

Network Neutrality

BEREC consultation on draft guidelines on Net Neutrality and Transparency

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Summary

BEUC supports a **regulatory approach regarding net neutrality** in order to ensure that consumers:

1. Are entitled to an Internet connection of the speed and reliability advertised to them.
2. Are entitled to an Internet connection that 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. Are entitled to an Internet connection that is free from discrimination with regards to the type of application, service or content.
4. Are entitled to competition among network, application, service, and content providers.
5. Are entitled to know which network and traffic management practices are deployed by their network providers.

BEUC welcomes BEREC's initiative to develop transparency guidelines. For transparency to be effective, a number of conditions must be met. In particular:

- Internet Service Providers must disclose the information that enables consumers to know precisely what type of service they are contracting, what the limitations to the service are, and clearly explain what the implications of these limitations are.
- The information disclosed to consumers needs to be presented in the most understandable, user-friendly way, be up to date and accurate.

National Regulatory Authorities shall monitor that these criteria are met, and develop comparison tools for consumers to find easier ways to choose between providers.

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 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:

1. Are entitled to an Internet connection of the speed and reliability advertised to them.
2. Are entitled to an Internet connection that 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 method¹ to reach any destination from any point on the Internet without restrictions.
3. Are entitled to an Internet connection that is free from discrimination on type of application, service or content.
4. Are entitled to competition between network, application, service and content providers.
5. Are entitled to know which network and traffic management practices are deployed by network providers².

Consumers rely on Internet Service Providers (ISPs) and telecom operators to access this wealth of resources and applications. They expect Internet Service Providers to comply with the fundamental principles of openness, inter-operability and neutrality which constitute the founding of the Internet architecture.

Nevertheless, various parties, such as network operators providing end-user connections, challenge the neutral architecture of the Internet when they undertake certain discriminatory activities, undermining users' rights. The European Union has missed the opportunity to safeguard net neutrality as a fundamental regulatory principle during the revision of telecom 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 potentially unfair and discriminatory traffic control of the Internet. The adoption of transparency and information disclosure requirements cannot be the sole remedy, especially in a market where there are few market players, and barriers to switching and infrastructure impediments to new entrants seriously hamper competition.

¹ "Communication method" herein discussed in a wide definition sense to refer to any tele-communicative protocol, port or technology to transfer data over the Internet.

² Transatlantic Consumer Dialogue (TACD) Resolution on Net Neutrality, April 2010.

Need for an EU regulatory approach vis-à-vis Net Neutrality

BEUC has been consistently supporting a regulatory approach vis-à-vis net neutrality. Given the ongoing implementation by Member States of the new Telecoms package, BEUC is continuously calling upon the European Commission to undertake further regulatory action to ensure net neutrality as a fundamental regulatory principle and guarantee consistent implementation across all Member States.

Otherwise, the risk of divergent rules across Europe is very high. This is 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.

Whereas the European Commission must assume its responsibilities and respond to the call by the European Parliament, the Economic and Social Committee and the numerous stakeholders for the adoption of legislation specifically protecting net neutrality, the role of BEREC is crucial in ensuring coherence in the approach to be adopted by national regulators. The launch of the current consultation on transparency and net neutrality is a positive step in this direction. However, BEREC must be more ambitious, both with regards to the interpretation of key provisions of the Telecoms Package and the gathering of evidence on net neutrality interferences.

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

I. Transparency is insufficient

The new rules outlined in the Telecoms Package strengthen the information obligations which electronic communications operators must comply with in their service contracts, including changes to conditions after the conclusion of the contract.

These rules establish the default possibility for ISPs to adopt traffic management measures, as long as they are notified to consumers³. Operators are allowed to use procedures to measure and shape traffic on their networks in order to avoid congestion and poor performance in the provision of their services⁴.

³ Article 20.1.b.2 amended Universal Service Directive 2002/22/EC stipulates that consumers will receive "information on any other conditions limiting access to and/or use of services and applications, where such conditions are permitted under national law in accordance with Community law". Article 21.3.c stipulates that consumers will receive information about "any change to conditions limiting access to and/or use of services and applications, where such conditions are permitted under national law in accordance with Community law".

⁴ Recital 34 of the revised Universal Service Directive 2002/22/EC.

However, we agree with BEREC and consider these transparency obligation provisions inadequate and insufficient to afford a fully-fledged protection of the principle of net neutrality. There are four key factors that demonstrate the inadequacy of the current approach.

a. Net Neutrality interferences already occur in Europe

Infringements of the net neutrality principle can occur in various forms. Reported cases include where network operators have used their power as regards the control of traffic to: block access to specific content, services or applications being transmitted over their networks; prioritise their own services at the expense of their competitors; restrict the use of certain applications; or charge online service providers a premium to guarantee fast delivery of their content. For further explanatory comments on the different types of net neutrality infringements, please refer to our response to the European Commission's consultation on net neutrality.⁵

b. Remaining barriers to switching

The limitations of a transparency-based approach are also demonstrated by the significant barriers consumers face when switching between providers. Switching between operators is not easy for consumers. Typical switching barriers faced by consumers include contract cancellation fees, costs for setting up the new network in case of bundled services (e.g. software, equipment, installation costs), and time costs associated with informing third parties about new contact details (telephone number/and or email address). This is also confirmed by the recently published Consumer Scoreboard, according to which one of the most difficult markets for consumers to switch operators is the ISP market⁶.

Therefore, providing consumers with clear and transparent information will not empower them to become proactive market players who can find and switch to the offer which best suits their needs.

c. Lack of competition and choice

In addition to difficult switching, it may occur that all operators in a Member State impose restrictions - contractual, technical or financial - on the use of specific services such as Voice over Internet Protocol (VoIP) services over their mobile data networks. In such instances, consumers are left with no choice.

Another scenario that may arise is that ISPs may adopt intra-industry codes focusing exclusively on transparency requirements, thus allowing them to agree to perform the same traffic management measures. This is detrimental to consumers as it reduces their choice with regard to the type of service they get from different ISPs. This is already the case in the United Kingdom⁷, where, as the sole remedy, ISPs have drawn up a transparency code to disclose the traffic management measures they adopt, the result being that most of them slow down traffic during peak times. Consumer choice is even more limited for those living in areas where the number of broadband providers is fewer.

⁵ BEUC response to the European Commission's consultation on Network Neutrality, Ref.: X/070/2010 - 30/09/10 pp 4-5.

⁶ <http://docshare.beuc.org/Common/GetFile.asp?ID=30369&mfd=off&LogonName=GuestEN>
6th Edition of the Consumer Market Scoreboard, 21 October 2011

⁷ http://ec.europa.eu/consumers/consumer_research/editions/docs/6th_edition_scoreboard_en.pdf
<http://www.broadbanduk.org/content/view/479/7/>

As regards the use of EU competition rules to sanction net neutrality interferences, BEUC recognises that these could be helpful. Nevertheless, the application of EU competition rules only allow for *ex post* intervention, thus failing to prevent interferences which act to the detriment of competitors and end-users. In addition, although competition law can be used to deal with the situation in which a dominant undertaking blocks or degrades data traffic from a specific content provider in order to favour an affiliated content provider, it is less clear whether it will apply when an entire class of data, such as VoIP traffic, is blocked or degraded⁸. Furthermore, competition law takes effect in cases where a company is proven to have abused its significant market power and relies on a narrow definition and interpretation of the relevant market in which such power arises. However, in the complex and fast evolving ICT market, it is difficult to define the appropriate market.

d. Key provisions of the Telecoms Package remain undefined

As highlighted above, defining key concepts is of utmost importance, and these definitions should be the backbone of any legal instrument adopted in the future to protect net neutrality.

The establishment of clear, well-defined concepts like *legitimate traffic management measure* is important to ensure that all implementation measures at Member State level are fully harmonised and that there is clear legal certainty for consumers across the EU. BEUC is concerned that the provisions contained in the Telecom package which allow access providers to undertake traffic management measures at their own discretion, could be paving the way for net neutrality infringements disguised as necessary traffic management. It is therefore of utmost importance that clear regulation is adopted outlining what traffic management measures are legitimate and which ones are in violation of net neutrality.

II. What role for transparency with regard to net neutrality?

As a matter of principle, consumers are entitled to receive clear, precise, complete and accurate information on the ISP's policies and procedures on network management and how these affect access to particular content, services, applications, or the ability to attach particular devices.

Consumers must be informed about the technical properties of their Internet access, so that they can know the resources that have been assigned to them and the performance they can expect under normal conditions. Information should also be provided on the way in which Internet access potentially shares available connectivity resources with other services, particularly when it comes to bundled broadband services, where it must be specified how the use of television affects the quality of the Internet connection. Contracts must also stipulate the specific technical characteristics that may be necessary for the provision of particular types of services.

⁸ EU study, Legal Analysis of a Single Market for the Information Society- New Rules for a New Age?, prepared by DLA Piper, October 2009.

1. Fundamental principles of an effective net neutrality transparency policy

BEUC agrees in principle with the analysis provided by BEREC in the draft guidelines regarding the principles that a fully effective transparency policy must comply with, but some caveats need to be pointed out:

- **Accessibility**

Information should be easily found and identified, while the channels and technologies used for delivery should be diverse and familiar to consumers, reducing the time and number of clicks it takes for an average consumer to find the relevant information. The means for delivery must also include paper versions to ensure that consumers who cannot access the Internet are able to access the necessary information.

A practical approach on this could be the design of a special **“What are the characteristics of this connection?”** button placed on a visible, easily-accessible part of the access providers' homepage. This button, once clicked on, would display information about the particular access point relevant to the consumer. The access provider should be able to uniquely identify the customer that is requesting information about their own connection to the Internet and therefore display the relevant information to them without requiring any further step from their side. A similar approach would mean consumers do not have to log-in to their operator's website, always an extra, cumbersome step that may discourage consumers to go check their connection's details. Logging in to the operator's website would therefore only be necessary when consumers wish to access their connection's characteristics from a different location, using a different access point.

NRAs should ensure that access providers use the most consumer-friendly channels to communicate information concerning the characteristics of consumers' Internet access.

- **Understandability**

Information must be understandable by non-tech savvy consumers. This means that complex technical concepts must be explained in a sufficiently understandable manner. Adding explanatory graphics or videos to technical concepts would surely help consumers better understand what is being described on each point. Clear design and layout techniques should be used to supply information. The consumer should also be able to access this information from any type of device using the same access point they want to enquire about.

- **Meaningfulness**

The information provided to consumers must be the relevant, unambiguous and presented in an accessible way. To this extent, the information should be properly categorized and well explained. For example, information concerning the quality of the service consumers are receiving should be regrouped in one category, so that consumers are well informed about the Quality of Service they can expect. The restrictions to their connectivity should also be clear and grouped, giving a full, transparent picture of what kind of connection consumers are paying for. In addition, the information provided should be linked to the quality of experience, with practical examples to help them understand its implications. For example: 10 GB would enable unlimited surfing, sending/receiving 600 emails, 5 hours of streaming, and so on. The information summary box should be presented in plain language with the least possible amount of technical jargon.

- **Comparability**

The information presented to consumers must be easily comparable with that of other access providers. In order to do so, NRAs should encourage access providers to use the same structure and categorization methodology when presenting the relevant information to consumers. The information should include a number of key elements that are presented below.

Our Danish member gives the example of the internet-based comparison tool run by the Danish regulator to compare offers in terms of both price and quality of service. The “Teleguide” established by the Danish regulator is a prime example of how it can be done authoritatively, effectively and at little cost⁹.

For efficient comparability to be ensured, BEUC believes it should be mandatory that NRAs develop and maintain their own price and offer comparison websites, as this is the best way to ensure consumers receive accurate and relevant information, thus protecting them from situations of legal uncertainty or intentional misinformation.

In parallel, NRAs shall still provide guidance in industry-driven initiatives. In cases where it is up for third parties to develop price comparison websites, NRAs should use accreditation schemes in order to drive standards up and ensure that these comparison services give consumers access to impartial, up to date and accurate information.

- **Accuracy**

As mentioned above, the information provided to consumers needs to be accurate and up-to-date. Providing accurate information will enhance consumer trust in the service provided, and will enable consumers to make well-informed decisions about what access package best suits their need. The information provided must be appropriately monitored, and measures to correct misinformation situations should be enforced.

- **Verification**

NRAs must support development of a credible and independent mechanism that would assess and monitor ISPs traffic management practices to ensure that information provided to consumers and any third parties is accurate and robust.

To that extent, it is important to encourage the development of technical tools that will empower consumers to verify the parameters of the services they are contracting. For example, in the United States, the Federal Trade Commission has recently placed significant emphasis¹⁰ on the importance of free software tools to help consumers monitor and detect blocking and discriminatory practices.

- **Sanctions and redress**

NRAs should also establish sanctions for ISPs that provide misleading information to consumers alongside appropriate redress systems. The right to cancel the contract is not sufficient enough in cases where consumers encounter connections or equipment costs for which they may not be compensated or consumers have no choice of alternative providers but instead experience frequent service disruptions.

⁹ For more information, please visit - <http://www.it-borger.dk/verktøjer/teleguide>

¹⁰ Federal Trade Commission, Final Rule Vol. 76. No. 185, September 23 2011.

2. The right amount and kind of information, at every stage

In order for consumers to be empowered to make well-informed decisions about what is best for them, the information provided by operators and NRAs should always comply with the five aforementioned elements.

Regarding how general or specific the information should be to consumers, BEUC believes that what is crucially important is that the information is understandable and helpful to consumers in their real-life experience. In that sense, general information about average speeds and services offered may be interesting for some consumers. Nevertheless, what is considered of utmost importance is that specific information about the service they have contracted is accurate and reflects the reality of the experience they can expect.

In this respect, before the contract is concluded consumers need to be informed of:

- traffic management practices, the reasons and the circumstances that might justify their introduction, as well as the type of traffic to be affected and the impact on their Internet experience, including in terms of speed;
- the real connection speeds they can expect, regarding to both the download and upload streams;
- the capacity and quality of the Internet connection;
- the application of a minimum quality of service for applications and services;
- pricing information for conditions to the volumes of use, such as monthly bit caps limits and the costs for exceeding them;
- the reliability of their connection, easily explaining what types and frequencies of reduced or faulty connectivity they can expect;
- real-time information about their consumption and notification when close to exceeding the cap;
- any change in the operator's traffic management policies and the impact on consumers' experience;
- what they should do when their connectivity is reduced or halted;
- contact details for technical support;
- information regarding means of redress, including independent alternative dispute resolution (ADR) bodies as well as internal complaint handling schemes;
- contact details of the regulatory authorities.

Any change to the agreed conditions should be communicated to the consumer and should comply with the legislation on consumer protection, namely the Unfair Contract Terms Directive.

3. Direct Vs Indirect approach

A direct approach to providing transparent, relevant information to consumers is already mandated by the Telecom package, which establishes the obligation for electronic communications providers to disclose the appropriate information for consumers about the services they are contracting. BEUC believes for a direct approach to be effective, NRAs should provide clear guidance to providers on the types of information to be displayed, the means and channels of display, while enforcing compliance and providing efficient verification mechanisms.

An indirect approach, where information disclosure occurs through third parties too, is strongly encouraged, and as mentioned before, should be undertaken by NRAs. However, this should not occur at the detriment of the direct approach to information provision by providers.

4. Definition of “problematic traffic management” measures

As stated in the introduction, BEUC believes there is a need for a clear, harmonized definition of *legitimate traffic management measure*. Should the concept of *problematic traffic management measure* be introduced by these guidelines, BEUC believes it is necessary that it be properly defined beforehand. Defining what traffic management measures could be problematic for consumers cannot be done by the industry stakeholders but should be defined by NRAs.

It should be for the National Regulatory Authorities to provide certainty as to definitions following consultation with all relevant stakeholders, including industry, consumer associations and other civil society organizations. It is important that the provisions established therein are mandatory, and that NRAs would be responsible for monitoring potential deviations from the agreed definition and enforce the provisions when deviations occur.

III. Contents of a net neutrality transparency policy

BEUC shares the analysis by BEREC that the current provisions of the Universal Services Directive which include the minimum elements of information to be provided to consumers in the contract with the provider, are not specific enough and fail to reflect the different parameters that should be part of a comprehensive transparency policy. It is important that this information is provided to the consumer through different channels and at all stages.

1. General scope and content of the offer

- **Availability of services**

BEUC shares the concern that informing consumers about all possible uses might be too complex. To this end, we agree that the focus should be on uses that are not permitted and on possible limitations. However, it must be born in mind that the provision of information is a key component of consumers' expectations. As regards the change of contractual terms, full compliance with consumer acquis and the Unfair Contract Terms Directive¹¹ must be ensured.

As regards the development of a common frame of reference that encompasses the different elements of “Internet access”, BEUC considers it as a useful proposal. However, a number of questions remain to be solved, including the process for the development of such frames of reference, the institutional framework and its enforcement. In any case, it is important not to entrust this task to industry. It should be the competence of NRAs and developed through consultation with industry, consumer associations and civil society groups.

- **Terminology**

The terminology used by access providers and ISPs in their transparency policies should be consistent across national markets, while efforts need to be undertaken towards further convergence at EU level. BEUC considers that NRAs have an important role to play within the framework of BEREC.

¹¹ Directive 93/13 on Unfair Contract Terms.

- **Advertised/headline speed**

Advertised speeds should include both download and upload maximum or average speeds. Consumers need to be told a) what headline speed means and why this is not necessarily their actual speed and b) in what cases can they expect what speed to be delivered. Full compliance with the Unfair Commercial Practices Directive¹² needs to be ensured.

- **Actual speed**

Consumers need to receive all the necessary information to make an informed choice, including when and under what conditions their actual speed will be different from the advertised speed. They also need to have a clear idea of what actual speeds they can expect. BEUC agrees the information can relate to peak hours or to the average speed delivered over a 24-hour period, but this needs to be clearly disclosed and explained to the consumer.

- **Quality of Service**

It is of paramount importance that specific requirements as to the information that should be delivered by access providers are defined so that consumers are able to accurately assess the quality and reliability of their Internet connections. Besides there not being an agreed definition of QoS, which we believe is of utmost importance, once again, it is for competent authorities to monitor that QoS standards are fulfilled. In case of persistent gaps between the contractually agreed speed and the actual delivery speed, this should amount to non-fulfilment of contractual obligations, thus allowing consumers to cancel the contract without incurring a fee and seek redress to obtain adequate compensation where appropriate. The role of NRAs in monitoring compliance with QoS standards and ensuring effective enforcement is crucial.

- **Quality of Experience**

In addition to quality of service, consumers must be provided with “real-life experience” information enabling them to understand concretely what they can do with their connection. To this end, the suggestion of BEREC to encourage the development of colour coding systems is worth exploring. However, such schemes need to be clearly complemented with explanatory statements that help consumers quickly understand what exactly is contained in the offer. To take as an example, there will be many consumers that will not understand acronyms such as P2P, HD, SD or VPN. NRAs, with BEREC’s guidance, should lead the efforts to ensure a harmonized approach across different market players and also across Member States.

- **General Limitations to the offer**

Any limitations on the offer such as fair use policies and data caps or download limits must be explicitly disclosed and properly explained by the ISP to the consumer through their transparency provisions. In particular, BEUC agrees that fair use policies should not be encouraged, and when used, it should be clear to the consumer what is considered as fair and the criteria applied to determine a breach of the policy.

¹² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

2. UCompliance and enforcement

Without prejudice to what is explained above about the need to develop monitoring and verification free software, BEUC believes that NRAs must monitor the potential violations of net neutrality that may be incurred by providers and ISPs. The expert knowledge and technical expertise needed to comprehend and identify violations of net neutrality make it extremely difficult for the average consumer to do so independently. Furthermore, Data Protection Authorities should have the mandate to assess the impact of net neutrality infringements on consumers' fundamental rights to privacy and confidentiality of communications.

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