



The Consumer Voice in Europe

# **BEREC Monitoring quality of Internet access services in the context of Net Neutrality**

BEUC statement

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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, all the while promoting innovation, economic growth and democratic participation.

The success of the internet would not have been such without its default neutrality, without the underlying principle that all content is served on a *best effort* basis, regardless of its source, destination, nature or technology used; a model whereby companies providing access to the internet have not and should not be the ones to choose what content, services or applications get to win or to lose in a competitive online environment.

### **Both new legislation and monitoring systems are needed to protect Net Neutrality**

As BEREC's 2012 traffic management investigation showed, too many unacceptable practices exist in the EU that violate this basic principle, and more appear every day. BEUC has been consistently supportive of a legislative approach at an EU level, given the divergence in implementation by Member States.

The provisions in the 2009 Telecoms Package have proven to be largely insufficient to solve this important issue. Regarding pre-contractual and contractual transparency obligations, the current legislative framework lacks specific provisions on Internet Access Services. An update of the Universal Services Directive is necessary in this regard.

BEUC strongly supports the European Parliament's approach on Net Neutrality in the draft Connected Continent Regulation, a balanced text that ensures that all Internet Access Services are free from undue discrimination, while still allowing traffic management to exist when it is really necessary for non-commercial reasons.

BEUC disagrees with BEREC's assessment that "a quality monitoring system by itself could motivate all parties to take a more net neutrality friendly approach". Net neutrality is a principle that underpins the provision of any service that offers consumers access to the Internet, and should therefore always be fully complied with, regardless of whether there is a monitoring system in place or not.

Monitoring the situation in the market and the effective compliance of all actors with the legislative framework is essential. Both BEREC and individual National Regulatory Authorities (NRAs) have a crucial role to play in this regard. Rather than only relying on network operators to voluntarily disclose their activities, monitoring systems under the responsibility of NRAs should be put in place.

### **Different possible regulatory approaches**

BEUC agrees with BEREC that a traditional regulatory approach, where the NRA, either by itself or by using an independent measurement provider chosen by public procurement, is the best approach. NRAs should have the statutory responsibility, complementary powers and sufficient resources to be responsible for such monitoring systems. Outsourcing the

responsibility to third parties would eventually create conflict of interests, and it cannot be expected that network operators will objectively monitor and police themselves.

Alternatively, co-regulatory approaches may be envisaged when certain criteria are met. BEUC agrees with BEREC that cooperative systems with certain stakeholders like independent research institutions, consumer organisations and third party comparison websites could bring significant added value to the monitoring system. It is important nonetheless that the NRA remains ultimately responsible for the system and its results, and that it is ensured that the involvement of third parties does not impede the achievement of the system's objectives.

On the other hand, an entirely self-regulatory approach would be inadequate and unacceptable. As BEREC recognises in its draft report, NRAs would not control the methodology of the quality monitoring system, its implementation or the generated data. Conflicts of interest would be unavoidable. BEUC therefore believes that the NRA should exercise control over the quality monitoring system in all cases, whether there is a co-regulatory element to it or not.

Regarding procedural issues, NRAs should involve consumer organisations from the start of the development of the monitoring system, as it is consumer organisations that will have the necessary insight into the degree and nature of consumer complaints and in many cases be able to co-operate with awareness raising and information dissemination campaigns. Furthermore, NRAs should always do a public consultation. The governance structure of the monitoring system could also include advisory boards where consumer organisations take part.

It is also important to look carefully into the cases where certain NRAs face legal hurdles to undertake nation-wide monitoring exercises (Spain is mentioned as an example in the draft report), as it is important that this monitoring takes place in all Member States.

### **Scope of the monitoring system and legal value of the measurements**

BEUC agrees with BEREC's suggestion regarding the minimum parameters that should be monitored, including upload and download speeds, delay, jitter, and packet loss ratio. Furthermore, BEUC agrees that measurements should also take place beyond the provider's own network. This should allow addressing potential deviations from the Net Neutrality principle that exist in the transit layer of the internet.

BEUC also agrees with BEREC that measurements should cover both fix and mobile networks, with specific instruments and parameters available for mobile networks, where the reality of the service provision is different. In addition, the monitoring system must ensure that measurements have sufficient legal validity for consumers to use the measurements as proof in different scenarios, whether in a direct dispute with the operator, before an ADR body, or in court.

Furthermore, it is essential that consumers have the explicit right to step out of their contracts when the Quality of Service that was promised to them is not being delivered. Too many economic and legal barriers exist that prevent consumers from changing providers of Internet access when they are dissatisfied. When the provider is not delivering the quality that it is bound to and that the consumer legitimately expects, the measurements undertaken by the monitoring system should enable the consumer to prove non-conformity and to terminate the contract without any penalty.

### **A focus on specialised services is of particular importance**

BEUC has been calling for clear regulatory certainty on the relationship between specialised services and internet access services to be put in place in the European legal framework. Some telecom operators are increasingly streamlining technical and financial resources towards the provision of so-called specialised services, which makes it ever more important to monitor how these services affect the quality of individual Internet access services, but also to analyse its impact on the general internet economic environment.

BEUC therefore agrees with BEREC that quality measurements need to be done in a way that allows trend analysis, and need to be assessed in the light of technical progress and market evolution. Specific mandates should be given to NRAs so they closely monitor the offering and serving of the different types of specialised services that may arise. In particular, it must be ensured that specialised services are clearly distinguished from internet access services and from online services both in theory and in practice. For example, taking an online service and serving it separately from the general internet access service, calling this a “specialised” service is contrary to the default neutrality and non-discriminatory nature of the internet and should be prevented.

### **BEREC to undertake a new traffic management investigation**

BEUC is gravely concerned about BEREC’s remarks in its draft report regarding the traffic management investigation. BEREC now says it “may repeat” the investigation, while the second investigation is an integral part of its Work Programme for 2014. BEUC considers that it is of utmost importance that BEREC undertakes a new traffic management investigation as a matter of priority, correcting the structural weaknesses of the 2012 exercise.

As BEREC recognises, the first investigation “did not provide a full and deep view of all practices currently in the markets”, which is precisely one of the reasons why it must be enhanced and repeated. The 2012 traffic management investigation reported very significant and worrying practices that violate the principle of the openness and neutrality of the internet. For example, 35% of fixed operators admitted that in order to offer specialised services, they manage their networks in a way that can affect the provision of their internet access services. Numerous cases where specific online content or services providers were being given preferential treatment were also found.

Firstly, it must be possible to disaggregate the collected data per Member State. This is the only way to enable a thorough, fact-based assessment of the existent degree of consumer choice regarding the openness and neutrality (or not) of internet access services in each Member State.

Secondly, clarity is needed as to the difference between contractual and technically implemented restrictions or prioritisations. One of the shortcomings of the 2012 traffic management investigation has been that network operators have argued that while they have multiple discriminatory clauses in their contracts, they do not implement them technically in practice. This is an extent which is by and large impossible for an average consumer to verify, and it is therefore paramount that BEREC and NRAs get a fully detailed view of what is and what isn't being implemented in all EU markets.

It is important to do a second, better investigation to address the shortcomings of the 2012 investigation, but also to be able to get a snapshot of where are the markets in 2014. This investigation will surely offer important insight into other regulatory and legislative ongoing discussions.

#### **Any monitoring system must fully respect consumers' privacy**

BEUC welcomes the intention of BEREC to assess the impact of quality monitoring systems on consumers' privacy and personal data. BEUC would like to recall that the right to the protection of personal data and to privacy is a fundamental right enshrined into the EU Charter of Fundamental Rights; any interference has to be prescribed by law, be proportionate and necessary and in compliance with the legal framework.

We strongly believe that consumers' trust is a prerequisite for the system to be effective. To this regard, we consider the close involvement of Data Protection Authorities as a condition *sine qua non*. DPAs have the necessary expertise to ensure compliance with data protection legislation of the entire system.

Whereas national implementation of data protection and privacy rules may differ, the forthcoming adoption of the General Data Protection Regulation will harmonise national rules and provide for legal certainty with regards to key elements.

We would also like to stress that consent is one of the legal grounds that may be used to legitimise the processing of personal data. It must be ensured that consent is based on an affirmative action from the data subject and is free, specific, and informed. Once the consent is valid, any processing operation must comply with the data protection principles, namely data minimisation and purpose limitation, while the controller is bound by a number of obligations as outlined in the 95/46 Directive.

We call upon BEREC to take into account the draft Regulation currently being debated by the EU institutions when considering the impact of quality monitoring systems on consumers' rights to protection of personal data and to privacy.