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Answer to BEREC's consultation about the draft report on IP-Interconnection practices in the context of Net-Neutrality

Fédération FDN

July 7, 2017

1 Introduction

This document responds to the consultation issued by BEREC about the draft report on IP-Interconnection practices in the context of Net Neutrality.

All the document will be published on the Federation's website, and is not subject to secrecy.

The "Fédération des fournisseurs d'accès à Internet associatifs" (Federation of the non-profit Internet access providers), also known as "Fédération FDN¹", gathers almost 30 non-profit Internet access providers, mostly in France, under its banner.

Each of these Internet access providers (IAP) is managed by its subscribers and is value-centered: access is provided by non-profit associations, that care first for the fundamental rights of their members and subscribers. Each member IAP is also declared as an operator to the relevant NRA. Our operators are established in France, including overseas, except for one that is established in Belgium.

The Federation itself is user-powered, all the actions being handled by volunteers, including the response to this consultation. Our organisations are old (in comparison to the history of the Internet), so our volunteers have a good knowledge of the telecom market in France and Europe, as they have been working on these topics for many years. In France, despite the fact that the volunteers of Fédération FDN have a lack of time and funding to attend all events in Europe and to develop their advocacy activities, their positions on matters like net neutrality are considered well-argued and have an influence on policy-making.

¹In reference to FDN, "French Data Network", a non-profit Internet access provider founded in 1992, which is the oldest Internet access provider still operating in France, and is the origin of our Federation.

2 The lack of a political vision

One of the most striking elements about this report is the lack of political vision of BEREC, notably showed by the fact that the regulator addresses each interconnection problem individually instead of addressing them as a whole with a systemic approach. Since the cases are addressed separately, the regulator is reducing its vision to each particular case instead of embracing all the cases in the same logic.

BEREC and NRAs **must** think like a customer of an Internet Access Service (IAS): what do the citizens want? What is the impact of technical or commercial practices on users' rights? The proportion of disputes ("disputes concern less than 1 % of all IP interconnection agreements") is not significant. However, the crucial point is that each commercial dispute impacts heavily the rights of users, rights that are guaranteed by the Regulation 2015/2120. Each dispute impacts millions of citizens. Additionally, disputes may have long-term impacts on other markets. For example, if Orange provides a very weak throughput to Youtube, people will use Dailymotion (which is known to be partly owned by Orange), and the online video market will therefore be disrupted by an IAP. In the same way, this is a big threat for newcomers because they do not have enough visibility and knowledge of the situation to protect themselves from bigger actors on the market.

3 About monitoring

We **strongly disagree** with the general approach chosen by BEREC. NRAs **must** closely monitor IP interconnection practices and be strong when they decide whether regulatory intervention is actually warranted, instead of just applying a careful approach. NRAs' purpose, as independant regulatory authorities, is to monitor the IAPs and impose remedies, including penalties when necessary. Their purpose is not to remain kind with them. NRAs must exhibit and regulate the abuses by operators and not hide or minimize them. We thus recommend a strong and fast ex-post regulation: as soon as a discriminating interconnection problem occurs, the relevant NRA must consider the situation as soon as possible.

Each IAP **must** maintain and make its network grow, including its interconnections with other networks, in accordance to its size (customer count). Nevertheless, an IAP providing IAS must not beg for a higher price for an interconnection with asymmetrical throughput, because its role is to connect users to the whole Internet, and not to the parts of it that generate the biggest revenue. Some interconnections are highly profitable, and some others are not. It is IAP's duty to cope with this fact. The value of an IAP is not the amount of eyeballs it can sell to a Content or Application Provider (CAP), but the quality of its network. It has to provide an access to the whole Internet, without discrimination.

NRAs must permanently collect technical and financial data about IP interconnections like ARCEP does. The discrimination attempts by IAPs can thus be immediately visible to NRAs, in order to discourage ISPs from having a *visible* bad behavior.

This monitoring of interconnections shall be done but only with aggregated data. This point is very important to ensure that the monitoring is compliant with fundamental rights such as privacy. In March, during the stakeholder meeting, we warned the BEREC about the risks of monitoring the network of the end-user.

4 About methodology

The report is also interesting because it sheds light on the way information is gathered from the different NRAs. It gives useful insights from different authorities, while showing the differences between the methodologies and approaches chosen across Europe by the various regulators.

It is obvious that it would make no sense to analyse the different markets with exactly the same tools or methods. Still, the differences between the methodologies presented here from one structure to another gives room for thinking. Whereas ACM is able to say "The report methodology included the analysis of existing cases, theories of harm, interviews with stakeholders, evaluate market circumstances and input from interviews to assess the likelihood of competition problems." (which could be even more precise), other authorities leave the reader only with a blurry idea of what were the tools employed.

We noticed in this report that BEREC made a great care of the research in its field to argue, this is a **good** point. But, as in research, it is important here to also have a strong methodology and to present it, even briefly, in the text: the context of the production of the data is *important*. For example, the French NRA, ARCEP, collects data directly from ISPs with forms and questionnaires that are filled by the relevant services. Data collected from ISPs this way have an obvious bias that is known by ARCEP but not exposed in the report: ISP tend to be reluctant in sharing the data that bother them. This seems obvious, but mentioning the bias of the chosen methods in the text tells the reader that the Regulator knows this bias and took it into account in the analysis.

Also, putting in the same report data that were not produced the same way across NRAs may bias the analysis if the methods are not mentioned, because the reader is not able to take into account the context when comparing the data.

Finally, we think that NRAs must share their regulation experiences and monitoring methodologies: this will spread the good measures and methods; and allow BEREC and the NRAs to apply the Regulation in a uniform way throughout the European Union.

5 From on-net CDNs to IXPs

The on-net CDNs or cache servers are a **strong problem** for fair competition: is every CAP able to get the authorisation to install its equipments inside each ISP's network? Is a newcomer on this market able to have the financial power to do this? Obviously, no.

From the user's point of view, newcomer's services will be slower than well established services. NRAs **should** study these potential infringements to users' rights and limit this practice in favor to Internet eXchange Points (IXP) and free peering.

We strongly approve ITU-T's recommendations about promoting local IXPs: non-profit local IXPs and free peering are the **only** interconnection forms that allow any newcomer to exist and grow on the market. This model has permitted the growth and success of the Internet. BEREC and NRAs **should** promote IXPs and free peering as background actions preventing later commercial disputes.

6 Conclusion

So, if the report is well documented, we would like to stress that the analysis lacks a political vision of the interconnection matter, especially from the end-user point of view. This point of view also puts in light what is at stake: the possibility for newcomers in the market to provide access to all the services their customers ask for, and, this way, more generally, the citizen's rights.

Though, the report shows that we already know the tools to regulate most of the problems: monitoring and investigation. Given what is at stake, we encourage the BEREC to be vigilant and firm towards ISP's bad practices when necessary.