

Call for Action **Time to truly protect Net Neutrality in Europe**

The European Consumer Organisation, BEUC, and European Digital Rights, EDRI, representing together over 80 consumer and citizens organizations across the European Union, strongly call on the European Commission to take action to restore and protect the principles of openness and neutrality of the Internet in Europe.

There is no Internet without neutrality

Openness and neutrality are principles that have fundamentally defined the architecture and functioning of the Internet as we know it. These principles have allowed the Internet to enhance citizens' participation in society, access to knowledge and diversity on an unprecedented scale. All the while promoting economic growth and democratic participation and fostering innovation to the benefit of all citizens, consumers, big and small businesses alike.

Net neutrality is the principle that network providers may not hinder or block electronic communications passing through a network, that they are treated equally, independent of content, application, service, device, source or target. Distributed generation of content, applications and services on the Internet are crucial to the development of the European online economy and thrive on the Internet remaining neutral. Therefore, the separation of the network and application layers delivers real economic efficiencies and would benefit greatly by strong protection.

Net Neutrality is being violated across Europe

Operators have repeatedly violated the neutrality of the Internet by engaging in restrictive practices that do not respect this fundamental pillar. The sector is heading in the wrong direction: towards a fragmented online environment, where innovators no longer have equal access but depend on the underlying commercial agreements and practices on the infrastructure layer, and where many end-users can no longer decide for themselves what they want to do through an Internet access.

There is growing, overwhelming evidence that European operators and ISPs, particularly in the mobile sector, are using technical measures for their own commercial interests, tampering with citizens' ability to access the Internet. Both the prioritisation and/or blocking and throttling of specific services, applications or protocols, where not needed specifically for exceptional technical reasons such as temporary relief of network congestion, represent deviations from a neutral Internet, where all content should be treated equally. The evidence collected by the Body of European Regulators for Electronic Communications¹ and through citizen platforms such as Glasnost² and RespectMyNet³ provide a crystal clear picture of the numerous, harmful neutrality violations already taking place in Europe.

¹ https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Traffic%20Management%20Investigation%20BEREC_2.pdf

² Glasnost test results visualized, net neutrality map – www.netneutralitymap.org

³ RespectMyNet: <http://respectmynet.eu>

Europe cannot afford to repeat past mistakes

In other telecommunications markets, like local loop unbundling, mobile roaming and mobile data roaming, the European Commission first tried a *wait and see* approach before the anti-competitive behaviour of operators forced the Commission to act and ensure real competition through regulatory initiatives. Each of these failures cost billions to European citizens and SMEs. As in the past, operators claim that if too much regulation is introduced, investments will be discouraged.⁴ Yet the industry sector has greatly benefited from regulation on local loop unbundling, and while not perfect, markets are much more competitive than before. A similar phenomenon is happening with net neutrality, where the *wait and see* approach is unduly delaying a real solution, so it is in the hands of European policy makers to avoid repeating past mistakes.

Competition and transparency: necessary but insufficient

The European Commission's decision to protect net neutrality through competition and enhanced transparency alone is misguided. While these are necessary mechanisms to construct a healthy market, they do not effectively enable citizens to exercise their fundamental rights and enjoy their freedom of expression by being able to access an open and neutral Internet. Users, not network providers, should be able to decide on their own what they want to do with their Internet connection.

A neutral Internet is instrumental to encourage strong competition between network providers on bandwidth and data caps. Traffic management, which should only occur for exceptional and legitimate reasons such as congestion, is not something consumers are always aware of or thoroughly understand.⁵ This means that traffic management is not subject to competition to the same extent as other features such as price or speed. Therefore, the regulatory framework cannot solely rely on competition and transparency. Even if it is assumed that switching barriers from one provider to another are negligible, the fact that operators are fully transparent about their discriminatory practices so end-users can switch to what interests them the most does not solve the problem. A choice between the lesser of two evils is not a choice that European citizens should face.

In a competitive market, easy switching and transparency allow consumers to vote with their feet by moving to a new operator when they are dissatisfied. Yet over-reliance on switching to ensure a competitive market has proven to be a myth. Good switching is insufficient in an industry where consumers are tied into lengthy contracts, as their ability to switch providers may not be feasible in practice. End-users can be left in a restricted, low quality slow lane, or a fast lane with fewer destinations to reach, without even knowing about it.

⁴ ETNO annual report, p.11

<http://www.etno.eu/Portals/34/publications/annual%20reports/Annual%20Report2000.pdf>

⁵ For example Consumer Focus report *Lost on the broadband super highway*, that investigated consumer understanding of information on traffic management, concludes that increased transparency alone is unlikely to safeguard effectively the open Internet and prevent discriminatory restrictions online; <http://www.consumerfocus.org.uk/files/2012/11/Lost-on-the-broadband-super-highway.pdf>

In addition, allowing network providers to restrict Internet access does nothing to help European innovators seeking to develop online services, as it is of no use to them whatsoever to know that their services are being blocked or throttled in a transparent way or that users can easily switch suppliers. Investors will simply see a smaller marketplace for their services. For instance, an NGO or start-up company might not reach certain ISP's customers since a non-neutral Internet will not be in any way helped by transparency policies.

There is an urgent need for action

Relying solely on transparency requirements and on market forces will lead to the development of a multiple-tier Internet, to the detriment of citizens and consumers, and the competitive digital single market. In light of the many reported violations of net neutrality, it is now clear that we now need timely and evidence-based action.

We call on the European Commission to address the following issues, including giving consideration to legislative initiatives where appropriate:

- The Internet must be kept neutral and open. Reachability between all end points connected to the Internet must be maintained without any form of unlawful restriction.
- Clarity on which types of traffic management are legitimate and under what circumstances.
- A general prohibition of all forms of discriminatory traffic management, such as blocking or throttling unless done on legitimate traffic management grounds, and in particular a prohibition to violate the end-to-end principle.
- Traffic management should only be allowed as narrowly tailored deviations from the general rule. These deviations must be justified either on grounds of verifiable and exceptional technical necessity or to address a transient network management problem which cannot otherwise be addressed.
- A clear set of obligations on ISPs regarding the neutrality and Quality of Service of the Internet broadband services. Accessible, complete information on traffic management practices and justifications must be published and easily available to end-users.
- The pro-active monitoring by an independent institution of the Quality of Service of fixed and wireless networks. This institution can be the NRA.
- Use of deep packet inspection (and re-use of associated data) should be reviewed by national data protection regulators to assess compliance with the EU's data protection and fundamental rights framework. By default, only header information should be used for traffic management purposes.

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