



Safeguarding transparency and openness and protecting end-users' rights to access and distribute the content, services and applications of their choice on the Internet

Comments on the Directives forming the EU Electronic Communications Framework

February 2009

Introduction

The undersigned companies welcome key provisions in the Electronic Communications Framework that aim to safeguard the strengths of the Internet as we know it today so that we can build on them in the future to the benefit of users and the wider economy. It is crucial that the Framework promotes openness and transparency in how networks will be operated and managed, and continues to allow users to access and distribute the content, services and applications of their choice on the Internet.

Next generation networks are vital to support the Internet's innovative potential and will create unparalleled benefits for consumers, business, and economies in Europe and worldwide. But those benefits will only be possible if the on-ramps to the Internet are not only robust, but also kept open.

"Net Neutrality' has to be guaranteed. New network management techniques allow traffic prioritisation. These tools may be used to guarantee good quality of service but could also be used for anti-competitive practices. The Commission has taken additional steps, through measures proposed to reform our telecom package, to better prevent such unfair abuse to the detriment of consumers."

Viviane Reding, European Commissioner for the Information Society and Media, 2 February 09¹

¹ Speech at the Lisbon Council on the "Internet of the future: Europe must be a key player"
http://ec.europa.eu/commission_barroso/reding/docs/speeches/2009/brussels-20090202.pdf.

Underpinning a strong digital economy with openness and transparency

The power of the Internet's fundamentally open, non-discriminatory nature to inspire innovation is not only central to the success of all today's online business models but also to the unparalleled innovation that users enjoy every day online, and which has underpinned wider economic growth and productivity gains over the past fifteen years. Keeping the Internet open is about allowing innovation and ensuring an ecosystem, where new ideas can succeed, and new business models can flourish on their own merits. The ability for new European Internet start-ups to emerge and grow globally is dependent on robust, open and non-discriminatory Internet access.

This is beneficial to all stakeholders. The unprecedented wave of innovation in Internet applications and content drives user demand for Internet access and bandwidth that is so much needed in the current economic climate, and which will underpin future investment in better broadband. We must therefore be careful to preserve this virtuous cycle of innovation and respect the existing, successful balance.

Promoting competition and minimizing existing and new bottlenecks

In the next generation environment, market consolidation is likely and the number of providers in a position to invest in next generation access infrastructure may be limited. Abuses such as the undue blocking and degradation of traffic already take place in the current market environment. It will be important to acknowledge the potential for future market structures to incentivise discriminatory behaviour, particularly the abuse of bottleneck control over users' Internet access. It would therefore be appropriate to introduce specific safeguards to ensure openness and transparency.

The introduction of active traffic management in next generation access networks is a matter of fact. There is a case for managing demands on the network in order to achieve a positive experience for Internet users as a whole. The question for the EU Framework is how best to allow the emergence of new networks with this functionality while at the same time meeting users' expectations and ensuring that traffic management is both necessary to provide the service to end users, and fair, non-discriminatory and pro-competitive with respect to those providers whose traffic is being 'managed'.

Refocusing the Framework on users and the wider economy

The goal of the Framework must be to strike a balance between the needs of all parties. The Council's common position seeks to do so and, in some crucial areas, sets important principles. These include safeguarding end-users' right to end-to-end connectivity and, where there are variations to this, introducing obligations on network providers to openly and transparently disclose this fact to their customers. In the common position, these variations in end-to-end connectivity are strictly limited to network management of the kind required to manage congestion on the network and provide users with a reasonable quality of service. In other words, traffic management could not be abused for other purposes, including discriminatory behaviour against those perceived as direct or indirect competitors.

There are, however, suggestions of further amendments which would have the effect of changing this careful balance. Traffic management, for example, would be defined more broadly and would be permitted for a broader range of purposes. These amendments could also be interpreted as permitting discrimination between individual services of the same type (e.g.: between providers of different VoIP services or different online gaming services) rather than simply policies which manage the demand that such traffic places on the network generally. These amendments would also have the effect of allowing network providers to routinely limit users' choice of the services or types of services available as long as the practice was disclosed to customers of that broadband provider.

Such broad and flexible provisions cannot be in the long-term interests of EU Internet users or the wider digital economy in the EU.

Striking the right balance

The representations of consumer groups and providers of online services and applications are frequently associated with preserving 'net neutrality'. Some suggest that this school of thought is intent on imposing legal restrictions on the providers of communications networks such that they cannot practice traffic management at all, for any purpose. This mis-represents the views of the parties to this document. As noted above, traffic management will be a matter of fact in the next generation broadband world. This paper aims to foster the common understanding that the Internet is based on the principle of free choice of what web sites to visit and services to consume, to secure transparency where there are exceptions to this principle, and to ensure that NRAs have the powers they need to act in cases where traffic management practices constitute unnecessary, discriminatory and/or anti-competitive behaviour.

We encourage the legislator to strike the right balance by achieving three objectives:

- Establish a presumption of end-to-end connectivity which consumers have come to associate with the Internet;
- Clarify that traffic management, where it is necessary to manage congestion and is essential to providing a broadband service to end users, is reasonable, justified and transparent to all parties (both end users and those parties whose traffic is being managed);
- Ensure that NRAs have the regulatory powers and access to evidence that they require to investigate claims that traffic management is unfair or anti-competitive and to give the timely remedies that are essential to support a fast-moving online market.

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