

ES -UK COMMON PROPOSAL ON NET NEUTRALITY

Possible recital:

We would suggest a recital that would clarify the difference between two kinds of reasonable traffic management (both of which would be subject to the requirement that they be transparent, proportionate, non-discriminatory, and not anti-competitive):

1. TM between different kinds of services (e.g. between emails and videostreams)
2. TM between different services of the same kind (e.g. between two different VOIP services, or two different video services).

Type 1 is what we expect operators do when managing congestion on their networks on a day-to-day basis.

Type 2 is more likely to be TM targeting specific content (as opposed to specific classes of traffic) and therefore should be more restricted, i.e. only allowed in the circumstances listed in (a)-(d) (subject to a revision of this list by BEREC/the Commission to ensure it remains in step with technological developments).

Article 2 - Definitions:

() “Internet access service” means a publicly available electronic communications service that provides connectivity to substantially all end points of the internet, irrespective of network technologies or terminal equipment used.

Article 23 – End-user freedoms to use Internet Access Services and permissible traffic management

- (1). Subject to Article 23 (3), all end-users shall be free to access and send and receive lawful information and content, use services and run applications of their choice using their internet access service.
- (2). End users shall be free to enter into agreements with providers of internet access services on the commercial and technical characteristics of their internet access service, in particular regarding the data volumes and speeds of the connection and the access technology employed.
- (3). Within the limits of any contractually agreed technical characteristics of the internet access services, providers of internet access services shall not implement specific treatment or conditions for specific content, applications or services, or specific classes of network traffic, except in cases where such measures can be considered reasonable. Reasonable measures shall be transparent, non-discriminatory and proportionate and shall not constitute anti-competitive behaviour.

When such measures consist in blocking, slowing down, degrading or discriminating against specific content, applications or services, they shall in addition be limited to cases where it is necessary to:

- a) implement a legislative provision or a court order or a non-legislative approved self-regulatory system designed to prevent access to, or the dissemination of, unlawful or harmful content;

- b) preserve the integrity and security of the network, services provided via this network, or the end-users' terminal equipment;
- c) comply with an explicit request from the end-user, or be done with the explicit consent of the end-user;
- d) prevent or mitigate the effects of exceptional network congestion in justified cases when application-agnostic measures are not efficient.

BEREC shall periodically, and on request, review the list of situations where traffic management measures are permissible. It shall consider whether any of the items on the list should be withdrawn or amended and whether any new items should be added. Any permissible traffic management measures shall in any event be transparent, non-discriminatory and proportionate and shall not constitute anti-competitive behaviour. The Commission shall act on the basis of BEREC's report, and may alter the list through implementing acts.

Article 24 – Safeguards for quality of service and the availability of internet access services

(1). National regulatory authorities shall closely monitor the effective ability of end-users to benefit from the freedoms provided for in Article 23 (1) and (2), and the application of reasonable traffic management measures in compliance with Article 23(3), as well as the continued availability of internet access services at appropriate levels of quality, and shall ensure that adequate measurements of this quality are performed.

(2) Providers of access services shall make available, at the request of the national regulatory authority, information about how their network traffic and capacity are managed, as well as justifications for any network traffic management measures applied, in accordance with Article 23

(3). Article 5 of the Framework Directive shall apply, mutatis mutandis, in respect of the provision of information under this Article.

(3) National regulatory authorities, taking into account current advances in technology, shall have the power to impose technical characteristics and quality of service requirements and, including, where appropriate, prohibitions on blocking, slowing down, degrading or discriminating against specific content, applications or services, on one or more providers of internet access services, in order to safeguard end-users' rights in Article 23 (1), to prevent the general degradation of quality of service of Internet access services, and to ensure compliance with Article 23(3).

(4). BEREC shall, in close cooperation with the Commission lay down guidelines on the application of traffic management measures, on the basis of this Article, and for monitoring compliance.