



FORBRUKERRÅDET

Policy Development Unit (B1), BU33 7/40
DG Information Society and Media
European Commission
B-1049 Brussels
Belgium

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TN

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NCCs response to the European Commission's public consultation

Summary:

The Norwegian Consumer Council believes that

- Net neutrality is a pre requisite to ensure freedom of expression, to hold opinions and to receive and impart information and ideas.
- Net neutrality is a pre requisite to ensure further innovation and development of network related services.
- It must be up to individual broadband customers to decide how to use their bandwidth.
- The quality of the content must not be affected by the Internet service provider's agreements, preferences, financial interests or other concerns.
- Congestion must be met with further development of capacity, not by traffic management.

The Norwegian Consumer Council believes that network operators should respect the following principles, as laid down in the Norwegian Post and Telecommunications Authority's guidelines on network neutrality:

1. Internet users are entitled to an Internet connection with a predefined capacity and quality.
2. Internet users are entitled to an Internet connection that enables them to
 - send and receive content of their choice
 - use services and run applications of their choice
 - connect hardware and use software of their choice that do not harm the network.
3. Internet users are entitled to an Internet connection that is free of discrimination with regard to type of application, service or content or based on sender or receiver address.

In view of the above, national regulatory authorities must be granted the necessary powers to sanction behaviour that goes counter the principle of net neutrality. National regulatory authorities should be able to monitor the behaviour of service providers in relation to potential discriminatory practices. Adequate and dissuasive sanctions against those practices should be enacted.

The Norwegian Consumer Council questions whether guidelines and/or other soft law approaches are a satisfactory regulation for such an important precondition for the further development of all services that do not require physical presence.

Forbrukerrådet

Postadresse:
Postboks 4595 Nydalen
0404 Oslo

Besøksadresse:
Rolf Wickstrømsvei 15
0486 Oslo

Epost/web:
epost@forbrukerradet.no
forbrukerportalen.no
org.nr: 871 033 382

Telefon:
23400500
Telefax:
23400501

The Norwegian Consumer Council believes network neutrality should be regulated through hard law to ensure that the Internet and other infrastructures continues its prevalent success as vital, innovative and open lines of communication between consumers, businesses and public entities.

In addition to this response, CCN supports the European consumer organisation BEUC in its reply.

End summary

Introductory and general remarks

The Consumer Council of Norway is an administrative organ with special powers and its own board and statutes granted by Royal Decree. This means that the organisation is independent politically from its governing ministry, which is the Norwegian Ministry of Children and Equality. This means that The Consumer Council of Norway is an independent professional body.

CCNs has through its policy department Digital Services, focused on the importance of securing neutral networks for several years. This has made CCN a natural participant in the Norwegian Post and Telecommunications Authority (NPT) collaborative effort with various industry players, such as Internet service providers (ISPs), industry organisations, content providers and consumer protection agencies to carve out a set of guidelines for network neutrality¹.

As NPT them selves put it in the foreword, the Guidelines “are intended to ensure that the Internet remains an open and non-discriminatory platform for all types of communication and content distribution.” Norwegian stakeholders have broadly adopted them, and the guidelines could form the basis for a broad discussion on how net neutrality should be regulated in Europe.

Even though it is the Internet that comes to mind when net neutrality is discussed, there is no actual, practical or principle reasons to restrict discussions on network neutrality and open networks to the Internet. The Norwegian guidelines are to be considered as technology neutral, and they apply to other networks such as mobile broadband as well as Internet.

Non-discrimination is a term that can be used to clarify what we mean by "neutrality". This means that different data streams on the Internet should not be treated differently in unreasonable ways. At the same time, we should acknowledge that a network could never be 100% neutral, all the time traffic consists of data with different protocols, and that the data therein requires different managing. The kind of purely technical handling is generally not to be seen as traffic management in breach of the principles of net neutrality.

For a further explanation of concepts and history behind the debate about net neutrality, refer to the Post and Telecommunications Authority's publication "Network neutrality - Guidelines for Internet neutrality".

There is not more than one obvious and official violation of network neutrality within the official Norwegian Internet history, but there are several concrete examples of violations of network neutrality outside Norway. In addition to several transatlantic examples, the Dutch ISP UPC traffic management practices that began in summer 2009, stands out as the clearest and most striking example we have of violation of net neutrality².

It is sometimes argued that small portions of Internet users consume the bulk of the capacity that exists, and thus creating congestion on the access network. It is, however, impossible for any Internet subscriber

¹ <http://www.npt.no/ikbViewer/Content/109604/Guidelines%20for%20network%20neutrality.pdf>

² <http://www.v3.co.uk/v3/news/2248371/dutch-isp-set-first-europe-net>

to use more bandwidth than the subscriber and ISP has been promised, and has to be considered as a contractual obligation for the ISP.

The question of traffic management is also a matter of over sales of capacity. CCN believes that it does not benefit the development of capacity, nor the development and introduction of new and better services if the demand for capacity is answered by restricting use of the ordered and paid capacity.

Network neutrality and the principle of more conduit

The principle of *merê conduit* is laid down in EU Directive 2000/31/EC Electronic Commerce. From this provision, the network operators basically have no liability for the consequences of traffic on their networks.

This principle has on the one hand, been recognized as an adequate argument and defence that ISPs cannot operate as an Internet police / gatekeepers to control traffic in the networks. On the other hand, it is the CCNs view that this lack of legal obligation also entails a lack of right for the ISP to intervene/manage traffic on their networks.

The CCN considers the principle of *merê conduit* as especially important when it comes to legal and contractual regulation of the ISPs rights and obligations, whether it is directed at content, services, applications or subscribers. In our opinion it is of paramount importance to safeguard on a principle that states that the suppliers of infrastructure is not going to do more than just that, and that the principle in our opinion is a prerequisite for ensuring neutral networks.

Our response to The Commissions questions:

Question 1: *Is there currently a problem of net neutrality and the openness of the internet in Europe? If so, illustrate with concrete examples. Where are the bottlenecks, if any? Is the problem such that it cannot be solved by the existing degree of competition in fixed and mobile access markets?*

Due to the technical aspects of net work architecture and functionality, there will be never be IP networks that are 100 % neutral. We believe the dutch UPC example is an exception when it comes to openness from ISPs. Such blunt openness when it comes to informing the public of traffic management that openly and obviously breaks with any idea of network neutrality, is what the Commission has demanded through out the process of the telecoms -package. And this example in our minds clearly shows that information isn't a safeguard for net neutrality. (If this stunt moved customers away from the service, is a story not told).

The question prerequisites such openness, as the technical expertise and equipment needed for revealing a breach of network neutrality, is a seldom asset to most of us.

We point to BEUCs response for a more complementary answer.

Question 2: *How might problems arise in future? Could these emerge in other parts of the internet value chain? What would the causes be?*

One of the challenges we see in the future, is the frustration ISPs might feel as their income comes from providing pure infrastructure, and as the more lucrative business models are referred to content, applications/software and hardware (both paid or advertised). This frustration can

derive from both ends in this infrastructure, and business models based on premium and thus prioritized traffic can easily be imagined.

A second challenge can arise from non-conformant exploitation of vertical integration as a business model. Any ISP that enters other levels in this business chain will be exposed to competition that can be met by non-neutral traffic management.

The largest ISP in Norway, the former state telecom company Telenor, is an ISP, but also holds interests in music streaming services and television distribution, to name but a few. For the normal customer, it would be close to impossible to detect a manipulation of competing music streaming services, such as Spotify, and thus give the customer an incentive to change to their music streaming service.

Question 3: *Is the regulatory framework capable of dealing with the issues identified, including in relation to monitoring/assessment and subsequent enforcement?*

As introduced above, under the Norwegian guidelines as presented in the TACD resolution (and PTs homepage), there have not been any known breaches of network neutrality. The one year evaluation performed by the Post and telecommunication authority earlier in 2010 showed that none of the signatories demanding a stronger regulatory framework.

NCC regrets the weak protection of net neutrality in the new European Telecom legislation that is in the process of being implemented in Norway now³. First of all, the legislation in mention, establishes the possibility for ISPs to adopt traffic management practices, as long as they are communicated to the consumers. Without any national law prohibiting breaches of net neutrality, the telecom legislation could in fact endorse such breaches of net neutrality.

The focus of the new rules has been on enhancing transparency regarding restrictions imposed by network operators. For all practical purposes, the earlier mentioned example of UPC has to be seen, as within the telecom regulation as long as the Netherlands doesn't have any national legislation covering such management.

By focusing on transparency without securing that the necessary competition is in place, (accessible, competing providers, and/or a threshold for switching that the consumers are able to overcome), transparency still isn't a strong enough tool for securing a neutral net.

The process of implementing the telecoms package into Norwegian statutory law is well on its way. With in this process, NCC will ask the Ministry of Transport and Communications to perform a similar process as the one the commission is launching with this questionnaire. In this environment everything changes fast, and a more solid foundation for enforcement could soon be needed.

³ The new rules were published in the Official Journal of the EU ON 18 December 2009 <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:337:SOM:EN:HTML> and Member States will have to transpose them into national laws by May 2011.

Question 4: *To what extent is traffic management necessary from an operators' point of view? How is it carried out in practice? What technologies are used to carry out such traffic management?*

Question 5: *To what extent will net neutrality concerns be allayed by the provision of transparent information to end users, which distinguishes between managed services on the one hand and services offering access to the public internet on a 'best efforts' basis, on the other?*

Please see BEUCs response to these questions.

Question 6: *Should the principles governing traffic management be the same for fixed and mobile networks?*

There is no actual, practical or principled reason to restrict discussions on network neutrality and open networks to the Internet. The Norwegian guidelines therefore apply to both fixed and mobile networks.

Question 7: *What other forms of prioritisation are taking place? Do content and application providers also try to prioritise their services? If so, how – and how does this prioritisation affect other players in the value chain?*

Please see BEUCs response on this question.

Question 8: *In the case of managed services, should the same quality of service conditions and parameters be available to all content/application/online service providers which are in the same situation? May exclusive agreements between network operators and content/application/online service providers create problems for achieving that objective?*

A QoS is usually needed when there is a (possible) scarcity of capacity on the best effort part of the broadband. For example, a family could be using their capacity for many different services and applications. This could lead to a VOIP⁴ services experience coming through as being poor, due do heavy use of a usually poorer upload line, if another family member is listening to a streaming music service. Some customers are capable of setting up there own QoS in these situations, while others might need help. For those who's needs for capacity is bigger than what they have access to, QoS could be offered as a service from the ISP (or anyone with the competence of setting this up, really)

If the services or applications are being transmitted through the best effort, capacity, the answer is definitely yes. First of all, the experiences that triggers the need for QoS is individual, and therefore impossible for ISPs to control. A general QoS is in breach of net neutrality, but providing QoS to a customer, when it is the customer who takes an initiative towards an ISP to set this up, is within the guidelines.

Question 9: *If the objective referred to in Question 8 is retained, are additional measures needed to achieve it? If so, should such measures have a voluntary nature (such as, for example, an industry code of conduct) or a regulatory one?*

Question 10: *Are the commercial arrangements that currently govern the provision of access to the internet adequate, in order to ensure that the internet remains open and that infrastructure investment is maintained? If not, how should they change?*

⁴ http://en.wikipedia.org/wiki/Voice_over_Internet_Protocol

Question 11: *What instances could trigger intervention by national regulatory authorities in setting minimum quality of service requirements on an undertaking or undertakings providing public communications services?*

Question 12: *How should quality of service requirements be determined, and how could they be monitored?*

Question 13: *In the case where NRAs find it necessary to intervene to impose minimum quality of service requirements, what form should they take, and to what extent should there be co-operation between NRAs to arrive at a common approach?*

Question 14: *What should transparency for consumers consist of? Should the standards currently applied be further improved?*

Please see BEUCs response to these questions.

Question 15: *Besides the traffic management issues discussed above, are there any other concerns affecting freedom of expression, media pluralism and cultural diversity on the internet? If so, what further measures would be needed to safeguard those values?*

The Norwegian Consumer Council would like to emphasise the importance of interoperability as a paramount prerequisite for a sound and healthy, level playing field for innovation and possible penetration of future digital products and services. At the same time, interoperability facilitates the will and possibility for consumers to seek other and better offers and solutions to their wants and needs in a developing reality.

Yours Sincerely,

Audun Skeidsvoll
Policy Director

Thomas Nortvedt
Head of Section Digital Services