



Consultation publique sur l'Internet ouvert et la neutralité des réseaux en Europe

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Le Luxembourg a l'honneur de transmettre à la Commission européenne sa contribution à la consultation publique sur l'Internet ouvert et la neutralité des réseaux en Europe.

- The principle of network neutrality refers to an open, non-discriminatory and decentralised Internet for end-users (private and professional), without any access restrictions. It is the principle that is fundamental to the functioning and the end-to-end architecture of the Internet and that is responsible for its huge success. In other words, this principle ensures that no network operator controls the way in which consumers (private and professional) use the Internet. The end-user is guaranteed to access, consult, send, receive and use all online content, services and applications of his/her choice – a choice that cannot be anticipated arbitrarily by the network operator or Internet access provider on his/her behalf. It is crucial that this principle is applied to all electronic communications networks: fixed, mobile and satellite, in line with the EU principle of technological neutrality. Evidently, this principle cannot be used to legitimize unlawful or harmful actions and content on the web.
- Whoever enables end-users' access to the Internet is in a position to control the Internet. The risk for abuse that would lead to one or more (Inter)nets controlled by gatekeepers (network operators) is real. Unrestricted access to the same content by all Internet users is not only a legitimate expectation by citizens, but also a requirement to ensure future innovation and therefore EU competitiveness. Innovation has indeed been identified in the EU2020 strategy as one of the key drivers of the European economy and as one of the key elements to improve its competitiveness. Moreover, the principle “think small first” anchored in the Small Business Act for Europe with the goal of encouraging entrepreneurship should be underlined.
- The Luxembourg Government has inscribed the principle of network neutrality into its National Strategy for very high-speed Broadband¹. The national regulatory authority ILR (Institut de Régulation Luxembourgeois) will apply the relevant provisions of the 2009 EU regulatory framework on electronic communications and closely monitor the neutrality of the electronic communications networks in Luxembourg.

¹ National Strategy for very high-speed Broadband, April 2010. Page 8.
http://www.mediacom.public.lu/institutions/Institutions_nationales/smc/20100309_ngn/index.html

I. The open Internet and the end-to-end principle

- In Europe, the level playing field that the Internet set out to be has been questioned on several occasions.
 - In fixed networks, a video service platform in a national market in Europe was blocked by an Internet service provider (ISP) that was vertically integrated in a larger group that also proposed a video platform. Commercial reasons thus dictated that subscribers of the ISP were unable to access the video platform of their choice.
 - In mobile networks, voice over IP (VoIP) applications were blocked in several national markets across Europe. When blocking was lifted, technical and contractual conditions were imposed that put VoIP applications at a disadvantage compared to other online services. In all markets, customers did not necessarily have the choice to switch operators – in itself cumbersome and costly, particularly with bundled offers – as competition was not sufficient.

Generally, there is a risk to see the emergence of negotiated exclusive deals between network operators and content providers that makes it impossible for start-up service providers to compete, as they have no market entry or chance to be discovered by consumers.

- The growing vertical (and horizontal) integration of various players active in the online world makes it increasingly difficult to identify companies that are exclusively Internet access providers or exclusively content providers for instance. The consequence is the emergence of groups and companies that are capable of controlling the entire Internet value chain from end-user Internet access to the end-users' online activities. The risk for “locking” consumers into their own services and applications is real, and the chances for small and medium sized companies to compete with these dominant players are practically non-existent. The entry-barrier for “the two guys in the basement” that “come up with the next big thing” becomes insurmountable – unheard of in the context of Internet, whose virtue it is precisely to offer a level playing field for all innovative services and equal chances of success – be they large multinational companies or teenage individuals behind their PC.
- This would fundamentally change the nature of the Internet as it would create different kinds of Internets with different contents depending on what access provider has been subscribed to. It may create many exclusive proprietary networks with selected accessible content and applications. Thus, having “access to the Internet” should clearly mean unrestricted access to the same and full Internet for all, rather than just a preselected portion of it.
- The 2009 EU electronic communications regulatory framework has the merit of addressing the issue of network neutrality. Its emphasis is on monitoring and transparency, as the Commission's document for the public consultation outlines. While there is no obligation for national regulatory authorities to monitor the traffic on the networks and detect violations of the principle of net neutrality, they are to “promote the ability of end-users to access and distribute information or run applications and services of their choice”². NRAs are not

² Art. 8(4)(g), Framework Directive. 2009/140/EC

legally bound to ensure such unrestricted access. On the contrary, the regulatory framework “neither mandates nor prohibits conditions imposed by providers of publicly available electronic communications and services, limiting end-users’ access to, and/or use of services and applications”³. End-users have the right to be informed comprehensively about their access and surfing conditions and about the contractual terms when signing up with a network operator. Yet, a mere transparency obligation imposed on network operators seems insufficient to ensure the absence of discriminating traffic management practices or limited Internet access. In other words, while transparency is encouraged, it could be counterproductive by implicitly allowing for restrictive conditions taking place. Misleading information about “Internet access” while in fact it may be access to a limited version of the Internet may even qualify as unfair commercial practice.

- Should discriminatory behaviour be detected on behalf of a network operator, competition rules will apply and redress the market situation. The existing rules are certainly efficient, useful and necessary, but are only an *ex post* remedy. They are not sufficient to ensure *ex ante* that the Internet remains the level playing field it has been in the first place.
- Similarly, competition at the retail level is often referred to as the solution for consumers: if they are dissatisfied with the service offered, they are free to choose another operator. This logic of a competitive market with various offers by many different providers does not hold true in a small market, such as Luxembourg, which reaches its point of saturation faster.

II. Traffic management/discrimination

See also section I.

- Traffic management techniques are currently used by network operators to allow for a smooth and swift flow of data in the networks, avoiding congestion and protecting from harmful traffic such as viruses, with the objective of optimizing end-user experience. Such traffic management is hence acceptable for technical purposes; indeed it may be necessary as the “blind” transport of data would be inefficient, slow down certain services and compromise the experience of the end-user.

However, the emphasis has to be on the *technical* aspect of traffic management. It seems legitimate for a network operator to proceed, if necessary, to the prioritization of traffic according to the *type* of the data. Indeed, different applications, services or content have different characteristics regarding their bandwidth consumption and the quality of data transmission, such as latency for instance, by their nature or type and may need to be privileged – by so-called “intelligent networks” – in the traffic flow. The origin or destination of the data, as well as the “owner” of the data should be irrelevant in the transmission of the data. A prioritization according to the origin or the destination of the data, where commercial interests are likely to interfere and discriminate in an anti-competitive way, is likely to distort the market.

³ Art. 1(3), Universal Service Directive. 2009/136/EC

- The principle of technological neutrality is prominent in all EU regulation regarding electronic communications networks and is also crucial in the discussion on net neutrality: the open and non-discriminatory treatment of Internet traffic is to be preserved in all networks be they fixed, mobile or satellite.

III. Market structure

See also section I.

- The current arrangements in the functioning of the Internet have allowed it to become a success. They are based on the principles of openness, non-discrimination and democratic access. By jeopardizing this, the whole Internet economy may be threatened by creating unjustified entry barriers and market obstacles. As shown above, innovative service providers would not have the level playing field they need to launch their ideas, and customers would be prevented from benefitting from these. Indeed, it should be the market that decides which services will become a success, and not the network operator. Anti-competitive prioritization would reduce incentives for content creators, potentially lowering the overall value of the Internet for all users. Hence, by giving all actors of the Internet value chain the best incentives for optimal investment, net neutrality encourages a cycle that breeds more content, which in turn breeds more users. Indeed, this is the logic of the Internet economy: the end-user subscribes to the Internet via his network operator *because* there is interesting content and applications online. The network operator has customers *because* of the content and applications online to which it gives access.
- Regarding the question of infrastructure investments, it has to be emphasised that the end-users (subscribers) pay for the deployment of these new networks via their subscriptions. Also, content providers should not be regarded as “free-riders”: they each need to pay for their servers connecting to the Internet in the first place. Asking an additional fee from the content providers would inevitably fall back on the consumer who will then be charged twice.

IV. Consumers – quality of service

- The 2009 EU regulatory framework⁴ indicates that national regulatory authorities should be able to set minimum quality of service requirements. While it is crucial to give the national regulatory authorities the necessary tools to ensure end-users get the full Internet experience and to keep the market competitive, the *ad hoc* character of this provision may not be sufficiently efficient in the borderless Internet context. Additional clarifying guidance should be discussed at EU level.

⁴ Art. 22(3), Universal Service Directive. 2009/136/EC: « In order to prevent the degradation of service and the hindering or slowing down of traffic over networks, Member States shall ensure that national regulatory authorities are able to set minimum quality of service requirements on an undertaking or undertakings providing public communications networks. [...] »

V. The political, cultural and social dimension

- The Internet concurs to the exercise of citizens' fundamental rights, such as freedom of expression, free access to information, media pluralism and cultural diversity. A non-transparent and discriminatory management of traffic could adversely affect those rights. This dimension of the debate has been referred to as the "net freedoms", while the net neutrality dimension relates primarily to the technical and economic issues, as discussed above. While it is important not to mix both debates, there is clearly a link in that a restrictive access to the Internet – caused either by anti-competitive behaviour on behalf of network operators or by governmental censorship – prevents citizens from the full enjoyment of their rights, as inscribed in the European Charter of Fundamental Rights.
