



BEREC Guidelines on Net Neutrality and Transparency: Best Practices and Recommended Approaches – Virgin Media Consultation Response

Virgin Media welcomes the opportunity to respond to BEREC's consultation on the Guidelines relating to Net Neutrality and Transparency. We consider that transparency is a key component not only in a positive end user experience but also to maintaining the competitive retail broadband environment that has prevailed across the EU to date. A consistent, proportionate and considered approach to transparency in relation to the internet is therefore vital.

In this response we have generally focussed on high level principles although we do, where appropriate, address certain of the specific aspects of the consultation in more detail. As a general point we would draw BEREC's attention to the self-regulatory approach to transparency that has been adopted in the UK, as well as the policy as applying to indirect approaches. Our experience of these serve as the backdrop to this response. Moreover, in our view, the UK arrangements serve as a credible demonstration of the positive effects that such initiatives can have and, we believe, could serve as a blueprint for similar approaches in other Member States.

Introduction

We consider that BEREC has a key role to play in fostering best practice in this regard. In particular there is a need to ensure that individual NRAs do not inappropriately deviate from the EU regulatory framework or pursue approaches that are not in line with general EU policy objectives and expectations. However, by the same token it is equally important for national specificities to be recognised such that flexibility is maintained to allow NRAs to reflect specific national circumstances. In particular we would urge BEREC, in the course of finalising the Guidelines, to avoid undermining any programmes or initiatives already established or advanced by individual NRAs – or indeed industry players - which have been proven to be effective.

We would also note that the wider net neutrality debate – and the affected markets – continues to evolve at a rapid pace. In many respects some of those markets are nascent. It is important, therefore, that the Guidelines as applying to transparency take into account this ongoing evolution and are sufficiently flexible so as to avoid stymieing innovation and to allow for revision should circumstances require it.

Moreover we consider it crucial that BEREC recognises, as an over-riding principle, that ISPs are best placed to communicate with their customers, given their ownership of the customer relationship and knowledge of how customers react to the provision of information.

From a broader perspective, the regulatory approach to the internet is a key factor in the ongoing efforts to enhance and extend broadband availability in the EU. Stimulating, facilitating and supporting private investment must be the principal tenet of those efforts, and it is vital that regulation complements them and does not disincentivise future investment or indeed undermine investments that have already

been made. It is important therefore that any regulatory approach to transparency is proportionate and that a balance is achieved between encouraging investment and competition, achieving the best possible end user experience and avoiding the imposition of overly burdensome obligations on providers that could jeopardise existing or future investment and innovation.

Scope

Given the importance of transparency in the net neutrality debate, we are encouraged by the fact that BEREC is seeking to provide clarity to NRAs and ensure consistency. We welcome, also, the fact that BEREC has limited the scope of its consideration to transparency requirements and measures and has not, for example, sought to potentially cloud the exercise with the inclusion of a debate about which operator practices or policies are problematic/unacceptable etc. These aspects of the wider net neutrality debate require, in our view, their own specific focus. Moreover, the establishment of any regulatory approach to transparency is not necessarily dependent upon defining what practices are/are not problematic – on the contrary, we believe that clarity in respect of the former could actually help to crystallize any debate on the latter.

In terms of the extent of BEREC's consideration of transparency specifically, we support the approach of considering transparency in the context of net neutrality more broadly – as opposed, for example, to limiting the exercise to traffic management practices in isolation. In our view it is critical that the importance of transparency of other factors that affect the end user experience is recognised and taken into account. In this regard, we believe that BEREC's consideration should be broader still. That is, Virgin Media believes that a key factor in the overall net neutrality debate is a notable lack of consumer understanding and cognisance of the characteristics and capabilities of their internet access products. Improving this aspect is, we believe, fundamental to ensuring consumers can make informed choices about their internet access products and to be able to put their own individual experience and requirements into context.

We are in addition strongly of the view that any consideration of the regulatory and policy approach to transparency should not be confined to ISPs or network operators. The internet is a multi-dimensional ecosystem and is comprised of multi-sided markets. The factors that determine an end user's experience are not the sole preserve of ISPs/network operators. Participants at other points in the internet value chain can all affect that experience. For example, content/service providers can (and do) exercise discretion around the extent of access to, or availability of, their services (and in this regard we would draw BEREC's attention to the emerging debate about 'device neutrality'). We believe, therefore, that it is vital for transparency to be considered in the broader context of the overall internet value chain and the different players that participate in it.

Overall Approach

We would strongly advocate a progressive regulatory approach to transparency. That is, we consider that self regulatory or industry driven initiatives should be pursued in the first instance with a more formal approach only contemplated if such initiatives are not effective or a demonstrable market failure is identified. We believe that this type of approach will be attractive to, and has positive implications for both industry and NRAs alike. Industry players generally have a strong incentive to advance such initiatives (as an alternative, for example, to potentially being subject to more formal

regulatory obligations), and they arguably have positive benefits for NRAs given the reduced resource intensiveness as compared to the imposition and enforcement of formal regulatory requirements.

In this regard we would suggest that is important not to underestimate the effectiveness of self-regulatory initiatives. By way of example we would draw BEREC's attention to the voluntary Code of Practice as recently launched in the UK earlier this year by the Broadband Stakeholder Group ('BSG'). We understand that BEREC is familiar with this initiative, so have not set out the specific details of it herein, however we would highlight the positive responses that it has received and the notable achievement of gaining consensus agreement between all of the UK's principal fixed and mobile ISPs. The BSG project has been welcomed by many stakeholders, including consumer groups, Government and information aggregators. Furthermore, the signatories to the Code of Practice have committed to allow independent, third party verification of the information that they publish – which will clearly serve as an additional safeguard and underpin the credibility of the scheme.

We would also highlight the fact that regardless of any specific initiative or regulatory requirement, transparency is increasingly becoming both a reputational factor and a competitive differentiator. That is, ISPs have an inherent incentive to be transparent about their policies and practices in order to remain competitive (or to establish an advantage), and to preserving or enhancing their standing in the market. We consider it equally important that BEREC and NRAs take account of these market effects.

As we have alluded to above, we consider that in terms of ensuring the best possible end user experience and levels of satisfaction, transparency of traffic management/net neutrality factors must not be considered in isolation. In particular we believe that a general lack of consumer cognisance and understanding of the capabilities and characteristics of their internet access products exists. An end users experience is not determined solely by network and traffic management practices. The specification of their equipment, in-home wiring factors, constraints at other points in the internet, delivery technology etc all have an impact on that experience. By way of example, the practice of advertising headline or 'up to' speeds is a particular source of confusion and misinformation, with certain technologies substantially under delivering against those theoretical capabilities in the majority of cases.

We are strong advocates, therefore, of the suggestion that transparency of factors additional and arguably complementary to traffic management should be advanced by NRAs. We also believe that in addition to a broader perspective on transparency, there is a pressing need to improve consumers' general appreciation of their internet access products. We believe there is a key role to be played in this by NRAs, in both establishing educational programmes or similar and in involving all players in the internet ecosystem in appropriate initiatives. We believe that this latter element is a critical 'missing link' in enabling consumers to make informed choices and in ensuring that they are able to put their own experiences and requirements into context.

Specific Observations

Virgin Media is strongly of the view that the principle of proportionality, together with clarity and ease of understanding of information provided to consumers must

necessarily be key determining factors in any NRA consideration of whether or how to advance direct or indirect approaches to transparency. In the vast majority of cases, we consider that a direct approach to the matter alone will, by far, be the most appropriate and should be favoured over either an indirect or combined approach. ISPs hold the direct relationship with the customer and are, given their knowledge of the types of information and manner of communication that customers respond to, arguably best placed to communicate information to them. There is, in our view, significant scope for indirect approaches, if unmanaged, to create confusion for, and potentially lead to mis-information of consumers.

Inappropriately targeted and/or mandated indirect approaches also have the potential to be extremely onerous and costly for ISPs. That is, any formal obligation for ISPs to make available data to, or otherwise interact with, comparison sites or aggregators is likely to be resource intensive and self defeating. Rather, we believe that alternative approaches would deliver far more favourable outcomes.

In this regard, we believe that there is significant scope for direct measures, if implemented in a suitable manner, to facilitate/support and indeed stimulate indirect measures on a complementary basis, instead of their being a need to formally require ISPs to underpin the latter. That is, we believe that against the backdrop of the provision of accurate, relevant and consumer-friendly information in the public domain, indirect approaches will naturally evolve as comparison facilities identify an opportunity to aggregate and compare information published by internet service providers (albeit that it is important for such facilities to be 'policed' in some way).

To the extent that indirect initiatives are pursued by NRAs, we believe that they should not result in mandated obligations for ISPs. By way of example, we would draw BEREC's attention to elements of the approach taken in the UK. In this instance a healthy and competitive 'comparison site' market has become established, based on an accreditation scheme underwritten by the national regulator. Third parties collate data about ISPs' products based on information available in the public domain, and provide comparison of that information to the general consumer market. The accuracy and credibility of those comparisons is underwritten by Ofcom's accreditation scheme, to which third parties must comply if they are to be competitive and successful in the market.

Furthermore, as a result of the aforementioned BSG transparency initiative these third parties are, in addition to tariff elements, now enhancing their facilities to incorporate comparisons between ISPs' products based on traffic management and other conditional elements of broadband packages. Again, this is based on the sourcing of public domain information – and this approach has been facilitated by the engagement and consultation of comparison site operators in the development of the BSG initiative (rather than there being any formal mandate on ISPs).

Conversely, as we have set out above, a mandated indirect approach, including any requirement for ISPs to provide specific information (or information in a specific format) to third parties, would likely lead to additional and unnecessary costs – not just for ISPs but for regulators also.

In a similar vein we would urge extreme caution in any consideration of a requirement for "real time" information – particularly in respect of burdensome obligations on ISPs and the reaction of end users to such information.

Notwithstanding the considerable technical challenges and cost associated with the provision of certain real time information by ISPs, we are of the view that such information has the potential to prove both disruptive and mis-informative for consumers. There is, in our opinion, considerable scope for consumers to misinterpret this type of information or to take it out of context – leading, potentially, to them making inappropriate decisions or choices in respect of their broadband services.

Instead we consider that alternative measures would be far more effective – for example the provision of clear and understandable information about the circumstances in which traffic management is employed, the effects thereof and the impact that certain activities or actions can have on any usage limits or other constraints to which the end users' particular package might be subject. In this regard we would note that many ISPs already provide this type of information.

In any event, we note that tools for measuring, for example, internet speeds exist today in the market and can provide consumers with an immediate 'real time' indication of how well their internet service is performing. Again, there is possibly a need for greater education in respect of these types of facilities, but any consumer seeking to monitor the performance of their services is certainly not without options.

Conclusion

Ensuring that end users are able to make informed choices – and indeed maintaining a competitive environment – are critically dependent upon transparency. However, transparency, in and of itself, is not the sole factor in this regard. As we have set out above, we consider that there is a need to establish a greater consumer understanding and appreciation of the characteristics and capabilities of broadband products in general.

As a complement to this, a broader approach to transparency which has regard to other factors that can determine the overall end user experience would help to improve understanding and contextualization of traffic management practices.

Finally, we would re-iterate that while consistency of approach as between Member States, and accordance with Framework requirements is of great importance, a 'one size fits all' or overly generalist approach to transparency would very likely have detrimental consequences.

We would be happy to elaborate on the points that we make and/or to discuss the matter further. Please do not hesitate to contact me should you wish to do so.

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Virgin Media, November 2011