



Response to BEREC's Public Consultation on:

Guidelines on Net Neutrality and Transparency

By **kgbdeals**

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Introduction to KGBdeals

kgbdeals is part of kgb is a privately held, New York-based company and the world's largest independent provider of directory assistance and enhanced information services. During its nearly twenty year history, kgb has built some of the most successful brands in the telecommunications, customer care and enhanced information services sectors. kgb's European brands include The Number 118 118 in the United Kingdom and Le Numero 118 218 in France, both of which are leading players in their respective markets.

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Preliminary Remarks

kgbdeals welcomes the opportunity to comment on BEREC's Consultation on its Draft Guidelines on Net Neutrality and Transparency (hereafter "the Guidelines").

kgbdeals is part of the kgb Holding, which also comprises The Number, the largest pan-European independent directory service provider. Through its affiliate The Number, kgbdeals brings to this consultation its experience of an existing so-called two-sided market in the voice and SMS sector, namely the "Premium Rate Services" (PRS) model. The PRS model is a good illustration of how access bottleneck operators can behave in an abusive manner if certain structural elements are lacking. Two-sided markets such as PRS and internet traffic management need a clear structure to govern access mechanisms and commercial interactions between the two-sides, to encourage best practise. For kgbdeals, BEREC needs to urgently put in place a framework:

1. setting out the limits of permissible behaviour;
2. identifying what constitutes fair and unfair behaviour; and
3. establishing a quick and simple mechanism for resolving disputes regarding behaviour that is alleged to be unacceptable or unfair for consumers and competition.



These elements must be addressed if the mistakes of the past are not to be repeated. Establishing the approach we have identified can ensure a clear and fair environment for investment, innovation and consumer benefits.

We hence regret that at this stage, all documents produced by BEREC focus first and foremost on the 'How to communicate traffic management practices' or 'What's their impact', instead of addressing the first critical issue, namely: 'Which practices should be allowed and which ones should be sanctioned by NRAs'.

Transparency is not enough

As BEREC itself admits in these Guidelines, in many cases, **transparency provisions will be insufficient** to ensure fair competition and consumer protection due to the difficulties encountered in switching access provider and the fact that even where several so-called 'competing' access providers are active, they could (and often do) align their traffic management policies hence not giving choice as such to end-users. Moreover, as set out in these Guidelines, the complex nature of the offered products and any intended limitations are not necessarily understandable to many consumers. If consumers cannot readily understand the nature of the policies or limitations being disclosed to them, then transparency of product limitations combined with a competitive market will not necessarily result in limitations being 'competed away' as consumers will not be influenced by transparency requirements.

So transparency is **not** sufficient to guarantee consumer choice and market innovation, unless it is combined with certain safeguards, especially a non-discrimination requirement.

In many cases, even though from a strictly regulatory point of view markets may be deemed competitive, the reality is that mobile and fixed access are generally oligopolistic and most users do not have a big choice in service providers to switch to if not satisfied.

Moreover, in practice, it must be noted that "consumer choice" implies that consumers be aware of all the content, services and applications that are available on the Internet, so that they would be aware that access to a given website, service or application is blocked or hindered. If users are pushed into walled gardens, they will initially spot the fact that major applications or sites are not accessible (or only accessible at low quality), such as YouTube or Skype, but they will not know "what they are missing" for a raft of smaller applications and services that may be "less" visible or known currently. Kgbdeals therefore strongly opposes any blocking or degradation of any legal content, service or application providers over the Internet, and considers transparency on its own an insufficient tool. Transparency is a particularly ineffective tool if the information which it must convey is particularly complex or granular as many consumers do not understand the information and so do not act on it. This has been evidenced by a plethora of Credit Card regulations that have failed to achieve clarity and action by consumers.

Through its affiliate The Number, kgbdeals has experienced the limitations of transparency as a remedy for competitive issues. When UK consumers decide to subscribe to BT's Broadband Talk package, when using their VoB service, they can only access BT's own directory services, but not to



any of its competitors (including 118 118, the most called number in the UK). Consumers are probably informed of this fact in the small print of their contract but this transparency is of no effect as access to a specific directory service number is too small an issue to determine a consumer's choice of access service. The UK regulator Ofcom treats retail broadband as a competitive market so BT knows perfectly well that under the current rules and considering Ofcom's approach to the definition of relevant markets, it is unlikely to risk regulatory intervention. The end-result is the squeezing out of all BT's directory services competitors from BT's VoB services. Such a scenario should not be seen as a one-off, and is likely to repeat itself in the future for multiple services and applications considered as being in competition with access providers' services.

Moreover, competition in itself will not necessarily avoid abusive behaviour occurring, as the issue of net neutrality is one that centres on the abuses stemming from a bottleneck, not necessarily from a dominant position.

Bottleneck

In its Consultation on Net neutrality and Open internet, the European Commission rightfully linked threats to the open internet to an issue of bottleneck. Too often, NRA's reasoning is based on the Article 7 process of definition of a relevant market, designation of an SMP provider and choice of remedies. By following this reasoning, regulators are likely to conclude that as the relevant market in the context of the Internet is "competitive" and hence not a "relevant" market, no single player has dominance and thus there is no incentive to behave in an abusive manner. This is not an acceptable path and it certainly does not reflect reality, as we describe in the section hereunder on '(Lack of Competition'.

kgbdeals' affiliate The Number, as a directory service, has direct experience with the concept of a two-sided market in the telecoms sector, albeit one very much controlled by the bottleneck access operator in terms of prices. The logic followed for all PRS is one whereby consumers pay a price to the access operator to be able to reach a service (e.g. 118118) and where that service gets a portion of the revenues from the access operator. In the case of mobile access to directory services in the UK, it is actually a "worst case scenario" of a two-sided market as kgbdeals' affiliate **The Number has no control over the retail price charged to end-users for contacting its UK 118118 service, and cannot buy a wholesale origination product from mobile operators, so has no certainty of revenue share either.**

The end-result of this two-sided market approach where commercial negotiations are supposed to prevail is abusive hikes of retail prices by mobile access operators to end-users for accessing 118118, in the UK and an absolute absence of mechanism for kgbdeals' affiliate The Number to be able to influence and control this. The rationale behind it is not even always one of discrimination between the access operators' own service and that of competitors. It is quite frankly one of "milking" a service where deemed possible, because users may not notice it, regulators are unlikely to intervene and the operator does not care if the service ends up going belly up as a result of its abusive behaviour (as access operators often control rival directory services of their own). The two-sided nature of the market is not one where choice and commercial negotiation prevails at each end - it is



one where both end-users and service providers such as kgbdeals' affiliate The Number get the worst possible deal, to the benefit of a bottleneck access operator. Such a scenario could be what the future Internet turns into, if no guidance is put in place: just replace 'directory services' in the previous paragraph with 'voice services' and the scenario that will come to life will look oddly familiar.

(Lack of) Competition

kgbdeals believes that competition will not, on its own, solve the issue of existing threats and assaults on the open internet. Moreover, the degree of competition in Europe should not be overestimated.

While the mobile market is generally considered competitive if one looks at the theoretical principles, the market is generally an oligopoly, if only due to the scarcity of spectrum and the limited number of licences delivered.

Building on its own experience, kgbdeals would like to point out two realities:

- For small service providers needing a certain volume of traffic, not being accessible (or being accessible at unreasonable conditions) on one single mobile network makes their business case flounder. This is true for kgbdeals' affiliate The Number as a directory service in the voice world, but it is equally true for small players in the Internet world.
- In the UK, one mobile operator suddenly significantly increased the retail tariffs paid by end-users to access directory services and this had a cascading effect on its competitor networks, which then followed suit. This example is however not confined to the UK, nor to Directory Enquiries. In Spain, the Spanish regulator CMT had to equally intervene in a dispute between a Premium Rate SMS Provider and all 5 Spanish MNOs, after the PSMS Provider complained about the wholesale rates of PSMS being four times the wholesale price for regular SMS between subscribers.¹ One can hardly see what competitive forces are at play in cases like this, and it does not bode well for the future of the internet should a two-sided approach be adopted without guidance and control.

On the other hand, in the fixed network sector, whilst there may be a larger number of ISPs, in most Member States there is a core of just 3-5 infrastructure providers, most other ISPs being resellers of the products of the latter. It is to be expected that any limitations imposed on the networks of these handful of 'big players' who provide the wholesale products would impact the resellers' service offering.

Barriers to switching must be removed to make transparency relevant

Before even considering users' ability to understand and act upon information, the first issue to consider is the practical barriers that exist to switching. The theory is that an unsatisfied broadband

¹ CMT Decision of 22 July 2010, Alterna Vs. Spanish MNOs.



user can just move to another provider to get a better offer. This ignores various practical impediments:

- (1) in the mobile industry and to a lesser extent in the fixed, operators tend to align their offers as demonstrated by the VoIP blocking by all MNOs in France and Germany under their “fair use” policies, due to the oligopolistic nature of the market.
- (2) barriers to switching go beyond cost and administrative burden, to also cover such things as the lack of “email address” portability for end-users that rely on the email address that was given to them by their ISP and which they can’t take with them when switching to another ISP (or even ask for it to be forwarded to their new email for a limited time period at no cost).
- (3) there have been significant issues in ensuring that consumers have access to, and understand, the headline broadband speeds advertised in the UK (e.g. 8MB broadband). If consumers have difficulty understanding this headline concept and what may affect the overall performance of their internet access, it is reasonable to be sceptical about the degree of useful understanding they will glean from more granular and technical information regarding traffic management policies.
- (4) comparing non-standardised transparency policies is likely to be highly complex and too onerous for most consumers to do.

Acceptable Traffic Management and ‘Application agnostic Vs. Application specific’ practices

The references to the possibility of application specific traffic management practices makes kgbdeals think it is urgent to define what one understands as covering ‘traffic management’. Best effort management does not necessarily imply **no** prioritisation but may be split into multiple categories of traffic management:

- engineering to make the network function properly – to be managed in a non-discriminatory fashion
- commercial traffic management - tiered-approach
- security traffic management – blocking spam etc
- legal traffic management – child abuse, terrorism etc

Traffic management that is intended to block spam or child abuse material has never been contested as being useful (if combined with an effort to pursue those that post and produce child abuse material), whereas other forms motivated by commercial discrimination are more problematic and unlikely to generate consumer value, and certainly not choice.

Practice shows that incentives to discriminate can go beyond the will to favour a subsidiary or “preferred partner” and relate to control of what happens on the network. Access operators have clearly indicated their fear that infrastructure is becoming a commodity, the IP packets that flow over it being the real added value. Monetising or otherwise controlling the flow of those packets puts access operators in the position where they can choose how to extract maximum value from that control of IP packets, even if it means degrading the service available to consumers rather than



being the “dumb pipe” that serves the IP packets as efficiently as possible. This dimension should certainly not be ignored by the Commission, especially in light of the past illustrations of the increased possibilities of abuses and diminished consumer choice in the context of vertically-integrated consortia in the infrastructure and content industries.

Scope of Transparency

Transparency should be understood as a principle that protects all end-users, i.e. both consumers and businesses.

For end-users to be able to easily compare traffic management policies, two fundamental principles should be in place:

1. A two-layered approach to traffic management policies:
 - a first-layer that gives the plain language “traffic management for consumers” information that can be understood by non-technical users
 - a second layer that is much more detailed in order to allow business users, specialists and application/service/content providers to maximise their products for an efficient use of the network.

2. The possibility for users to compare apples with apples:
 - Traffic management information should be presented in a standardised format, to allow proper comparisons by users.
 - This seems to be the case in Hungary, and is frankly the only option if regulators want to create an effective form of transparency.

Such an approach would benefit from EU wide guidance.

Avoiding the dirt road effect

It is crucial also that whatever traffic management practices access operators are allowed to carry out, they do not create a “dirt road effect” for the Internet. For example, what percentage of the broadband pipe can be allocated to managed services as opposed to being kept for Internet access? This is not a case for a fixed mathematical equation. For example, proposing a 40%-60% split between managed services and Internet access can have very different meanings depending on the total capacity of the pipe². If a mobile operator offers a user a 1 Mbit/s data connection on their smartphone with a bundle of mobile TV, email and Internet access, but in practice allocates 90% of that bandwidth to mobile TV and only 10% to Internet access, their experience of the Internet on that network will be extremely limited, with probably slow download of websites and the impossibility to use a certain number of applications and services. The mobile network operators will have complied with transparency requirements by telling the user that their bundle included

² In other words, 60% of 1 Mbit/s or of 1 Gbit/s are extremely different realities in terms of the applications and services that can be accessed.



managed services and limited Internet, but his/her consumer experience, although transparent, will be disappointing. This issue is likely to require detailed and evolving guidance (due to technological evolutions) on a case-by-case basis (as not all networks are equal) by regulators, including setting minimum quality of service requirements for Internet access, as is now allowed under the Revised Universal Service Directive. We understand BEREC will consult separately on this issue and look forward to participating in that consultation process.

Conclusion

Though kgbdeals appreciates BEREC's effort into looking at transparency in the context of Net Neutrality, we consider now is the time to identify the key principles required to preserve the Open Internet in Europe.

From a general point of view, if no clear ex ante guidance is in place that reassures developers and producers of content that their services, applications and content will be available to all users wishing to access them, how will they find the investors willing to fund their inventions and creations? The Internet was built on the principle of "innovation without consent". Yet if every innovator, from even the smallest village of Scotland or Lithuania, has to negotiate SLAs with every access operator on earth wishing to leverage the "two-sided" market argument at them, then the innovation and business models epitomised by the "two guys in a garage" internet start-ups simply ends and the Internet will move to being dominated by only the largest companies with the most money.

kgbdeals considers that this balance could be found in the approach outlined by the French regulator ARCEP in its recent consultation on net neutrality. ARCEP proposes to allow access operators to differentiate between "Internet access"³ and "managed services"⁴.

This distinction would however need to be accompanied by a set of principles, some of which are part of the "directions" proposed by ARCEP:

1. The central principle should be that users should be the ones choosing which content, services and applications they access. ISPs acting as gatekeepers should not be allowed.
2. Internet access should be offered under the "best efforts" principle, in a net neutral and open manner.
3. Managed services could be offered under a Quality of Service SLA but they should always be offered on a non-discriminatory basis and under fair and reasonable terms. Broadband providers should not be permitted to leverage their control over broadband networks to extract "prioritization" fees from third party applications and content providers without

³ Defined by ARCEP as "a service that consists of providing the public with access to online communication services. This service provides the public with the ability to send and receive data by using the IP communication protocol, from all or virtually all points, designated by a public Internet address, from all of the interconnected public and private networks around the world that make up the Internet".

⁴ Defined by ARCEP as « services providing access to content/services/applications through electronic means, marketed by the network operator which guarantees certain specific features thanks to the process it uses on the network it owns and operates. Some of the classic features include reliability rate, minimal latency, jitter (variation in time between packets), guaranteed bandwidth, security level, etc."



proper scrutiny. There is a serious risk of creating a “Premium Rate Services” model on the Internet. Experience in the copper voice world shows that many abuses have occurred in the PRS sector over traditional voice. In some countries, this has required regulatory intervention to ensure access to third party services and reasonable access charges to be levied by operators. In other countries such as the UK, it has shown the limits of the regulatory framework and the difficulties for a regulator such as Ofcom to intervene against abusive behaviour by operators with bottleneck control of access. Similar services should be offered equivalent conditions, and regulators should ensure that even when offering a managed service under non-discriminatory terms, an integrated access provider does not offer unfair and/or unreasonable terms, knowing that its own affiliate might be paying those terms as a left pocket / right pocket operation, whilst all competitors suffer from it.

4. Labelling a service as “something other than the Internet” (3G, high quality services, etc) should only be deemed to be acceptable under certain conditions, otherwise this approach can be misused to bypass regulations via marketing (e.g. calling something a “managed service” to escape obligations of openness choice delivery related to the “internet”).
5. The balance between the bandwidth reserved for “Internet access” and the capacity allocated to “managed services” should not lead to a “dirt road” effect for the Internet.