

Resolution on the open and neutral Internet

Introduction

This resolution builds on the TACD net neutrality resolutions of April 2010¹ and June 2014², which called for policies in the United States (U.S.) and the European Union (EU) to promote the principle of net neutrality and secure an open Internet for all. The need for robust open Internet policies is ever more important in order to protect the Internet as we know it today and ensure it continues to thrive in the future as a platform for creativity, innovation and freedom of speech.

Since the last TACD resolution, significant developments in both the EU and the U.S. markets are increasingly threatening the neutrality and openness of the Internet, changing economic flows and concentrating power in the hands of Internet Service Providers (ISPs). The ISP industry is increasingly coming up with ways to extract rents without offering new added value. In particular, they look for ways to have two sources of revenue for the same service (delivery of content): from the end-user's subscription and from the content provider.

If the principles of openness and neutrality are not urgently protected in both the EU and the U.S., the development of the *best-efforts* Internet as we know it is at risk. Allowing deviations from these principles represents a significant paradigm shift that will certainly affect the Internet's innovative character, the economic growth opportunities it offers and the enhanced access to knowledge and freedom of speech that it allows citizens to enjoy. By becoming global leaders on net neutrality, the EU and the U.S. have the opportunity to make sure the Internet remains open and neutral in the future.

Protecting the right to access an open and neutral Internet is preserving the Internet itself, its openness and innovative character. Legal certainty is served by setting out on the one hand the rights attributed to end-users and on the other hand the obligations on ISPs. As defined here, net neutrality is a state in which users have the right to access the content, services, applications and devices of their choice without unreasonable discrimination. Importantly, for an open Internet to become a reality, the principle of neutrality must be applicable to all layers of the Internet, and not just the last mile.

In a neutral network, consumers:

1. Are entitled to an Internet connection of the speed and quality advertised to them.
2. Are entitled to an Internet connection that enables them to
 - send and receive content of their choice,

¹ [TACD "Resolution on Network Neutrality"](#) (DOC NO: INFOSOC 42-09)

² [TACD Resolution "The open and neutral Internet"](#) (DOC NO: INFOSOC 52-14)

- use services and run applications of their choice,
 - connect hardware and use software of their choice as long as they do not harm the network.
3. Are entitled to an Internet connection that is free from unreasonable discrimination with regards to type of application, service, or content or based on sender or receiver address, and the price of Internet access services should not be based on the content that is transmitted over them.
 4. Are entitled to competition among network, application, service, and content providers.
 5. Are entitled to know what network management practices are deployed by their network providers and that these practices are in full compliance with privacy legislation and industry best practices.

These principles do not prevent the exercise of legal obligations and reasonable network management practices, which are practices that are necessary to ensure the proper functioning of the network. Reasonable network management practices include measures put in place to address temporary and exceptional network congestion.

Recommendations

TACD resolves that the EU and U.S. follow these principles:

1. Governments and regulators must strongly defend the principles of openness and neutrality of the Internet as defined in this resolution via regulatory mechanisms, covering all layers of the Internet.
2. Lawmakers and regulators should prevent ISPs and network providers from engaging in discrimination between content, services, applications, and devices unless it is necessary to implement reasonable network management. In particular, preferential treatment and zero-rating of specific content or services should not be permitted.
3. Lawmakers and regulators should require that ISPs have an obligation to provide fair, complete, and accurate information on company policies and procedures for reasonable network management, and how these affect access to particular content, services, applications, or the ability to attach particular devices, in a way in which it is easily understandable and comparable for consumers.
4. Governments and regulators shall monitor the development and provision of other specialised broadband services, in particular those delivered over the same broadband infrastructure as Internet access services, in order to identify and address cases where these services affect the provision and quality of general and/or individual Internet access services.
5. Lawmakers and regulators should ensure that consumers have recourse to an effective complaint and enforcement mechanism if providers fail to provide service plan information or discriminate between content, services, applications, or devices in a manner that contravenes the principles of openness and neutrality.

6. Regulators should continuously monitor networks in order to assess whether ISPs and network providers discriminate between content, services, applications, or devices on their network; whether any such discrimination falls outside the scope of legitimate network management; and take action against discrimination that contravenes the principles of openness and neutrality.
7. Policy-makers shall define the conditions under which network management can be considered reasonable and exempt from the general prohibition of non-discrimination. Such conditions may include: addressing temporary and exceptional network congestion or complying with a legal or judicial obligation. ISPs shall prove that the management activities they want to carry out are legitimately under the scope of one or more of these previously defined conditions.
8. Differentiation of service should be non-exclusive and not unduly discriminatory. It should not have anti-competitive effects or degrade other services. Enforcement of non-discrimination rules should be transparent, promote public involvement and ensure disputes are resolved on an expedited basis.
9. Regulators should assess the level of competition in broadband Internet access, and take steps to enhance competition where individual operators hold too much market power.

Background

Access to the Internet remains an increasingly important resource to individuals, as both consumers and citizens. Today, the Internet provides the main line of communication with any public or private entity, as well as social interaction. Protecting the Internet is protecting democracy itself, ensuring that consumers and citizens continue to enjoy the same, if not better, opportunities to access a wealth of information and knowledge, innovative services and applications.

As consumers, individuals gain access to digital content such as music, films, e-books, games, and any number of goods and services through e-commerce. As citizens, individuals gain the ability to both access and create conduits for discourse, debate, and creativity. At the same time, a growing number of official services are provided via the Internet.

The wealth of information available, and the variety of applications that consumers can use to communicate, allow for an unprecedented freedom of expression and information. To access all these resources, consumers rely upon ISPs, which provide end-users access to the Internet.

The importance of a neutral and open Internet

Unless corrected by regulatory mechanisms, ISPs have economic incentives to promote their own products and services by degrading the experience of competing products and services. The integration of ISPs with providers of television, radio, and telephony gives integrated providers an incentive to privilege the transmission of content, services, and applications with which the providers are associated, either directly under the same company group, or via bilateral commercial arrangements. This tendency, which has become commonplace over the past few years, prevents vibrant competition in the markets for online content, applications, and services. For instance, an ISP that also supplies telephony services might degrade or block the services of a Voice over Internet

Protocol (VoIP) provider. Similarly, an ISP that also provides a specialised service such as digital video has incentives to dynamically allocate greater bandwidth to its own services at the expense of potentially competing Internet applications. Such self-interested bandwidth allocation runs at the risk of, in time, severely damaging the available bandwidth for Internet services, and the investments therein. Therefore, lawmakers and regulators need to ensure that ISPs have incentives to streamline bandwidth and investments towards the provision of Internet access services.

The continued growth of a neutral Internet will encourage innovation and economic growth. Services and applications can rely upon the current *best-efforts* architecture of the Internet only so long as providers do not unfairly discriminate against particular applications, services, protocols, or content. If such unreasonable discrimination is allowed to take place, it would force technological innovators to shape their new offerings to meet myriad, variable regimes, discouraging the development and deployment of new technologies and services. Innovative start-ups would have a difficult time reaching the same amount of end-users as their bigger, more resourceful competitors who do have the capacity to negotiate for preferential delivery of their content.

Internet openness and neutrality are necessary to ensure the fundamental right of free speech. Internet service providers should not abuse their place within the network architecture to block or degrade communications they may disagree with. The Internet's unparalleled value as a tool for political and creative expression deserves the strongest protection against unwarranted barriers.

Departing from these principles represents a significant paradigm shift in terms of consumers' experience and expectations. Since its inception, the Internet has always been a *plug-and-play* experience for all, where all that was needed was an Internet connection, and any new service, application or technology that was invented would work. Under a *best-effort* regime, content and information should be sent and received by consumers at the speed that was contractually and technologically available, without the ISP enacting discriminatory practices based on commercial considerations. By parcelling the Internet into different quality lanes, this expectation will be modified in time, since whether or not a new service, application or technology will work adequately will very much depend on which ISP each individual consumer is a client of.

Free or below-cost products and services, although superficially attractive, are not always in the best long-term interest of consumers. Practices such as dumping and predatory pricing, for example, can cause significant damage to the markets that serve consumers, and are typically prohibited by competition and trade law. Zero-rating of selected websites or services can damage the open Internet in a similar way, because of the way that it distorts competitors' ability to innovate and provide access to a broad range of content online.

Reasonable network management

As noted above, reasonable network management must be permitted under the legislation to allow the proper functioning of the network. For instance, controlling traffic that is used to alleviate network congestion in extraordinary cases of temporary network overload can legitimately be prioritised over other traffic in order to ensure the continued operation of the network. However, any claims by an ISP that a practice does not violate openness and neutrality principles should be scrutinised carefully.

To be considered reasonable, network management must be non-discriminatory and respect the civil rights of users to free speech and privacy. Reasonable network management should therefore not include scrutinising the quality, source, destination or content of data traversing the Internet.

Reasonable network management should also be distinguished from efforts to comply with a legal obligation, a legislative obligation or a judicial order. Measures taken under specific legal obligations will have specific policy rationales different from the technical reasons motivating network management, and voluntary efforts against unlawful transfers of content should not serve as a pretext for discrimination or promote discriminatory effects.

In determining whether particular practices are reasonable, three determinations should be made. The first is whether the particular practice intended to address a crisis situation or congestion is proportional and designed to further a legitimate purpose to ensure the proper functioning of the network. The second determination is whether a lighter, alternative instrument is available to further the legitimate purpose, and if not, whether the necessary practice is as narrowly tailored as possible to address that purpose. The third determination examines service differentiation to ensure that it is non-discriminatory, not anticompetitive and does not detract from the quality of Internet service widely available to the public. These principles should ensure that network management practices have both a legitimate purpose and a non-discriminatory effect upon network traffic.

Action taken by the EU and national governments

In Europe, the 2009 Telecoms legislative package included general provisions that aimed to ensure consumers are able to access and distribute information and run applications and services of their choice and to allow National Regulatory Authorities (NRAs) to impose minimum Quality of Service (QoS) requirements on ISPs. In practice, these mechanisms have proven largely insufficient to ensure that European ISPs do not deviate from the openness and neutrality principles.

Beyond the general principles contained in the 2009 Telecoms package, two EU Member States have enacted net neutrality specific legislation: the Netherlands and Slovenia have been the first countries in the EU to have concrete legislation that outright bans discrimination on Internet access services. Price discrimination is forbidden in the Netherlands and Slovenia, and in countries such as Germany and Norway, regulatory authorities have denounced such practices.

The EU's institutions are currently debating a recent legislative initiative³ that aims to establish more concrete and stringent net neutrality rules, rules which should in theory outlaw discriminatory practices and offer some regulatory certainty regarding so-called specialised services and the impact these can or cannot have on Internet access services.

Action taken by the U.S. Government

The Federal Communications Commission (FCC) recently published an order laying out rules for broadband Internet providers operating in the U.S., rules that represent a step towards net neutrality. These rules, which apply both to fixed and mobile providers of broadband Internet access,

³ The European Commission published a Proposal for a [Regulation 2013/0309 \(COD\) to establish a Telecommunications Single Market](#) in September 2013, [the European Parliament adopted its report](#) in April 2014, and the [Council of the EU its negotiating mandate](#) in March 2015.

ban blocking, throttling, and paid prioritisation (subject to some limitations), and include a general requirement not to unreasonably discriminate or disadvantage particular users, content, applications, or devices.

The first two rules (no blocking and no throttling) include exceptions for “reasonable network management” and for conduct relating to “unlawful” traffic. The exception for reasonable network management essentially defines such practices as those that are primarily used for and tailored to achieving a legitimate network management purpose. The FCC contemplates that network security and protecting users from traffic that the users themselves do not want are potential areas for reasonable network management, as well as some measures taken to alleviate congestion. Network management practices are more likely to be found reasonable if they are transparent and allow end-user control or do not target or favour particular applications.

The exception for “unlawful” traffic does not appear to be limited to traffic that has been found by a court to be unlawful. The exception seems to leave some degree of discretion to broadband providers to decide for themselves whether and how to discriminate against traffic they deem “unlawful.” TACD is critical of this approach because ISPs are unlikely to give proper consideration to user privacy, limitations on copyright law, and collateral damage to free speech in their decisions about blocking or throttling particular applications, content, or endpoints.

The third “general conduct” rule also covers interconnection arrangements between ISPs and other Internet infrastructure companies. In other words, the FCC will begin to evaluate interconnection arrangements on a case by case basis to see whether the ISP is abusing its position as gatekeeper.

The order also contains transparency rules, requiring that broadband providers publicly disclose their network management practices, performance, and commercial terms to an extent sufficient for consumers to make informed choices and for other parties to offer content, applications, services, and devices that work over the broadband provider’s network.