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Public consultation on draft Guidelines on Net Neutrality and Transparency

Opinion by the Federation of German Consumer Organisations

BEREC Guidelines on Net Neutrality and Transparency: Best practices and recommended approaches (Draft)

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General

The original proposal on the new European telecommunications legal framework contained a far reaching principle of Net Neutrality. During the second reading in the European Parliament this principle was softened considerably. The final rules primarily set priority on the information obligations that electronic communications operators must comply with in their service contracts. From our perspective the Net Neutrality in form of a free data transmission cannot be guaranteed by this sort of regulation policy.

The current practice of equal treatment of content and services on the Internet (best effort approach) has proven itself. The openness of the Internet is the basis for the access to information, to all kinds of goods, for the use of private and public services, and for an unprecedented possibility of participation. Any turn off from this basic principle without justifiable and understandable reason is unacceptable. To ensure Net Neutrality in terms of equal opportunity and non-discriminatory access to content and services, legislative measures appear inevitable. A prioritization or throttling of data streams or blocking of content or services as an act of pure economic self-interest must be prevented by law.

Blocking of services / differentiated services

More and more ISPs act as providers of own services besides their function as network operators. Therefore, it is not surprising that these companies prioritize their own products not only by advertising them. Some also tried to favor these products or services in their networks using contract law to exclude competing measures or downgrade them by technical intervention. However, such measures restrict the use of the internet partly considerably. Such tendencies also impede competition in the markets for online content, applications and services.

However, not only the behavior of providers who want to rule out competing services by their actions is an issue which has to be considered. For example, in March 2010 the German subsidiary O2 of the Spanish telecommunications company Telefonica and the German Telekom AG announced that particularly data-intensive services (like Google) should pay additional fees for the transfers. The Association of German Cable Operators as well as BREKO (Bundesverband für Breitbandkommunikation – Federation of Broadband Communication) are supporting this demand. It must be assumed that these fees will pass on to the consumers. In the end of November 2010 Vodafone announced the transition of existing end-user tariffs in graduated tariffs and differentiated service levels. Taking in mind that the end-users already today can choose the quality of service by the relevant download speeds they thus would have to pay twice.

On the one hand the introduction of prioritizations or differentiated service would lead to significant distortions of competition on the supply side, since they would lead to higher costs of access. So, new innovative companies - such as YouTube a few years ago – would be hampered. On the other hand, these measures would lead to an unacceptable restriction of freedom of choice for the users, which would entail a two-class society in the internet. Prioritizations reinforce the digital divide, since the transmission of content will be based on the individual financial performance of the user. On the contrary Net Neutrality ensures access to knowledge and information regardless of location and economic performance.

Scarcity of resources and network management

A perceived need to maintain grid integrity because of scarce resources is often given to justify prioritizing or throttling certain services. However, as far as we know there is no such scarcity of resources, at least not as wired broadband communications is concerned. Therefore interventions in the network should not be a permanent condition, since otherwise it seems likely that a provider sells its customers non-deliverable capacity or has caused an artificial shortage. Simultaneously the prioritization of certain content or services automatically leads to a disability or impairment of the quality of other services. Rather a general prioritization also hinders the expansion of broadband infrastructure because it creates no economic incentive to invest. Quite contrary: in order to gain additional revenue with premium services the standard products may be of minor quality.

As an absolutely necessary exception only such measures would be acceptable that are aiming solely at a short-term traffic management to keep the availability and functionality of the networks. Such network management interventions are only acceptable at an acute, temporary overload and should retain to clear and transparent rules. These rules must be reviewed, published and controlled by an independent authority. Correspondingly there should be statutory reporting requirements for providers towards this authority. This concerns in first line the circumstances under which an intervention is deemed necessary, the measures taken and the duration of the procedure.

Doubts about the measures taken so far

The vzbv doubts that the proposed transparency requirements lead to more effective competition between operators. Especially in the area of the mobile Internet or in the countryside there are often very few (sometimes no more than one) service provider(s) which means that no real competition exists. Additionally there is currently no simple, quick and cheap way to change a provider when he breaches Net Neutrality. Many contracts are valid for several years, there are contract cancellation fees, costs of 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).

Claims

- Consumers must have the freedom to access content, services, applications, and to buy equipment of their choice. They also must have the right for such access which is free from discrimination according to source, destination, content or type of application. A selective slowing, disadvantage, blocking or prioritizing of data transfer protocols or both must be excluded when using a stationary and/or a mobile Internet access.
- The Internet access providers must disclose their network management practices. When interfering in their network they must prove that there are actually network congestions that make intervention necessary. In no way the ISPs shall sell more capacity than technically available in their networks. Techniques of deep packet inspection must be forbidden.
- Consumers must have access to an effective complaints mechanism if they had been provided with insufficient information or afflicted with a breach of Net Neutrality.
- Supervisory authorities must be able to promote, to monitor and to enforce Net Neutrality. The sanctions for breaches of Net Neutrality must be effective.