



TRANSPARENCY WON'T FOSTER NEUTRALITY

The EU needs to move past its failed wait-and-see approach

About La Quadrature du Net

La Quadrature du Net is a France-based **advocacy group that promotes the rights and freedoms of citizens on the Internet**. More specifically, it advocates for the adaptation of French and European legislations to respect the founding principles of the Internet, most notably the free circulation of knowledge. As such, La Quadrature du Net engages in public-policy debates concerning, for instance, freedom of speech, copyright, regulation of telecommunications and online privacy.

In addition to its advocacy work, the group also aims to foster a better understanding of legislative processes among citizens. Through specific and pertinent information and tools, La Quadrature du Net hopes to encourage citizens' participation in the public debate on rights and freedoms in the digital age.

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Executive Summary

While noting that BEREC is currently working on a study on traffic discrimination, La Quadrature du Net would like to take the opportunity of the consultation on its draft "guidelines on transparency and Net neutrality" to stress once again the shortcomings of the wait-and-see approach defended by both BEREC and the European Commission.

We stress that violations of Net neutrality are becoming widespread across EU Internet access markets, and harm fundamental rights, competition and innovation in the digital economy. In addition, we note that the perception of a lenient attitude towards network neutrality violations on the part of regulators deters investment in broadband networks, both fixed and mobile.

We conclude by reminding the EU Commission's commitment to preserve Net neutrality and call on BEREC to swiftly release a comprehensive and objective study on ongoing discriminatory traffic management practices, as required by the EU Parliament, so that the need for further regulation can be clearly established.

I - Failure of the transparency-based "wait-and-see" approach

The directives of the Telecoms Package adopted in late-2009 contain provisions which the European Commission said were useful to protect network neutrality. According to the Commission, transparency regarding traffic discrimination practices and competition between Internet Service Providers (ISPs), allowing subscribers to switch providers if they are dissatisfied, can help alleviate anti-Net neutrality practices.

Failure of the wait-and-see approach in the UK. However, the wait-and-see approach has already failed. The current regulatory framework, invoking transparency and competition, leads the Commission to apply at the European level the policies developed by the British national regulatory authority, Ofcom. As early as 2006, Ofcom had to deal with discriminatory practices on the part of British ISPs. It first favored rules governing the transparency of these practices, so that consumers were informed of their ISP's policies. Ofcom then realized that switching to another ISPs who did not engage in discriminatory practices was very difficult for consumers. Concerned with the fact that captive markets might be emerging, the regulator then tried —without much success— to facilitate migration from one ISP to another.

Why transparency and competition can't protect Net neutrality. The effect of Ofcom's policies on network neutrality is very dubious. First, transparency does not prevent all the ISPs in a given market to adopt anti-network neutrality practices, and there are many markets where no neutral Internet access is available, particularly in the wireless market (We call on BEREC to release a detailed study regarding market conditions, and the existence of a neutral access in all of EU electronic communications market). In such cases, competition provides no solution for consumers, who have the right to access a neutral Internet. We have repeatedly requested the inclusion in European and Member States policies of a commitment to ensure the widespread availability of at least one neutral offer in both fixed line and mobile Internet offers.—_When for geographical or technical reasons, only one offer is available in a given market (often subsidized), regulators should have already imposed strong requirements of network neutrality. In addition, the record of past policies in fighting market fixing agreements between mobile operators is very weak, which also suggests that the EU wait-and-see approach is bound to fail.

Second, even if neutral Internet access offers were to subsist in the absence of regulation, the transactions costs of switching ISP in a quadruple-play world where fixed Internet, TV, land-line and mobile phone are concentrated in one service remain so high that many users would feel discouraged to do so.

Thirdly, while it has profound political and economic implications, traffic management practices remain a technical topic, and average users may not properly understand the implications of their ISP restricting their Internet access.

As a matter of fact, the United Kingdom remains one of the EU countries in which network neutrality is most jeopardized¹, which clearly demonstrate that this two-legged policy regarding traffic management has failed. With the Telecoms Package, the European

¹ See La Quadrature du Net's answer to EU Commission questionnaire on Net neutrality, from September 2010. Address: <http://www.laquadrature.net/en/la-quadrature-answers-the-eu-questionnaire-on-net-neutrality>

Commission chose to expand this minimalist approach to the issue of network neutrality to the rest of the EU. Even though nothing prevents national regulators to go further than this minimum standard, network neutrality must be guaranteed by an ad hoc legislation across the European Union. Failing this, EU citizens will see the generalization of the crippled Internet access presented in BEREC's document (p. 39).

II - Ongoing violations of Net neutrality

Regarding BEREC's choice of words. La Quadrature du Net would like to express its concern regarding BEREC's forthcoming study of traffic management practices. BEREC says in the consultation document that it is "carrying out an economic analysis of the potential and theoretical impact on market conditions of discriminatory behaviour". The choice of words tells a lot of BEREC's approach to network neutrality. While many stakeholders points to existing Net neutrality violations and ask for urgent regulation, BEREC only mentions the "potential and theoretical impact" of discriminatory behaviour.

The origin of Net neutrality violations. Although commercially-motivated traffic discrimination practices have not been as aggressive as in the United States, violations of the network neutrality principle are gaining ground in the European Union. Since the apparition of inspection technologies – usually referred too as Deep Packet Inspection – for Internet communications, an increasing number of European Internet service providers (ISPs) implement network management practices that clearly breach the fundamental principle of confidentiality of communications, both on wireless and land-line networks. Generally speaking, and as the following examples outline, we can distinguish between three types of anti-Net neutrality practices that are currently implemented in the EU: throttling of bandwidth-intensive protocols (like peer-to-peer), inhibiting competing services (such as Voice-Over-IP applications) and billing extra fees for prioritized access to the Internet.

Anecdotal evidence of Net neutrality violations. In late-September, La Quadrature du Net and Bits of Freedom launched an online platform allowing citizens to report violations of Net neutrality by their ISPs: <http://respectmynet.eu>. The results so far - even though the reports need further verification - add to the already widely available anecdotal evidence of widespread discriminatory practices².

BEREC should move beyond pondering about the "potential and theoretical" impact of Net neutrality, and assess the impact of these traffic management practices in comparison to what would be the benefits of a widespread access to neutral offers, including in terms of fundamental rights, innovation, and economic growth.

III - Importance of Net neutrality

Save for those implemented for security issues or unforeseen and temporary congestion, Net neutrality violations have an immediate "impact" on fundamental rights, the digital economy and broadband investment.

² Got to the following address to browse the reported cases: <http://respectmynet.eu/list/>

→ **Fundamental rights.** Contrary to older traditional means of communications such as radio or television, producing and circulating information on the Internet does not require significant money. Thus, the ability to produce information and knowledge on the Internet is much more equally distributed in society, and results in positive effects on democracy as a whole. Net neutrality ensures that the ability to voice opinions on the Internet does not depend on your financial capacities or social status. It gives people the freedom to express themselves as they wish, and to access the information they want without risking to be put at disadvantage by the few actors who operate the network. If Net neutrality was abandoned or even durably weakened in Europe, the control of the new, networked public sphere would be handed out to private actors, who could use discriminatory traffic management as a way of achieving control on the Internet ecosystem. It could turn the Internet into yet another predominantly commercial media.

In a opinion of October 2011³, the European Data Protection Supervisor (EDPS), also stressed the importance of neutrality for privacy. According to the EDPS, traffic management practices that are not strictly necessary to ensure the network's security or integrity amount to a global monitoring and inspection of users' communications, thereby undermining privacy. To respect current data protection laws, the EDPS stresses that users must give explicit consent to their Internet communications being monitored and restricted. It further stresses that users should always have the choice between a restricted offer and neutral Internet access, without being imposed higher costs by telecom operators.

→ **Digital economy and innovation.** Net neutrality facilitates innovation and competition, as economic actors take advantage of the level-playing field in communication networks to launch new services. The concept of "innovation without a permit", where new entrants compete fairly with the incumbent giants is at the root of the development of the Internet as we know it. Entrepreneurs of the Internet have become the linchpin of the emergent knowledge economy. Beyond prominent examples of companies that became huge thanks to being able to innovate and grow on a neutral Internet such as Google, Skype, eBay, or Twitter there are thousands of smaller companies and services that represent an even bigger contribution to growth and social welfare. Free/open source software or open contents services such as Wikipedia or WordPress count among the most-used services in the world, and only exist thanks to the neutral and decentralized nature of the Internet. Many other essential parts of the Internet took advantage of an open network and became widely used all over the world only a few months after being created, because it was relatively cheap to produce and distribute their innovative services.

→ **Network neutrality spurs investment infrastructure.**—Net neutrality is also essential to stimulate growth in network capacities, which is driven by the development of services and applications⁴. This is worth recalling, at a time when some ISPs are seeking to monetize the under-capacity of their infrastructure. In the United Kingdom, British Telecom throttles all peer-to-peer traffic but sells premium subscriptions allowing customers to avoid such discrimination by paying a higher fee⁵. In this way, operators are in position to benefit from the scarcity of their network's bandwidth, as consumers are compelled to pay a higher price to communicate certain classes of data in normal conditions. Such practices, which consist in maintaining and managing an artificial scarcity, disincentivize investments in more network capacities, even though the price of bandwidth is rapidly decreasing. They cause a mid-term

3 http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-10-07_Net_neutrality_EN.pdf

4 See a recent study: <http://aiconsortia.com/2011/10/news-feeds/uk-broadcasters-open-internet-essential-for-broadband-growth/>

5 Chris Williams, -January 2nd, 2010, « BT to throttle P2P for faster broadband », *The Register*.

Address : http://www.theregister.co.uk/2010/01/22/bt_infinity_p2p/

loss for the overall economy, whose growth depends on the development of an open online infrastructure.

BEREC should further examine the operators' claims that increase in bandwidth usage is getting "too costly" for them to invest in more network capacity, and that congestion on their networks is unsolvable, before allowing any practice detrimental to free competition, innovation, and citizens freedom of expression and privacy.

IV - Need for objective assessment of the situation and further regulation

EU Commission's mandate is to protect Net neutrality. During her introductory confirmation hearing before the European Parliament, in January 2010, Commissioner Neelie Kroes vouched to fight against Net Neutrality violations⁶. Since then, she has been much less keen to address the issue, as shown by her recent statements against the pending Net neutrality legislation⁷.

EU Parliament resolution on "assessment of further regulation". Fortunately, the EU Parliament has reiterated its attachment to the protection of Net neutrality. On October 20th, 2011, the Industry (ITRE) committee of the EU Parliament adopted an overall a positive resolution, making a strong political statement in favour of Net neutrality⁸. It brings a useful definition of Net neutrality and of the network management policies that are detrimental to the users' freedoms and to competition. The resolution asks the Commission to move past its failed "wait-and-see" approach by assessing the need for further regulation on Net neutrality –a regulation we have been calling for over the past two years. According to the resolution, such assessment shall be made within 6 months of BEREC releasing its study on discriminatory practices.

Recommendations to BEREC. BEREC's study on traffic management practices is therefore very much anticipated.

As it concludes its work on this study, we call on BEREC to engage with all stakeholders, as well as to ensure that the study itself is comprehensive and based on creditable evidence, transparent assumptions and objective analysis. Again, the operators' claims that presumed and inevitable permanent state of congestion should not be taken for granted and require investigation.

We trust that BEREC's findings will show the need for a EU-wide regulation (as opposed to a mere code of conduct) that would:

- ➔ **Define the principle of network neutrality.** First, the specific architectural principles of the Internet should be recognized in the regulatory framework through the definition of the Internet as a public electronic communications network abiding by the principle of Net

⁶ Summary of hearing of Neelie Kroes - Digital Agenda Commissioner, January 14th, 2010.

Address:- <http://is.gd/nRkKcg>

⁷ Jennifer Baker, October 4th, 2011, "Neelie Kroes, telco CEOs wrestle over net neutrality", PCWorld.

Address: http://www.pcworld.idg.com.au/article/402825/neelie_kroes_telco_ceos_wrestle_over_net_neutrality/

⁸ La Quadrature du Net, October 20th, 2011, "Net Neutrality Resolution Adopted in EU Parliament".

Address: <https://www.laquadrature.net/en/net-neutrality-resolution-adopted-in-eu-parliament>

neutrality. This principle would rule out any discrimination based on the source, destination or actual content of the data transmitted over the network. ISPs would be compelled to respect this principle by given an equal treatment to all data flows and guaranteeing final users the freedom to 1) send and receive the content, services and applications of their choice; 2) use or run the application and services of their choice; 3) connect to the network and run any program of their choice, as long as they do not harm the network.

- **Provide a framework for acceptable network management practices.** Exceptions to the network neutrality principle should be possible in exceptional circumstances, such as in the case of unforeseeable congestion or in the event of a security threat on the network. The French NRA recommends⁹ that these "reasonable" traffic management practices respect the principles of relevance of the motives (temporary congestion¹⁰ or security threat), proportionality, efficiency, transparency and non-discrimination between users or types of communication subject to traffic management. To the extent that they clearly exclude commercially-motivated violations of network neutrality, these principles seem appropriate since they are flexible enough to accommodate any future legitimate need for traffic management practices while preventing abuses.

- **Create sanctions to punish any illegal violation of network neutrality.** A third important component of a regulatory framework aimed at protecting network neutrality is the creation of appropriate sanctions. National and EU regulatory authorities must be able to sanction ISPs when they violate Net neutrality rules, for instance through monetary fines (which should be persuasive enough). In the event of very serious and/or deliberate interferences with the freedom of communications of end-users, the judiciary authority should be competent to sanction ISPs .

⁹ Arcep's ten proposals on Net neutrality, September 2010.

Address: http://www.arcep.fr/uploads/tx_gspublication/net-neutralite-orientations-sept2010-eng.pdf

¹⁰ Arcep says that "beyond a certain threshold, the congestion can no longer be viewed as temporary but rather a capacity issue whose cause is structural, and for which corrective measures need to be put into place, particularly through additional investments".