



The Consumer Voice in Europe

# **BEREC report on differentiation practices and related competition issues in the scope of Net Neutrality**

## **BEUC statement**

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## **Introduction**

Net neutrality is one of the fundamental principles of the internet, which has allowed it to significantly enhance citizens' participation in society, access to knowledge and diversity, while promoting innovation, economic growth and democratic participation.

Defining net neutrality is of key importance in order to understand which underlying principles should be protected. From the consumer perspective, net neutrality is the principle that all electronic communication passing through a network is treated equally, independent of content, application, service, device, source or target.

In a neutral network, consumers<sup>1</sup> are entitled to:

1. An internet connection of the speed and reliability advertised to them.
2. An internet connection which enables them to:
  - a. Send and receive content of their choice;
  - b. Use services and run applications of their choice;
  - c. Connect hardware and use software of their choice which do not harm the network;
  - d. Use any communication method to reach any destination from any point on the internet without restrictions.
3. An internet connection which is free from discrimination as to the type of application, service or content.
4. Competition between network, application, service and content providers.
5. Know which network and traffic management practices are deployed by network providers.

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<sup>1</sup> 'Resolution on network neutrality', Transatlantic Consumer Dialogue, April 2010.

Consumers rely on Internet Service Providers (ISPs) and telecoms operators to access this wealth of resources and applications. They expect ISPs to comply with the fundamental principles of openness, inter-operability and neutrality which constitute the foundations of the internet's architecture. They expect their internet connection to allow them to access any content they choose, from any point on the network.

Nevertheless, various parties, such as network operators providing end-user connections, challenge the neutral architecture of the internet when they undertake certain discriminatory activities, thereby also undermining users' rights. The European Union missed the opportunity to safeguard the neutrality of the internet in Europe during the revision of telecoms rules in 2009. By recognising the possibility for network providers to engage in traffic management as a default rule, the EU has opened the door to unfair and discriminatory traffic control of the internet.

The extent of the problem related to infringements of net neutrality by telecoms operators is accurately disclosed in BEREC's fact-finding exercise undertaken in early 2012<sup>2</sup>. For instance, BEREC's findings show, that one in every two Europeans may not have the option to use Voice over Internet Protocol (VoIP) services on their mobile broadband service; that two in three Europeans may be subject to illegitimate discrimination of their internet connection due to their ISP's commercial decision to focus resources on specialised services; or that many ISPs are prioritising specific content as a general practice and especially during peak times.

BEUC believes that specialised or managed services cannot be confused with Internet Access Services (IAS) which offer a connection to the public internet. We are concerned that ISPs' decision to dedicate resources to specialised services is to the detriment of their Internet Access Services. Therefore, we strongly object to any activity related to an ISP's specialised service which influences the neutrality and Quality of Service (QoS) of an internet connection of an end-user.

### **Need for an EU legislative approach vis-à-vis net neutrality**

BEUC has been consistently supportive of a legislative approach to net neutrality. Given the divergence of implementation by Member States of the new Telecoms Package, BEUC is continuously calling upon the European Commission to undertake further legislative action to ensure net neutrality is enshrined in law and to guarantee consistent implementation across all Member States.

Otherwise, the risk of divergent rules across Europe is very high. This would be contrary to the objective of the Digital Single Market and the nature of the internet as a borderless environment. Europe cannot afford to miss a second chance to safeguard net neutrality to the detriment of freedom of expression, consumer choice, innovation and competition. When considering policies which might affect the neutrality of the internet, the interests of consumers and users need to be safeguarded.

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<sup>2</sup> "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe", BEREC BoR (12) 30, 29 May, 2012.

### **The crucial role for BEREC: need for more ambition**

Whereas the European Commission must assume its responsibilities and respond to the calls by the European Parliament<sup>3</sup>, the Economic and Social Committee<sup>4</sup>, citizens' rights groups and consumer associations across Europe for the adoption of legislation specifically protecting net neutrality, the role of BEREC is crucial in ensuring a coherent approach among national regulators. BEREC's work on four different aspects of net neutrality – Quality of Service, Transparency, Competition and IP Interconnection – represent steps in the right direction and are much welcomed. However, BEREC must be more ambitious in regard to the interpretation of key provisions of the Telecoms Package, gathering evidence of net neutrality interferences and on use of the powers conferred by the current legal framework.

In order to ensure legal certainty, it is of utmost importance that certain key concepts are well defined. These definitions, together with a clear list of consumer rights related to net neutrality and a set of prohibited discriminatory activities for telecoms operators, should be the backbone of any legal instrument adopted to protect net neutrality. Establishing clear, well-defined concepts such as what are 'legitimate traffic management measures' are important to ensure all implementation measures at Member State level are coherent and there is clear legal certainty for consumers across the EU.

### **The best effort approach needs to be safeguarded**

Until recently, best effort networks have adequately respected the neutrality of networks and hence ensured that consumers can enjoy fully neutral access services to the internet. Multiple techniques have been developed to tackle congestion problems without amounting to illegitimate differentiation of content, classification of traffic, throttling or blocking of high bandwidth demanding applications and services.

Furthermore, the separation of network and application layers that is characteristic of the best effort internet has allowed for great freedom to create relationships between Content and Application Providers (CAP) and Content and Application Users (CAU) without involving the network operator. BEUC agrees with BEREC that this model has helped spur the level of competition and innovation in content, applications and services. We also agree with BEREC that vertical integration (i.e. – the elimination of this separation of layers) gives an incentive to implement differentiation practices, allowing ISPs to reduce competitive pressure, to the detriment of consumers' ability to enjoy neutral access to the internet.

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<sup>3</sup> 'Resolution on the open Internet and net neutrality in Europe', European Parliament, 7 November, 2011.

<sup>4</sup> 'Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: The open internet and net neutrality in Europe'.

## **Competition is necessary, but in itself insufficient**

Competition in all layers of the internet is a necessary pre-condition to full consumer enjoyment of neutral access services. However, BEUC does not share BEREC's conclusions regarding the potential of competition law to alleviate the negative effects brought about by differentiation practices.

First, for competition law to intervene, the differentiation deployed by network providers must be the result of a breach of antitrust rules, such as with restrictive agreements or abuse of a dominant position, which may not always be the case.

Secondly, competition law relies on a narrow definition and interpretation of the relevant market. In the complex and fast changing ICT market it is difficult to define what the appropriate market<sup>5</sup> is.

Thirdly, it is questionable whether the criterion of 'Market Power' is appropriate - even an ISP with very little market power may profit by discriminating in favour of owned or affiliated content<sup>6</sup>. As pointed out by the Organisation for Economic Co-operation and Development (OECD), abusive behaviour by market players can occur in all types of markets, even those judged to be competitive and even in the absence of Significant Market Power of a single operator.<sup>7</sup>

Fourthly, competition law intervenes *ex post* once the anti-competitive behaviour has already taken place and the harm has occurred. Competition cases are costly and can take up to ten years to resolve and are therefore impossible to carry out for most of the European companies who exist on the internet given that 95% of European ICT firms are small and medium sized companies.

Furthermore, when competition infringements are confirmed, the consumers who are victims are not compensated. Hence it is of utmost importance that a binding legislative instrument is urgently adopted which would allow the victims of competition infringements to collectively claim compensation for the damages suffered.

## **Switching as a remedy is a myth**

For competition to be effective, it is essential that consumers are able to switch operators if they do not like the way a certain provider manages network traffic. According to BEREC's analysis, consumers' ability to switch between operators can alleviate the negative effects of discriminatory practices deployed by ISPs.

However, switching is often not easy; either because of the significant costs involved or due to contractual restrictions (as is the case with bundled services). Switching costs include contract cancellation fees, costs related to the setting up of the new

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<sup>5</sup> See also Ofcom's discussion document on Traffic Management and Net Neutrality, June 2010.

<sup>6</sup> 'Towards an Economic Framework for Network Neutrality Regulation', Journal on Telecommunications and High Technology Law, Vol. 5, pp. 329-391, 2007, Barbara van Schewick.

<sup>7</sup> OECD Paper on 'Internet Traffic Prioritisation: an Overview' April 2007, DSTI/ICCP/TISP(2006)4/FINAL, p.28.

network and installation costs, as well as those related to informing third parties of the new contractual information. Our Belgian member organisation Test-Achats receives numerous complaints about internet switches, which can take up to several weeks, while the lack of offers further hinders switching.

Switching may not be possible for customers who are confronted with a limited choice of available operators in a specific geographic area.

Switching also presupposes that there is sufficient information available for consumers to make well-informed choices in order to switch to a better deal. As has been recognised by BEREC and highlighted by BEUC in our responses to the public consultations on BEREC's draft Transparency Guidelines<sup>8</sup> and 'Guidelines for Quality of Service in the Scope of Net Neutrality'<sup>9</sup>, information disclosure related to net neutrality is largely insufficient or non-existent at the moment.

The European Commission's 2011 Consumer Scoreboard<sup>10</sup> shows that 80% of consumers have not switched internet providers, proving yet again that consumer switching in the telecoms market remains very low. Compounding matters, of the remaining 20%, only 10% have switched to a different operator, with the remaining 10% switched services within the same operator. The latter would never solve a problem of discriminatory differentiation if all the ISPs engage in the same kind of practices.

Last but not least, of the consumers who switched in 2011, only 50% found the switching process to be easy.

### **Content discrimination will change the internet forever**

The emerging trend of many Internet Service Providers displaying their intention to charge content providers for the delivery of their material across the ISP's network is one which provokes serious concern. We cannot see the merits of such practices, in particular because no evidence exists that increased contributions from content providers will lower retail prices for internet access services.

By way of example, in February 2010 the CEO of Telefónica stated that his company intended to charge search engines for the use of their network, adding that Telefónica will also seek to push its own content<sup>11</sup>. Telefónica also stated that it intended to end flat tariffs for mobile internet on the basis of alleged saturation of networks and would adopt a traffic management policy based on prioritisation of specific services<sup>12</sup>.

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<sup>8</sup> BEUC response to the public consultation on BEREC draft guidelines on Net Neutrality and Transparency, X/2011/114 - <http://docshare.beuc.org/Common/GetFile.asp?ID=42096&mfd=off>

<sup>9</sup> BEUC response to the public consultation on BEREC Guidelines for Quality of Service in the Scope of Net Neutrality, X/2012/60 - <http://docshare.beuc.org/Common/GetFile.asp?ID=42096&mfd=off>

<sup>10</sup> European Commission's 2011 Consumer Scoreboard, pp 15-16

[http://ec.europa.eu/consumers/consumer\\_research/editions/docs/6th\\_edition\\_scoreboard\\_en.pdf](http://ec.europa.eu/consumers/consumer_research/editions/docs/6th_edition_scoreboard_en.pdf)

<sup>11</sup> <http://www.eitb.com/news/technology/detail/350113/spanish-telefonica-to-charge-google-yahoo-bing/>

<sup>12</sup> <http://www.adslzone.net/article4483-telefonica-contra-la-neutralidad-de-la-red-no-se-eliminarian-las-tarifas-planas-pero-se-priorizara-la-red.html>

Charging content and application providers for the delivery of their content will simply put many individuals and small and medium size enterprises out of business. If they have to compete with large multinationals in order to get a decent amount of bandwidth assigned to their content, it is just a matter of time before all traffic ends up being redirected to the large commercial hubs, thus destroying the innovative, open and neutral fundamentals of the internet as we know it.

Vertical integration between the provision of infrastructure and content also raises a similar concern. When a single provider offers different infrastructure and content services, it is often done on the basis of different contracts and includes varying equipment linked to each of the services. This multiplicity of associated elements to the combined services significantly complicates the possibility for consumers to switch providers if they are dissatisfied.

### **The impact of discriminatory practices**

BEUC strongly disagrees with BEREC's position that discriminatory practices may have a positive impact and potentially can be justified on the grounds they could help operators increase their revenues and invest in network capacity. From a legal point of view, discrimination according to the type of content, service or application causes harm to consumers' welfare, unless it is justified on legal or technical grounds.

- **Discrimination hampers innovation**

Until only recently, the internet's model was based on non-discrimination and any content, application or service could be put online without needing to ask operators or anyone else for permission. This model has allowed innovative content and applications to be developed and disseminated across the internet, thereby also opening a whole new world of possibilities for SMEs and consumers. This virtuous cycle of online innovation has in turn generated constant consumer demand for more and better internet access services. Altering these fundamentals will have serious negative consequences. Any new model which breaks this virtuous cycle will hamper innovation and dissuade the millions of content and application providers who innovate every day thanks to the possibilities offered by the open internet.

If European ISPs continue to block and hinder activities on their networks in a discriminatory manner this will inevitably signal to the world that being innovative online in Europe is just short of impossible.

- **Discrimination reduces cultural diversity**

If network operators act as content gatekeepers there are serious risks regarding information pluralism and cultural diversity on the internet. The creation of a "fast lane" on the internet would allow the few biggest and wealthiest content providers, the majority of which are not European companies, to dominate the internet. In such a scenario, the impact on cultural diversity would be dramatic. The Audiovisual Media

Services Directive<sup>13</sup> explicitly requires Member States to ensure that not only television broadcasters, but also on-demand audiovisual media services promote European works. In addition, recital 5 of the Framework Directive<sup>14</sup> explicitly recognises the need to consider media pluralism and cultural diversity.

### **Peer-to-Peer cannot be discriminated against**

Peer-to-peer (P2P) is a revolutionary technology which has allowed consumers, business, academics and many others to share data with an unprecedented degree of efficiency. Blocking P2P ports or using Deep Packet Inspection to analyse the traffic of individuals to detect specific software and block this traffic is simply against the most fundamental aspects of net neutrality.

BEUC agrees with BEREC that the challenge for ISPs is the total traffic growth and not the P2P protocol or related applications in themselves. Therefore they should never apply restrictions against P2P. On the contrary, P2P should be protected and any necessary network traffic management should always be 'application agnostic' and therefore never discriminate against specific protocols such as P2P.

### **Voice over IP (VoIP) needs to be strongly protected, not blocked**

Voice over Internet Protocol represents a very important technological evolution in communications technologies. Unsurprisingly, traditional telecom operators are worried that it can hamper their revenues from traditional voice calls. BEUC strongly opposes any argumentation in this direction that aims at justifying the blocking of a new technology which gives consumers an easy, affordable way of communicating with each other.

It is also important to highlight that what BEREC describes as a "hypothetical" situation in which a mobile network operator or mobile virtual network operator blocks the use of VoIP applications is actually a reality today in many European countries. This is clearly highlighted by the BEREC fact-finding exercise.<sup>15</sup>

### **Deep Packet Inspection invades privacy**

Although BEREC's report does not deal with privacy issues, it is important to highlight that the use of Deep Packet Inspection techniques raise serious privacy concerns, given that they contravene the fundamental right to the confidentiality of communications.<sup>16</sup>

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<sup>13</sup> Directive 2010/13/ of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

<sup>14</sup> Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services

<sup>15</sup> 'A view of traffic management and other practices resulting in restrictions to the open internet in Europe', BEREC BoR (12) 30, 29 May, 2012.

<sup>16</sup> Article 8 of the European Convention on Human Rights.

The argument put forward by operators that DPI technology is necessary to prevent network congestion and ensure equitable network distribution to all their customers fails to respond to net neutrality concerns. It also overlooks the real problem which is the need for operators to invest in bandwidth capacity and higher quality networks rather than in the control of data transferred through their pipes. Furthermore, DPI technology may be used for tracking the online behaviour of users and profiling, thus allowing for additional revenues from advertising.

### **Need for urgent action**

We do not share BEREC's view in its draft report that empirical data on different traffic delivery conditions offered by network providers to content and application providers remains low. BEREC has taken the view that the likelihood of a "two-speed" internet is largely unclear, as most content and applications benefit from a best effort delivery on the operator's network. As we have stated above, the risk of differentiation practices which will endanger the best effort model is very high and already exists to a large extent across European telecom markets. The problem is particularly relevant in instances of vertical integration of content and broadband services.

Therefore we strongly urge BEREC to use all its regulatory powers to restore net neutrality in Europe using all instruments at its disposal. To this end, we welcome the four angles it is working on: Quality of Service, Transparency, Competition and IP interconnection. It is very important to restore net neutrality and protect it as much as possible from future violations by using regulatory action, but as is stated above, this will remain insufficient.

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