a bridge to Europe's future": "*I regret very much that The Netherlands seems to be moving unilaterally on this issue. We must act on the basis of facts, not passion; acting quickly and without reflection can be counterproductive. For example, requiring operators to provide only "full internet" could kill*

We believe that it is necessary to recall, as stated by the European Commission in their Communication on net neutrality in Europe³, that the new Regulatory Framework for Electronic Communications (hereinafter “Regulatory Framework”)⁴, which includes several provisions regarding the net neutrality debate, is currently under implementation in several Member States and it is therefore necessary to wait an appropriate period of time in order to be able to examine its functioning before adopting any other type of regulatory obligation other than those provided therein. We consider that these new regulatory provisions (reinforcing the principle of transparency, freedom to switch electronic communications providers in one working day, as well as the provisions on quality of service) are tools that contribute to reinforcing informed decision-making by users and this in turn leads to a more competitive market. As a consequence, it will be necessary to wait for the results of the implementation of the Regulatory Framework before adopting any other decision to this regard.

REDTEL agrees with the BEREC in their statement that the current provisions on the principle of transparency included in the Regulatory Framework can solve most of the problems of the debate on net neutrality⁵. Therefore, REDTEL believes that this document is of the utmost importance since it is of great interest as a compilation of the possibilities available for ensuring, within a series of harmonised transparency guidelines, the maintenance of an efficient level of competition within electronic communications markets.

However, we would like to point out that, as stated in the Regulatory Framework⁶, before enforcing any other type of obligation, it should be considered the possibility of operators acting on their own to meet the regulatory requirements, including the option of self-regulation, as it has been the case in the United Kingdom⁷. REDTEL understands that this should be the first option in any market since it would guarantee all the principles stated in the “Draft Guidelines”, including the principle of proportionality. Should this first option not be considered, there is a risk that imposing new obligations on a single link of the Internet value chain (operators) would entail excessive and disproportionate costs for these stakeholders at a time when important network investments are required under the current economic situation. On the contrary, operators acting to comply with the transparency regulations would contribute to guaranteeing Internet sustainability.

innovative new offers. Even worse, it could mean higher prices for those consumers with more limited needs who were ready to accept a cheaper, limited package”.

³ Communication on “The open Internet and net neutrality in Europe” of 19 April 2011. COM(2011) 222 final.

⁴ Directives 2009/140/CE and 2009/136/EC of the European Parliament and Council, of 25 November 2009.

⁵ Response of the BEREC to the Public Consultation on Net Neutrality of the European Commission: *“BEREC considers that the current framework including new provisions strengthening transparency and minimum quality requirements can probably address many of the concerns that have been expressed in the context of net neutrality to date”.*

⁶ Article 21(3) “Should it be deemed appropriate, national regulatory authorities may promote self-regulation and co-regulation measures before enforcing any type of obligation.”

⁷ Operators’ agreement on “Key Facts Indicator table”, March 2011.

SPECIFIC COMMENTS

1. Purpose and scope of the guidelines

First, we would like to state that REDTEL shares the opinion that transparency applied to telecommunications users is essential for allowing them to make informed decisions according to their needs and expectations. In order to meet this goal, it is necessary for the BEREC to address the net neutrality issue comprehensively in all the different aspects it is analysing, including Internet sustainability.

The “Draft Guidelines” document (page 6) states that a transparency policy can prove insufficient particularly when competition is not efficient and specifically when there are barriers to switching operators. REDTEL agrees on the need for both mechanisms, that is, a transparency policy which is adequate to user expectations and the possibility of switching operators, to be available to any user for the maintenance of an efficient competition. In particular, in Spain the rate of numbers ported, both mobile and fixed, is among the highest in the European Union⁸. As a consequence, transparency is positive since it helps users to make informed decisions in a competitive environment.

The BEREC agrees to use in their document a “literal interpretation” of the net neutrality concept understood as the principle according to which all electronic communications are treated equally independently of their content, application, service, device and sender and receiver addresses (page 7). REDTEL disagrees with the use of this definition, firstly because this option does not reflect the reality of how electronic communication networks and services operate, as has already been admitted formally on a European level as traffic management is a practice on which telecommunication networks have been developed since their inception and which is indispensable for the correct functioning of the services.

And secondly, because the BEREC chooses a definition that clashes with the very objective of its document, which is to propose several possibilities for applying transparency to the measures that operators need to take in order to provide quality services and deal with safety and congestion issues while guaranteeing the maximum efficiency in the use of network resources.

REDTEL considers that the net neutrality concept does not imply guaranteeing the same treatment for all electronic communications, but instead that users are allowed to access and distribute information and run the applications and services of their choice, without this being incompatible with the availability of an offer of differentiated services that users themselves demand. We must underline that the European Commission in its Communication of April 2011⁹ linked the definition of the net neutrality concept with article 8 of the Framework Directive which specifically includes these principles¹⁰. As a consequence, we understand that it would be preferable not to choose a specific definition in the “Draft Guidelines” document

⁸ Spain is the second country in volume of ported numbers with 1.26 million fixed numbers and 3.48 million mobile numbers ported between January and September 2010, according to the European Commission’s Digital Agenda Scoreboard.

⁹ Communication on “The open Internet and net neutrality in Europe” of April 19, 2011. COM(2011) 222 final.

¹⁰ Article 8(4)(g) of Directive 2009/140/CE of the European Parliament and Council, of 25 November 2009, which modifies Directive 2002/21/CE regarding a shared regulatory framework for networks and electronic communications, Directive 2002/19/CE regarding access to electronic communications networks and related resources and their interconnection and Directive 2002/20/CE regarding the authorisation of networks and electronic communication services (Text relevant to the effects of the EEE): “The national regulatory authorities shall promote the interests of the citizens of the European Union by *inter alia* (...) promoting the ability of end-users to access and distribute information or run applications and services of their choice.”

(the document itself admits that its objective is not to define the net neutrality concept) or, in any case, to ensure that the definition used is in accordance with the Regulatory Framework in force in the European Union.

2. Major requirements for a net neutrality transparency policy

REDTEL agrees on the criteria that, according to the BEREC, correspond to an efficient transparency policy, that is, that it should be accessible, understandable, meaningful, comparable and accurate (page 13). We would like to point out that, in order to comply with the principle of proportionality, it is essential for national regulators to coordinate their transparency policies with existing and future horizontal regulations on users, as stated in the reference document (pages 12 and 14). Otherwise, this could create a confusing environment where the user would not benefit from transparency measures while operators would bear an excessive regulatory burden. This aspect could be considered even more relevant in the case of the Spanish market where a broad regulation is already in force, both at a national and regional level, which includes aspects regarding the principle of transparency.

It is essential to point out that, as stated in the European Directives¹¹, before enforcing any other type of obligation national regulators must consider the option of self-regulation should the free measures of operators to comply with the regulations prove ineffective. Should the self-regulation option - as stated by the BEREC in its document (page 49) - be considered necessary, it could easily be monitored by national regulators and would bring on the advantages of providing a homogeneous procedure adapted to the service characteristics so as to make the information easily understandable with the aim of facilitating user decisions. Additionally, given the number of operators and offers in a highly changing market, it would guarantee that information is accurate and up-to-date.

REDTEL appreciates the need indicated in the “Draft Guidelines” document to adopt a common framework of terms as a reference framework which should include relevant standards and common terminology from the perspective of market self-regulation. In this sense, the Ministry of Industry, Tourism and Trade has launched an initiative for the publishing of a webpage, which would include the different electronic communications services offered by operators to Spanish consumers. The participation of all the stakeholders has been requested and at present the project is undergoing the phase of reaching a consensus on the common terminology for the different characteristics that will be published regarding each service.

The “Draft Guidelines” document (page 15) analyses, among others, the possibility of implementing a transparency policy through the combination of a “direct approach” by operators, as established in the European Directives, and an “indirect approach” of a supplementary nature. REDTEL considers that the “Draft Guidelines” give a relatively excessive importance to the “indirect approach” option as well as to the role that third parties could play. To this regard, we would like to point out that the Regulatory Framework in the article 21(2) of the Universal Service Directive just states that: *“Third parties shall have a right to use, free of charge, the information published by undertakings providing electronic communications networks and/or publicly available electronic communications services for the purposes of selling or making available such interactive guides or similar techniques”*. Therefore, it is clear that third parties may prepare additional comparisons based on the information published by

¹¹ Article 21(3) of Directive 2002/22/EC “If deemed appropriate, national regulatory authorities may promote self- or co-regulatory measures prior to imposing any obligation.”

operators. However, the emphasis on the role of these third parties - which are supposed to have the necessary technical knowledge and impartiality for carrying out such a relevant task - shown in the reference document does not seem appropriate.

In particular, we believe that application and content providers cannot be considered as users (page 8) and in no way as impartial stakeholders providing information (pages 16, 17 and 52). They should be considered as part of the Internet ecosystem and co-responsible for the Internet users experience. The “Draft Guidelines” document should consider that the Internet ecosystem is so complex (device manufacturers, operating system designers, application and content providers, etc.) that, should the focus be narrowed down to enforcing transparency measures on telecommunications operators, it may not be possible to achieve the objective of providing users with the opportunity of making informed decisions.

3. Contents of a net neutrality transparency policy

We share with the BEREC that, when defining a specific transparency policy, a detailed assessment of the cost of implementing the measures for operators and, where appropriate, third parties should be carried out in order to broadly minimise it (principle of proportionality).

In its document, the BEREC refers to problematic traffic management practices (pages 19 and 33), which in our opinion already shows a biased opinion. REDTEL understands that network management practices are an essential element for operators to guarantee the provision of quality electronic communication services and, in any case, the document should refer to the type of practices that affect aspects of user services. Additionally, we would like to underline the need to include the opinion of the operators themselves in order to explain what is considered a reasonable limitation of an Internet access offer without restrictions and what traffic management practices affect users. Any kind of classification should be agreed with the operators since they are more aware of the characteristics of the provided services. This is an essential aspect due to the impact that network and traffic management has on telecommunications operators’ activities, with expected consequences on network usage efficiency as well as on how security and congestion issues are dealt with.

We would also like to point out the difference which should exist between the contract transparency obligations set forth in the Regulatory Framework and all other obligations, since in case of the former being modified, there is an obligation of informing the users that are entitled to terminate their contracts¹². This is why it is essential that the contract conditions be, on the one hand, concise enough to provide the necessary transparency to the user and, on the other hand, flexible enough to adapt to possible modifications that may result in a market such as the telecommunications market, which is subject to constant changes in technical (increase of download speeds, etc.) and regulatory (legislation on website blocking in case of breaches of intellectual property rights, etc.) terms. In this sense, it would be advisable that the BEREC analyses and agrees on a reasonable application of the provisions established in article 20(2) of the Universal Service Directive in order to harmonise the diverging policies in force at present on this subject in the different countries of the European Union.

Moreover, as regards data consumption measurement tools (pages 31 and 33), we would like to point out that although they can help users to become aware of their consumption and to avoid exceeding data download caps, the methodology used by the tool should be clearly

¹² Refer to article 20(2) of the Universal Service Directive.

stated as well as any effect that may be external to the access line itself (for example, user hardware and software). Consequently, we consider it necessary that those tools include the information required for the user to understand their limitations and therefore, their lack of legal validity. In order to measure correctly the access speed provided by the operator independently from other user factors that also affect the actual speed, the measurement system should rely on measurements carried out by a probe at the access network.

4. Ensuring transparency

When defining how information is provided to users, it is essential to study the situation in each country and identify the existing transparency and quality of service measures in order to guarantee the principle of proportionality. In this sense, it is surprising that the “Draft Guidelines” document does not mention the example of the existing regulation in Spain, neither in the regulatory approaches section (pages 48 and 49) nor in chapter 5 (pages 52 and 53). Since 2006, a broad quality of service legislation is enforced in Spain and both the Ministry of Industry, Tourism and Trade and the operators themselves, periodically compile and publish a large variety of comparable quality of service parameters¹³. This information is previously audited and is subject to a Commission that monitors service quality. These quality of service data include, for example, the average, maximum and minimum data transmission speed obtained with the different operators and speed offers.

We believe that, in order to reduce the impact and costs of enforcing new transparency obligations, it is essential that the existing regulations are used as a starting point. Only in case it were necessary in accordance to the new provisions of the Regulatory Framework, should they be improved or specified according to the experience acquired and the requirements of each market. In this sense, we believe that taking into account the existing Spanish regulation, the reinforced transparency requirements of the new Regulatory Framework are mostly met and there is little room for a supplementary “indirect approach” by third parties, which however should not be ruled out if considered necessary.

We share the need for regulators to carry out information and promotion tasks. As much as the different stakeholders may try to implement a transparency policy, the efforts will be useless if the information does not ultimately reach the users. This task should not be reduced to the scope of websites with third party comparisons but it should also include the promotion of the measures carried out by the operators and, where appropriate, the regulator.

On the other hand, we believe that the information task regarding net neutrality aspects should be backed by information on the complexity of the functioning of the Internet and the role and responsibility of operators, which are just one of the numerous links in the Internet value chain. Experience proves that users have a high degree of lack of knowledge about what the specific responsibilities of operators are regarding different problems they encounter when using Internet access services (for example, problems with a specific webpage or with the equipment used for accessing the Internet) and users often address their claims exclusively to the operator because they are the most visible element and directly related to them. A clear example are the technical problems recently experienced by BlackBerry users with their messaging and e-mail services where telecommunications operators have been forced to announce compensations as users consider them responsible for the failure.

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<http://www.mityc.es/telecomunicaciones/es-ES/Servicios/CalidadServicio/informes/Paginas/Informes09.aspx>

The document itself, despite admitting the existence of a diversity of factors that affect the user experience and even envisaging at some point that those factors are not always under the direct control of operators (page 33), seems to ignore in several occasions that the operators are often not responsible for them (pages 21, 25 and 29). Any transparency policy should analyse in detail the degree of control of the different factors in the hands of operators and other stakeholders in the Internet value chain and should accordingly inform the users.

The BEREC holds an excellent position to monitor how operators meet transparency requirements in the different European Union countries. We believe that this information can be collected and published periodically in order to promote new ways of implementing transparency policies and contributing to an increased awareness among users.

5. Practical examples, outlooks and conclusions

When defining the transparency policy, the main objective of facilitating informed decision-making by users should not be overlooked. The “Draft Guidelines” document should take into account that the Internet ecosystem is extremely complex and, as stated above, application and content providers cannot be considered as independent stakeholders providing information in an unbiased manner (pages 16, 17 and 52). They should be considered as a part of the Internet ecosystem and co-responsible for the Internet user experience.

On the other hand, we believe that, in order to reduce the impact of the transparency policy, it is essential to take into consideration the existing legislation in each market, as well as the option of self-regulation, before enforcing any other type of obligation, in addition to the cost resulting from implementing any type of measure.

Finally, we would like to state that, in order to avoid premature regulation, any possible regulatory approach on net neutrality should be analysed at European level first and, in any case, should wait for the results of the Regulatory Framework’s implementation before adopting any other decision to this regard.

ANNEX: Transparency regulation in force in Spain

In Spain, electronic communications operators are subject to strict consumer and user regulations which detail the obligations of transparency, veracity and simplicity when communicating the main characteristics of the services they provide.

On the one hand, there is sectorial regulation as Royal Decree 899/2009, the charter of electronic communication services users' rights. It is the responsibility of the State Secretariat for Telecommunications and the Information Society to watch over its compliance and prosecute behaviours contravening this regulation.

Additionally, the electronic communications sector legislation also regulates the quality of the telecommunications services. Since 2006, the Order on Quality (Order ITC/912/2006) compels telecommunication operators to publish periodical and comparable information regarding different quality aspects of fixed, mobile and Internet services. In parallel, the State Secretariat for Telecommunications and the Information Society periodically prepares and publishes a quarterly report based on the audited operator information.

On the other hand, the Regulatory Royal Decree 1/2007 passing the General Act for the Protection of Consumers and Users summarises the general applicable regulation for all commercial relationships with end users throughout the national territory. The National Institute for Consumption is responsible for watching over its compliance.

Likewise, Autonomous Communities have legal authority to prosecute breaches of consumption regulations regarding behaviours which may have affected users and consumers residing in their appropriate autonomic territory. To this purpose, each Autonomous Community has its own legislation on this matter which develops and increases the obligations included in Regulatory Royal Decree 1/2007.

Thus, electronic communications operators are compelled to carry out the following actions as regards the information they must provide to consumers:

- Before purchasing any products and services, the user must be provided in a clear, understandable way adapted to their circumstances all relevant, truthful and sufficient information regarding the basic characteristics of the agreement they are about to sign.
- Ten days before their entering into force, the new electronic communications services must be notified to the Telecommunications Market Commission, the State Secretariat for Telecommunications and the Information Society, the Spanish Agency for Data Protection, the National Institute for Consumption and the Council of Consumers and Users. The latter sends this information to its integrated consumer associations.
- The general contract conditions must be published on the operator's webpage. Additionally, the operator will provide said conditions in writing and free of charge whenever a user requests them. Likewise, they shall inform about said conditions through their appropriate customer care service.
- In case of agreeing on the contract by phone or the Internet, should the user choose an offer or promotion containing particular conditions differing from those

published on the webpage, the operator will be compelled to send them a document stating all terms and conditions of the offer or promotion purchased.