BEUC The European Consumer Organisation

The Consumer Voice in Europe

Telecoms Single Market

Key priorities for BEUC - updated

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Introduction

BEUC has been actively defending consumer interests in the most relevant areas of the proposed Regulation on a Telecoms Single Market[1]. These mainly regard Chapter IV on updating the consumer rights framework, the provisions related to the open internet and those related to roaming.

A thorough, detailed position paper[2] produced shortly after the publication of the proposed Regulation outlined our analysis of these areas. It signalled the flaws, misguided approaches and potential loopholes contained therein and listed our recommendations of how to address them.

The European Parliament's Report, adopted on 3 April 2014[3], significantly improves the original proposal in all three aforementioned areas. Nonetheless, there are important unresolved issues in the European Parliament's Report which need to be tackled as a matter of priority in order for the end result to be truly positive for European consumers.

BEUC therefore urges all national delegations in the Council of the European Union to, based on the European Parliament's report in the 3 aforementioned issue areas, find solutions to the important flaws this paper highlights.

1. Consumer Rights

Using the adequate instrument

BEUC welcomes the European Parliament's initiative to update the consumer rights framework in the telecommunications sector as part of the existing Universal Service and User Rights Directive (USD) and is satisfied to see the Council agree with this approach[4]. Using this Directive as an instrument is more adequate for regulating consumer rights in such a fast-evolving sector, where national markets differ greatly from one another and where new abuses keep arising.

National Governments need a certain degree of flexibility in order to respond to these specificities and new abuses. In addition, we welcome the fact that the European Parliament put clear minimum harmonisation clauses in 3 articles of the USD and we call on the Council to include these minimum harmonisation clauses in all articles of that same chapter (articles 20, 20a as created by Parliament; 21 and 21a as created by Parliament; 26 and 30).

The regulation on the Telecoms Single Market offers a great opportunity to revise the USD that should not be missed. BEUC therefore calls on Council to ensure that the update to the USD remains within the scope of TSM.

[1] https://ec.europa.eu/digital-agenda/en/news/regulation-european-parliament-and-council-laying-down-measures-concerning-european-single
[2] http://www.beuc.eu/publications/x2013_081_qbe_telecoms_single_market.pdf
[3] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0281
[4] http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&f=ST+10109+2014+INIT

More consumer protection, less barriers to switching

A) Arbitrary Penalty Fees (APF) are inserted in contracts with the explicit objective of deterring consumers from switching operator before the contract comes to an end. While these penalties may give operators some predictability, in order to allow consumers to truly vote with their feet they need to be limited as much as possible and never be the default practice.

Therefore, Arbitrary Penalty Fees should **only be allowed when there is a specific, measurable economic advantage** for the consumer associated to the contract, such as when a contract comes with expensive equipment subsidised at a lower price or even free of charge. In such cases, the fees should only be applicable within the first months of the contract and within a maximum of six months and be always correlated to the economic advantage that consumers are getting. No penalty fees should be allowed beyond the first six months of the life of the contract, and no penalties whatsoever should be allowed in cases where there is no economic advantage for the consumer.

In the particular case of **subsidised equipment**, companies normally attach **compensation plans** to recover the value of the equipment if the consumer terminates the contract before it has been fully paid. These compensation plans need to be based on customary depreciation methods and proportionate to the duration of the contract and the time elapsed, while reflecting the real market value of the equipment. National Regulatory Authorities should clarify and standardise the methodologies used to calculate these compensations.

Ideally, contracts should separate the reimbursement or compensation plan for the subsidised equipment from the price of the service. If consumers decide to terminate the service contract, it will be legally clearer what remains outstanding and has to be paid. Consumers should pay whichever amount is less: either the compensation plan for the subsidised equipment or the service until the end of the contract, but never both as it is sometimes the case.

Unfortunately, these issues are left unresolved in the European Parliament's report and **should therefore be tackled as a matter of priority in Council.**

B) When the **contracted service quality levels are not met,** the contract must make explicit reference to the statutory rights of the end-user, including the **right to terminate the contract** free of charge, including free of any compensation due for an economic advantage received at the beginning of the contract.

Where there are discrepancies between the actual performance regarding quality parameters (including data speed) and the performance to which the operator is contractually bound, this should amount to **non-conformity of performance** and entitle consumers to exercise their rights. It must be clearly specified that consumers are entitled to terminate the contract without cost, including any due compensation. The legislation foresees that the discrepancies are to be "significant and non-temporary". These terms must be clearly defined so as to facilitate the enforcement of this provision.

Unfortunately, the relevant provision (article 20a.5 in the European Parliament report, Articles 26.1.f and 28.5 in the Commission's proposal) **does not recognise consumers' specific right to terminate the contract** when quality levels are not met and **should be appropriately amended**.

C) For **unilateral changes to the terms and conditions**, it is unacceptable that consumers' right to terminate the contract carries an exception in case "the changes are exclusively to the benefit of the end-user". This exception is unclear and allows operators to determine what they consider to be the consumer's benefit. Therefore, it should not be allowed.

If there are **unilateral changes to the terms and conditions regarding essential elements of the contract (e.g. price, duration or service quality)** the consumer must be able to terminate the contract without any cost whatsoever, including any due compensation for any economic advantage he or she might have received at the beginning of the contract. In these cases, the consumer agreed to a product or offer with certain characteristics which no longer exist. If the changes are truly to the benefit of consumers, it is unlikely they will want to refuse them.

The **exception "(…) unless the proposed changes are exclusively to the benefit of the end-user"** (article 20a.4 in the Parliament's Report, article 28.4 in the Commission's proposal) **should be deleted** as it is superfluous and potentially negative for consumers.

2. Protecting each consumer's right to access the open internet

Developments in European telecoms markets are increasingly threatening the neutrality and openness of the internet. These include changing economic flows and increased concentrating of power among the telecoms operators who provide access to the internet. The industry is continually coming up with ways to extract rents without necessarily offering new added value. In particular, they are looking for ways in which to generate two sources of revenue for the same service (delivery of content): from the end-user's subscription and from the content provider itself.

Additionally, the industry is coming up with new ways to become or **strengthen their position as gatekeepers of content and services,** such as by adopting discriminatory pricing strategies with practices such as paid prioritisation or zero-rating of content. Both should be clearly banned.

If the principles of openness and neutrality are not urgently protected against unintended consequences of these developments, they may put **the future of the internet as we know it at risk**. Allowing deviations from these principles represents a significant paradigm shift, one which will certainly affect the internet's innovative character, the economic growth opportunities it offers and the enhanced access to knowledge and freedom of speech it allows citizens to enjoy. By becoming a global leader on net neutrality, the EU has the opportunity to make sure the internet remains open and neutral in the future.

The European Commission's proposed approach on net neutrality is unacceptable as it does not adequately ensure consumers' right to access the open internet and includes a significant amount of loopholes which risk opening the door to exactly the opposite of what is theoretically intended. While the Parliament's Industry, Research and Energy (ITRE) Committee improved this, it was not enough.

A joint statement sent to the Parliament in early April by a coalition of NGOs and other stakeholders, including BEUC[5], accurately describes why the changes adopted in Plenary were important and necessary.

Therefore, BEUC strongly calls on the Council to take into account the important changes the European Parliament enacted in its Report as compared to the European Commission's original proposal. A principles-based approach to the issue of Net Neutrality would only be acceptable if it was ambitious, clear, and addressed all important issues. The draft General Approach produced on 14 November 2014 not only fails to achieve this, but would open new potential loopholes that could be exploited to circumvent non-discrimination obligations.

In particular, the following general principles should be respected:

1. Access an open and neutral internet should be a **right**, not a freedom. Article 23, as part of the Chapter on "Harmonised rights of end-users" should explicitly recognise it as such, just as the Parliamentary Report does.

2. The recognition of end-users' right to access the open internet must carry alongside it **a general prohibition (article 23.5) on discrimination** between different types of traffic, content or online services. Exceptions to the general prohibition must be foreseen, as telecoms operators surely need to be able to manage networks for them to function properly. The Commission's legal approach to define the general prohibition and then **outline a close-ended list of exceptions is adequate and should be respected.** Mechanisms to update this list should be foreseen.

3. The development of **specialised services** can never happen to the detriment or as substitutes of internet access services. Specialised services must be **truly differentiated** from an Internet Access Service (IAS), even if they are delivered over the same physical network and safeguards need to be in place to prevent and correct any undue impact they may have on IAS. In addition, the legal instrument should be drafted in such a way that it prevents telecoms operators from taking internet content, labelling it as a specialised service and selling it separately at a premium rate.

   BEUC does not consider that defining and regulating a heterogeneous array of services under a vague concept of "specialised services" is needed if the objective of the TSM regulation is to strongly protect the neutrality and openness of all Internet Access Services in Europe. Therefore, it may be worthwhile dropping all references to specialised services from the TSM regulation and ensure that strong safeguards and guarantees related to Internet Access Services are developped.

4. The **general non-discrimination obligation should apply to all internet traffic**, regardless of what has been agreed contractually. Article 23.5 in the European Commission's proposal would oblige telecoms operators to comply with the non-discrimination obligation *within* contractually-agreed data caps, but would allow them to manage traffic for their own commercial interests beyond that cap, which is totally unacceptable.

[5] http://www.beuc.eu/publications/beuc-web-2014-016_joint_statement_on_the_open_internet.pdf

5. **All price discriminations, including zero-rating of content**[6], **must be banned by the Regulation**. If the co-legislators fail to address this issue, the telecoms industry will succeed in becoming gatekeepers of online content and services, acquiring the possibility to pick winners and losers online. In addition, the **European instrument should never undermine the rights** acquired by consumers in countries where binding legislation on net neutrality already exists, such as The Netherlands, where discriminating on price is forbidden.

6. **Article 19 on Assured-Service Quality (ASQ)** products is yet another way the industry could misuse to charge content providers for the delivery of their content and significantly impact the value-chain of the "*best efforts*" internet. As the relationship between these products and a truly open and neutral internet has not been sufficiently investigated, **the article should be deleted.**

3. Truly ending roaming, for all consumers

A real Single Market will not see the light of day as long as roaming charges continue to exist. In order for consumers to reap the benefits of a fully integrated Telecoms Single Market, they need to not only be able to use their services at home without caring about borders, but importantly they want and need to be able to continue using their services no matter where they are within the European Union.

Achieving Roam Like at Home plans for all consumers

The market mechanism in the European Commission's proposal intending to create market incentives which should theoretically push operators to agree among themselves and offer Rome Like at Home (RLAH) packages to consumers is entirely unacceptable. The market mechanism does not offer a real end to roaming surcharges for all consumers, and due to its complexity, consumers will not necessarily understand it. Instead, **BEUC supports the European Parliament's approach, where a clear cut-off date is set, date as of which roaming retail caps are no longer allowed.**

Regarding the specific date, **BEUC agrees with the Parliament's suggestion of December 2015. If this date is to be modified, it should only happen due to legal procedural reasons and not as a trade-off with the industry against other commitments.**

In order for the concept of roaming to fully disappear in theory and in practice, **Roam Like at Home (RLAH) must be the reality for all roaming offers for all operators across the EU**. Consumers should therefore be able to replicate their domestic consumption while abroad, enjoying the same package, exactly as if they were home.

[6] http://gigaom.com/2014/04/26/forget-fast-lanes-the-real-threat-for-net-neutrality-is-zero-rated-mobile-traffic/

Strictly regulating any exceptions to avoid abuses

Where there are **unavoidable and significant additional operating costs** for providers offering roaming services, some limitation to the use of mobile services while roaming may be inserted and clearly disclosed to consumers according to "**Fair Use Policies"**(FUPs).

The criteria to use such clauses shall be developed by BEREC in coordination with all NRAs, must always be cost-reflective and strictly linked to the proven existence of these costs. In the absence of such additional costs, no limitation on the use of roaming services should exist other than what is already part of the domestic package in the contract. Where limitations are used, they shall always be based on criteria that relate to consumers' own individual consumption patterns, and therefore never to national averages or similar alternatives.

It would be completely unacceptable if abuses of such "fair use" clauses arise in such a way that impedes consumers from "confidently replicating their consumption patterns as if they were at home". **If policy-makers fail to correctly regulate these "fair use" clauses, Europe risks failing to eradicate roaming surcharges.**

In any case, the use of FUPs to limit RLAH must only be a temporary measure to allow for the market to make its transition to a fully RLAH-based market. FUPs should entirely disappear once wholesale caps have been reduced.

In addition, **safeguard provisions to avoid 'bill shocks' and control consumption** should also be applicable to roaming **outside the EU** and to all services - not only for data, but also calls and SMS. Furthermore, the data roaming safeguard limit should be applicable for all tariffs and packages - post-paid as well as pre-paid.

Ensuring the abolition of roaming does not affect competition

The abolition of retail roaming charges will have a certain degree of impact on operators' revenues. Though they do not represent a significant portion of current turnover (some figures put it at 8% of total annual turnover, at most), the **abolition of retail roaming charges will have a bigger impact on the smaller, less resourceful operators**. In particular, it will impact those operators which do not have their own network (Mobile Virtual Network Operators or MVNOs) and are therefore obliged to rent access to another provider's network.

In order not to strangle smaller, challenging competitors and push them out of the market, **it is important that wholesale caps are reduced too as a matter of priority.** A detailed analysis of the real costs that network operators incur when offering wholesale roaming access should be carried out and **wholesale roaming caps should be set around these costs, ensuring they are always cost-reflective and fair**.

Furthermore, **the adoption of a general RLAH rule should not entail increases in domestic prices**. National Regulatory Authorities should be tasked to closely monitor any potential 'waterbed effect' the abolition of roaming might create. Operators often denounce the amount of revenue they will theoretically stop receiving with the end of roaming. Yet it is crucially important to understand that

the disappearance of roaming will increase the use of telecoms services abroad, generate more demand and therefore more revenue for operators. According to estimates by the European Commission, **this increased demand could mean up to 300 million new roaming customers**[7].

In conclusion, the introduction of Roam Like at Home cannot wait, but it is of crucial importance that wholesale caps are reduced as soon as possible to avoid any potential distortion that RLAH might create.

END

[7] http://europa.eu/rapid/press-release_IP-14-152_en.htm