

The Consumer Voice in Europe

NET NEUTRALITY IN EUROPE: TIME FOR CLEAR RULES OF THE GAME

Position paper



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Why it matters to consumers

Keeping internet access open and neutral is essential if we are to exercise our fundamental freedoms and democratic rights to participate in today's interconnected online societies. It is also a precondition to benefit from eCommerce. Consumers need an unrestricted and neutral internet to access news and cultural content or to shop without restrictions.

We need net neutrality to protect the internet's open and innovative character, where any start-up can reach any internet user across the globe, without having to worry which internet service provider their target consumers use. It means that the companies that provide access to the internet don't get to become gatekeepers of what can be accessed online, or kingmakers of what services win consumer's attention.

Summary¹

An unrestricted, neutral internet allows consumers to participate in today's online communities by accessing news and cultural content, for example, or to shop without restrictions. Protecting the right to access an open and neutral internet is preserving the internet itself, its openness, innovative and decentralised character, and importantly, consumers' right to access the *best-efforts* internet without discriminations.

The fate of how European consumers will be able to access the internet is now in the hands of the Body of European Regulators for Electronic Communications (BEREC), the organisation that regroups all telecommunications National Regulatory Authorities (NRAs) in Europe. It is for BEREC to produce guidelines on the recently adopted EU net neutrality law² so that consumers, companies, regulatory authorities and judges all know how to apply the rules. A number of unclear concepts and rules are contained in the EU law, and thus BEREC needs to establish clear guidelines.

BEUC calls on BEREC to adopt guidelines which clarify that:

- Network operators cannot under any circumstance discriminate between **specific providers** of content or service.
- Discriminating between **entire categories** of traffic has to be demonstrably necessary to ensure the "overall quality and user experience", and authorised by the NRA.

¹ Our UK member Which? is not signatory to this paper

² Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

- The use of the exception for “impending congestion” needs to be duly justified.
- Specialised services are to be used in special cases, and not to deliver specific internet content or applications as a separate service. NRAs must prevent that specialised services are used to provide internet services and content in a way that allows providers to circumvent the net neutrality rules. These services can only be offered if operators are sure they can comply with the internet speeds promised.
- The EU law is to be interpreted as illegalising sub-internet offers. It is exclusively up to consumers to decide what type of content, services and applications to access, use and provide over the Internet Access Service they are paying for.
- Practices that include zero-rating of content go against the principle of net neutrality, reduce consumer choice and put barriers to future online innovation. The EU law should be interpreted as illegalising these practices.
- Consumers need clear information regarding the key characteristics of their internet access services, in particular on speeds. Providers need to deliver on the speeds they promise, and abusive practices such as the misleading use of “unlimited” when the service is not really unlimited should not be tolerated.

Introduction

If the principles of openness and neutrality are not strongly protected, the development of the internet as we know it is at risk. To deviate from these principles would represent an important paradigm shift that would gravely affect European consumers. It would undermine the internet's innovative character, the economic growth opportunities it offers and the enhanced access to knowledge and freedom of speech that all Europeans are entitled to. 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.

It is helpful to look at examples to understand the motives and effects of net neutrality legislation. In the Netherlands, the initiative by a phone company to sell WhatsApp separately, thus charging consumers for the delivery of this specific internet service in a clear attempt to counter the decline in revenue of SMS, triggered a public debate and eventually the decision to legislate. The net neutrality legislation in the Netherlands corrected this illegitimate practice and established that all online content and services are to be delivered over the internet in a non-discriminatory manner.

General Remarks

The EU has been right to address this important consumer issue through a legislative instrument that aims to provide legal certainty and sends both the market and society a clear signal: resources need to be focused on the *best efforts* internet. That is what consumers want, as shown by BEREC's Ecosystem Dynamics and Demand-side forces (ECODEM) report.³

Unfortunately, the rules contained in the EU's Telecom Single Market (TSM) Regulation⁴ are unclear and difficult to enforce. It was a welcome decision to task telecom National Regulatory Authorities (NRA), who are the ones that hold the technical expertise and know the markets best, with the development of interpretative guidelines that explain the new rules. The net neutrality rules in the TSM Regulation are so imprecise that it cannot not be claimed that the principle of net neutrality has been introduced in the European Union – yet. In its spirit and declared intentions, the EU Regulation aims to protect net neutrality, but this is not necessarily the case in practice. It is therefore now up to BEREC and the NRAs to produce clear and strong interpretative guidelines so that the EU's net neutrality rules fulfil their mandate.

This position paper outlines consumer views on the most important areas that have been regulated by the TSM Regulation, and includes calls to action for BEREC and NRAs to adopt clear guiding principles in their guidelines.

³ http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5024-berec-report-on-how-consumers-value-net-neutrality-in-an-evolving-internet-marketplace-a-report-into-ecosystem-dynamics-and-demand-side-forces

⁴ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union

Fulfilling the *raison d'être* of the Regulation

When in doubt about what the TSM text wants to achieve, one needs to look into the stated intention of the legislator. To determine this intention, each article must be checked against what is explained in recitals.

The objective of the TSM Regulation is quite clear, as stated in Recital 1: “This Regulation aims to establish common rules to safeguard **equal and non-discriminatory treatment of traffic** in the provision of internet access services and related end-users’ rights. It aims **to protect end-users** and simultaneously to guarantee the continued functioning of **the internet ecosystem as an engine of innovation**”. This last part is of particular importance, as we will outline later on, because it makes it very clear that the TSM Regulation’s objective is to guarantee that the internet continues to be “an engine of innovation”, which has concrete implications on what commercial practices should be allowed or not.

As a Regulation that is directly applicable in Member States’ legal systems, the TSM Regulation harmonises rules across the EU. Nevertheless, the Regulation should not undermine the acquired rights of consumers in Member States where the principle of net neutrality had been strongly protected, namely in the Netherlands and Slovenia. This is an element that BEREC and NRAs should bear in mind when producing guidelines, so that the EU rules encompass the additional protective measures that Dutch and Slovenian consumers had already acquired.

An efficient and enforceable TSM Regulation is only part of the solution

The TSM Regulation can go a long way in securing the net neutrality principle in Europe, but it will only be a partial solution due to the fact that it only regulates the last layer of the internet ecosystem, the one that is closest to the consumer. Beyond these (residential) Internet Access Services, a multitude of players, technologies and interests come into play to buy, sell and compete for access and deliver content in the higher layers of the internet. Importantly, for the open internet to be fully protected, the principle of neutrality must be applicable to all these layers of the internet too, where harmful discriminatory practices can take place as well.

In order to fully protect consumers’ right to enjoy a neutral and open internet, EU policy makers need to closely look into all layers of the internet, identify any anticompetitive or problematic discriminatory practices that might be taking place, and act swiftly to correct them.

1. Traffic Management – clear rules are fundamental for net neutrality

The networks that make the internet work need to be managed and maintained, but the conditions under which their management takes place need clear rules for all market actors involved. To safeguard net neutrality for consumers and give legal clarity to network operators it is important to set clear rules regarding what type of traffic management is possible and under what circumstances it would be allowed.

Certain terms are used in the TSM Regulation which need to be interpreted carefully so that their meaning leaves no room for abuse. If these concepts are not adequately defined and implemented, the rules could become unenforceable in practice.

Categories of traffic⁵

The intention of the legislator regarding “categories of traffic” is made clear in Recital 9. Network operators cannot under any circumstance discriminate between specific providers of content or service, regardless of whether they belong to the same category of traffic or not.

Only if it is necessary to “optimise (the) overall quality and user experience”, operators can use different traffic management measures for categories of traffic which can be differentiated “on the basis of objectively different technical quality of service requirements (latency, jitter, packet loss, bandwidth)”. It should be for NRAs to evaluate whether there are “objectively different technical quality of service requirements” and not for network operators. These “traffic categories” should therefore be agreed upon and defined by NRAs so that there is consistency within a national market but also ideally across the EU.

For example, this means that an operator can only apply different traffic management measures to all video traffic as compared to all email traffic only if it is objectively and demonstrably necessary to ensure “overall quality and user experience”.

Importantly, it is clear that differentiation between classes of traffic can never happen as a result of “commercial considerations”. Allowing class-based discrimination runs the risk of allowing operators to distort online competition in their favour, and this shall be duly taken into account. Network operators could, for example, discriminate against an entire class of traffic just because the traffic corresponds to a type of online service they do not offer themselves as an additional service, such as music, video, cloud storage, etc.

It cannot be for the operator to unilaterally decide that specific categories of traffic need different traffic management measures, but it should be authorised by the NRA. If this is not the case, operators might try justifying technically what they do for commercial reasons, to give themselves or their allies an advantage, or put their competitors at a disadvantage.

A clear example of a potentially dangerous effect of class-based traffic management relates to video. Many network operators dedicate network resources to provide their own managed digital television services, a fact that gives them an economic incentive to discriminate against traffic of online video services that compete with their own. In a situation where video provision is already moving from High Definition to Ultra High Definition-4K, more than ever before consumers need the bandwidth they are paying for to be untouched. By discriminating against online video services, network operators could push consumers towards their digital TV services, a move that would go against the overarching objective of the TSM Regulation, i.e. protect the internet as an engine of innovation.

It is important that clear rules are set so that network operators respect the principles that these traffic management measures can only be in place for “as long as it is technically necessary”.

⁵ Article 3.5, subparagraph 2.

Reasonable traffic management⁶

The Regulation states clearly that the objective of reasonable traffic management is to “contribute to an efficient use of network resources and to an optimisation of overall transmission quality”.

The Regulation also states clearly that reasonable traffic management should not be maintained for longer than necessary. This could be addressed by mandating that only during peak times, when it is necessary to ensure the quality transmission of different classes of traffic, operators shall be allowed to use reasonable traffic management. If this was the chosen approach, then the concept of ‘peak time’ should be defined.

The Regulation establishes that all reasonable traffic management must respect the principle of proportionality. This implies that where application-agnostic measures (those which do not single out any specific application) can be used, these should be preferred over application-specific traffic management measures. The principle of application-agnosticism should only be abandoned as an option of last resource and if all other options have been exhausted.

Traffic management beyond ‘reasonable’

For traffic management measures that go beyond the concept of “reasonable traffic management” under the exceptional circumstances foreseen in the TSM Regulation, operators too should handle these circumstances in an application-agnostic way, and only discriminate based on objectively different technical requirements, as is the case with reasonable traffic management. If this is not enough to, for example, address the exceptional and proven congestion, then other types of management measures must be used in a way in which the impact on consumer choice and online innovation and competition is minimised.

Importantly, the Regulation qualifies the exception for network congestion as an “impending” congestion. It is important that a burden of proof is set on network operators to demonstrate the claimed “impending congestion”, as it might otherwise be an exception that could allow for abuses.

2. Specialised or managed services

Clear rules of the game are necessary for all players

So-called specialised services (SpS) represent an unclear, heterogeneous type of digital service that is not clearly defined and regulated by the TSM Regulation. Instead, the Regulation refers to SpS as: “(...) services other than internet access services (...)”⁷, widening the scope of such category to any and all service that is not an Internet Access Service (IAS), which in turn is a category of service defined by the Regulation.

The rules on traffic management only apply to Internet Access Services and therefore not to any other type of service such as so-called specialised services. What is understood as specialised service is unclear, and needs to be narrowed down to prevent abuses.

⁶ Article 3.5, subparagraph 2.

⁷ Article 3.5 of the TSM Regulation.

These services should anyhow be only those for which it is technically necessary to provide them off the internet, and for which a guaranteed quality of service is required. For example, a digital TV or an IP telephony service that are typically offered off the internet because the guaranteed quality of service cannot be provided otherwise could constitute examples of such specialised services.

The way in which the TSM Regulation refers to this undefined category of services implies that these services should not in any way replace nor hamper the availability and provision of Internet Access Services, and of content and services online. They should thus be truly limited to services for which it is technically necessary to provide them off the internet.

Importantly, as stated in Recital 16, NRAs must carefully verify that the criteria are met for such services to be provided off the internet, notably in terms of a technically necessary optimisation. In doing so, the TSM Regulation mandates NRAs to impede that specialised services are used to provide internet services and content in a way that allows providers to circumvent the net neutrality rules.

With regards to SpS too, certain concepts need further clarification in order to allow for an efficient enforcement of the rules. For example, the TSM Regulation establishes that the provision of SpS can only happen if “the network capacity is sufficient to provide them in addition to any internet access service provided”⁸. Clear rules are needed regarding what “sufficient” means.

For example, the network capacity is clearly not sufficient for providers to offer SpS when the consumer does not get the internet speeds that he is paying for at all times, including when SpS are active too. This means that in order for providers to offer SpS, they must first ensure that they can comply with the internet speeds that consumers have been promised, and that by offering SpS on top, those speeds will not be affected.

Additionally, when operators lay out new infrastructure or make improvements to existing infrastructure, they could be obliged to dedicate at least 50% of the additional net increase in bandwidth to the provision of Internet Access Services, while the other 50% may be used for SpS. This would be consistent with the overarching intention of the TSM Regulation to protect the provision and development of the internet in Europe.

Innovation on the internet, not at its expense

Under equal conditions, innovative content and services should be delivered over the internet, thus strengthening it as the great societal resource that it is. Nevertheless, there can be future innovative services that network operators and providers of digital services will want to legitimately offer as SpS. Yet to date, from a consumer perspective the most commonly discussed examples have failed to be sufficiently substantiated.

It is particularly difficult to evaluate the real demand that consumers might have for legitimate SpS (such as IP telephony or digital TV offered off the internet) because they are very often bundled with IAS. In order to understand the real consumer demand for this type of service, NRAs should look into these bundles in a disaggregated manner. For other types of SpS, it is not possible to evaluate consumer demand without clearly identifying what concrete services are being referred to.

In this respect, article 3.5 sub-paragraph 2 is very clear: SpS cannot replace IAS, which means that SpS cannot serve as an alternative to access internet content, services and

⁸ Article 3.5 of the TSM Regulation.

applications. Internet content, applications and services should therefore never become “a kind of SpS”. If the rules were interpreted in a way that would allow network operators to “take content out” of the internet and offer it separately as SpS, the Regulation would fail to achieve one of its core objectives.

Access to the internet means the *full* internet: sub-internet offers are not allowed

As it is built, the TSM Regulation could lead some interested parties to interpret it in a way in which its rules only apply to IAS which provide access to the entire internet, but not to IAS services that offer access to only a part of the internet (e.g: only to the World Wide Web and email, but not other services such as VOIP or gaming), in what could be dubbed “sub-internet offers”.

It is important that BEREC clarifies that the TSM Regulation does not allow sub-internet offers. Providing such restricted access to the internet goes against the very essence of the net neutrality principle. An IAS must therefore provide access to the entire internet, and not only to a subset of the internet arbitrarily chosen by the access provider. It is exclusively up to consumers to decide what type of content, services and applications to access, use and provide over the Internet Access Service they are paying for.

While some consumers might appreciate the fact that sub-internet offers are cheaper, it is important to consider that they will not necessarily be able to evaluate the long-term implications that the mere existence of such offers will have on online innovation and therefore on their own choice. As BEREC’s own report suggests⁹, there is a portion of consumers who do not know enough about questions regarding competition and innovation to consider these important aspects of the debate as decisive factors when making their purchasing decisions.

3. Commercial practices, in particular zero rating

Zero-rating of content is a violation of net neutrality

As markets for online content and applications and markets offering access to the internet evolve, more and more innovative commercial practices arise. The most problematic examples of such commercial practices are the ones that involve zero-rating of content. Zero-rating occurs when a provider of IAS does not count the traffic generated by a specific internet service against the monthly data cap it imposes on the Internet Access Service that it is selling. For example, this happens when the IAS provider’s own cloud storage service is exempted from the monthly data cap, or when it exempts Facebook or Spotify.

There can only be offers with zero-rated content where data caps are present. Consumers would prefer no data caps, or larger data caps to smaller data caps. But importantly, if there were no data caps at all, zero-rating could not take place. There is no evidence suggesting that consumers prefer offers with data caps. In fact, research in the US shows that network operators use data caps as a means to extract additional revenue from its customers, rather than for purely technical reasons¹⁰. As shown by

⁹ BEREC ECODEM report.

¹⁰ Artificial Scarcity, reference https://static.newamerica.org/attachments/3556--129/DataCaps_Layout_Final.b37f2b8fae30416fac951dbadb20d85d.pdf

BEREC's research¹¹, data caps are a determining factor in consumers' purchasing decisions¹².

Although data caps are more common on mobile offers, it is important to note that they are not used only on mobile offers. In many European countries, it is a standard practice to use data caps also in fix Internet Access Services, and therefore the practice of zero-rating can also become problematic in fixed markets.

Though attractive to consumers at first sight, zero-rating practices amount to a reduction in consumer choice, as it is not the consumer who will freely choose what services or applications to use once the data cap is exhausted. Rather the company providing internet access decides what services would still be available once the data cap has been reached.

Zero-rating can also have an undesirable impact on online innovation and competition across the internet value chain, and that it is a powerful incentive for operators to continue maintaining low data caps. The lower the data cap, the more interesting zero-rating becomes. If they are not allowed to zero-rate specific traffic, network operators get an incentive to offer higher data caps, or no data caps at all.

With such discriminatory practices, network operators also have the chance to squeeze out competitors who do not have the capacity to negotiate with big content, service and application providers to make deals to zero-rate their apps. These big online providers get the chance to squeeze out the newcomers in their own markets. With zero-rating, competition and innovation are affected both online and offline.

For example, by zero-rating Facebook, the dominant player in the social network market in Europe, a network operator such as Orange solidifies its position, as smaller operators do not have the same bargaining power to negotiate with Facebook. And Facebook consolidates its dominance in the online market, as competing, innovative social networks will not have the capacity to negotiate with network operators. And last but not least, a customer of Orange who is considering what social network to use will have powerful economic incentives to join Facebook as a result of the zero-rated offer.

Even if network operators zero-rated entire categories of traffic and not a specific provider, this would still raise concerns as it can impact online innovation. This type of zero-rating would let operators zero-rate a category of content/service that is not in competition with one of their own specialised services, and keep the data cap low to ensure competitors to their specialised service are not preferred by consumers.

The TSM Regulation treats zero-rating as a violation of net neutrality

Although it does not refer to the concept of zero-rating as such, our interpretation is that the TSM Regulation does not allow such practices. First, the Regulation says that commercial practices between providers of IAS and providers of online content or services cannot undermine the end-user rights established in Article 3.1¹³, which means that when traffic is managed to zero-rate content, the operator prevents the consumer from exercising his or her right to freely choose what content, services and applications

¹¹ BEREC ECODEM report.

¹² This is also recognised in the US Open Internet Order, ¶ 82: "Data caps or allowances, which limit the amount and type of content users access online, can have a role in providing consumers options and differentiating services in the marketplace, but they also can negatively influence customer behavior and the development of new applications."

¹³ Article 3.2 and Recital 7 of the TSM Regulation.

he or she wants to use or access. Second, the Regulation clearly states that traffic management cannot be based on commercial considerations of the network manager¹⁴.

In this context, it is important that BEREC clarifies that any commercial agreement that curtails end-users' ability to exercise their rights established in this Regulation should not be allowed. Similarly, BEREC should clarify that traffic management based on "commercial considerations" means any traffic management that cannot be justified by objectively verifiable technical needs. Any practice that involves traffic management and which does not respond to a technical justification has a commercial motivation behind it, and should therefore not be allowed in accordance with the principles laid out in the TSM Regulation.

Commercial practices without traffic management

In general, commercial practices linked to Internet Access Services have the potential to influence the rights and choice of consumers in the online market, no matter if it is an explicit part of a contract or not. It is not possible to foresee what these practices might turn out to be, as innovation is an important part of effective competition. Therefore BEREC and NRAs must not restrict their interpretation of the term 'commercial practices' or 'commercial considerations' when defining the scope of what they will monitor and analyse.

Other commercial arrangements between providers of internet access services and providers of content, services and applications online that do not involve discriminatory traffic management do not pose a direct threat to net neutrality in principle. For example, the price of online services such as premium music streaming or paid-TV subscriptions can be bundled with the price of a mobile internet subscription, without entailing any differentiated traffic management whatsoever.

While these commercial practices can bring many consumer benefits in terms of choice, affordability and convenience, they can also have an undesired impact on competition, both online and offline. The TSM Regulation does not regulate this type of commercial practice, yet BEREC and NRAs should closely monitor the evolution of these practices to make sure they do not have detrimental effects on consumers.

4. Associated consumer rights in the TSM Regulation

According to surveys undertaken by the European Commission, telecommunications markets are ranked amongst the worst of all services markets¹⁵. These markets also collect the largest amount of consumer complaints – quite a feat if we consider that they only represent 3% of households' budgets on average.

These facts show that consumers truly care about their phone and internet services, as they increasingly lead digital, interconnected lives, and telecoms markets still do not deliver enough benefits to consumers.

Against that dire situation, BEUC's member organisations have undertaken multiple campaigns to correct telecom market failures when the markets have not delivered

¹⁴ Recital 9 of the TSM Regulation.

¹⁵ European Market Scoreboard, 2014.

solutions themselves. For example, an app developed by Test-Achats in Belgium¹⁶ highlighted that 50% of internet connections do not even get to 50% of the speeds they have been promised. In Spain¹⁷ and Italy¹⁸, our members OCU and Altroconsumo helped consumers compare and get access to cheaper offers.

Overall, one of the most problematic issue for consumers across Europe is that they do not get the speeds that they are paying for, and the lack of clearly available information on the characteristics of internet access services. The new rules on internet access services included in the TSM Regulation are therefore of key importance to address these unfair practices.

Transparency of the characteristics of internet access services

Transparency is an essential prerequisite for consumers to make informed choices and for all other rules and measures in the TSM regulation to function adequately. BEREC's findings in the ECODEM¹⁹ report suggest that consumers prefer the *best effort* internet and that when they are informed about traffic management and its consequences this impacts their purchasing decisions.

The information included in pre-contractual information and in the contracts should be clear and transparent so that NRAs can verify the obligations of the IAS provider, particularly on the quality of service. In terms of speeds, the information should be disclosed with concrete numerical values or well-defined ranges of values, and never with unclear adjectives such as "fast", "ultrafast", etc.

The TSM Regulation clearly states that information provided to consumers has to be "a clear and comprehensible explanation" of the listed elements, which implies explaining the possible effects/impact in a way in which consumers can refer to it. Real-life examples should be used to illustrate the possible effects and impact of traffic management measures.

Art. 4.1 of the Regulation establishes that operators should include in the contract at least the information that is listed in the article. This means that NRAs can go further and ask operators to disclose more information that they consider is important for consumers to have. Importantly, they should also make clear that the information should also be available to consumers beforehand, and not only in the contract.

Information disclosed before conclusion of and in the contract should meet three requirements:

1. It should give all technical information that is necessary for an expert to assess the quality of the service on offer and to enable comparison with other offers. This is helpful, because even if consumers may not be able to take decisions on the basis of technical data, experts in consumer organisations for example can analyse existing offers and inform the general public accordingly.
2. It should give explanations to consumers that focus on the effects of technical measures taken by the provider in a way in which it is easily understandable by consumers.

¹⁶ <https://www.test-achats.be/action/espace-presse/communiqués-de-presse/2015/internet-speed>

¹⁷ <http://www.ocu.org/tecnologia/internet-telefonía/noticias/compra-colectiva-telefonía>

¹⁸ <http://www.altroconsumo.it/hi-tech/cellulari/news/abbassalatariffa>

¹⁹ BEREC ECODEM report.

3. It should be provided in a format that can be used by price comparison websites to present different, competing offers to consumers.

National Regulators should harmonise terminology and standardise as much as possible the templates used to provide information regarding traffic management.

The need for clear information on speeds

The information that consumers get about their speeds is paramount. They have the right to receive accurate information and IAS providers must deliver the speeds that they promise.

“Normally available speed” is not a very useful term, because it will not help the consumer to know that a given speed should “normally” be available if in fact it still is not. To make at least some sense of it, it would have to be interpreted as a median speed: 50% of the time above this speed level, 50% below it. This would make more sense than interpreting the term as meaning “average”.

The different speeds and the places where they can be obtained should be written into the contract and clearly disclosed to consumers. Network operators should bear the obligation to disclose speeds that are as accurate as possible depending on the consumer’s address. In the case of mobile internet access, network operators should provide a map on their website showing what parts of the country it delivers what quality of service and speeds.

The way in which speeds are advertised and inserted into contracts should allow NRAs to easily monitor whether they are being met, and should be compatible with consumer’s right to exercise their national remedies, and in particular the right to terminate the contract free of charge when there is a significant discrepancy between the speeds.

Importantly, when calculating speeds, NRAs should bear in mind consumers normal habits with regards to the time of the day when they are online. It is the speeds they are promised during day time (and thus not in the middle of the night) that will be meaningful for consumers.

Abusive practices must cease

If consumers were to receive misleading information regarding the speed of their IAS, this could constitute an unfair commercial practice in the context of the Unfair Commercial Practices Directive²⁰ because the provider is misleading the consumer about the main characteristics of the service.

Another potentially abusive practice can happen when providers market IAS offers as “unlimited”, but then attach so-called “fair usage policies” to their terms and conditions. These policies are unclear for consumers and should not be used. If an IAS does not have a data cap and is marketed as “unlimited”, it should be truly unlimited.

Another problematic practice for consumers is that of tying. While bundling itself may offer certain advantages (e.g. reduced prices for a combination of services), tying poses a problem because consumers are obliged to purchase one service in order to have access to another. For example, in the Danish market the two largest cable-TV companies are technically able to provide high speed internet access independently of whether the consumer buys cable-TV from them. However, consumers are obliged to also

²⁰ 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

buy a cable-TV package from the provider in order to obtain high speed internet. For many consumers this is the only way to obtain 30 MB/s internet.

Protecting consumer's privacy

It is of utmost importance that all traffic management practices fully respect consumer's privacy. In order to do so they must be in compliance with the Data Protection Directive²¹ (and then with the General Data Protection Regulation²² which takes effect in May 2018) and the e-Privacy Directive²³.

In particular, ensuring a high standard of protection of consumers personal data means that all traffic management should only be based on the header of data packets, and never monitor the content of the packets. Deep Packet Inspection techniques should therefore never be used for the purposes of this Regulation.

END

²¹ Directive 95/46/EC.

²² Regulation 2016/679.

²³ Directive EC/58/2002.



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