



NET NEUTRALITY IN THE CONTEXT OF THE NEW PANDEMIC

1. Background

Regulation (EU) 2015/2120 of the European Parliament and of the Council laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union ("**Net Neutrality Regulation**") has as a main scope to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. Therefore, the Internet Service Providers ("**ISPs**") are prohibited from blocking or slowing down the internet traffic, except if the traffic management measure is needed to:

- (i) comply with a legal order;
- (ii) ensure network integrity and security;
- (iii) manage congestion, provided that equivalent categories of traffic are treated equally.

2. Traffic management measures in times of SARS-CoV-2

The social distancing measures introduced to contain the spread of and fight against the new severe acute respiratory syndrome coronavirus 2, known as SARS-CoV-2, had as a result an increased demand for Internet capacity, be it for teleworking, e-learning or entertainment purposes. But such increase in demand can put the internet networks under the strain in the near future.

Based on the Government Emergency Ordinance 1/1999 regarding the state of siege and the state of emergency, during the state of emergency, the companies providing public utility services in the field of communications are obliged to ensure continuous supply to the population with such services. It is true that the wording of the legal text reflects a reality that was valid in 1999, when for example, electronic communication services were qualified as public utility services. However, in these exceptional times who can argue that ensuring that

people can continue to communicate between themselves is not a matter of public interest and utility.

Because communication plays an important part these days for individuals, businesses, public authorities, the European Commission and the Body of European Regulators of Electronic Communications (“BEREC”) have set up a special reporting mechanism to monitor the internet traffic situation in each Member State to be able to respond to any capacity issues that might arise due to the high demand for internet services.

As mentioned above, the Net Neutrality Regulation prohibits operators from blocking, slowing down or prioritising traffic. However, in exceptional circumstances, such as the ones we are living today, the internet services providers might find themselves in the situation to apply exceptional traffic management measures to prevent impending network congestion and to mitigate the effects of the such.

The first information gathering exercise performed by BEREC showed that although the traffic on fixed and on mobile networks has increased in this period, for the moment, no major congestion issues have occurred, with the exception of some local and temporary difficulties that have been observed and mitigated. An update to BEREC’s reporting document on the internet traffic situation in each Member State shows that the ISPs continue to cope with the situation, but are paying close attention to any change that might occur in the network¹.

But the situation might change rapidly and the ISPs, in order to maintain the internet services operational, might be obliged to apply exceptional traffic management measures. Such measures must be in line with the provisions of the Net Neutrality Regulation and must be taken under the condition that equivalent categories of traffic are treated equally.

Also, because it is an exception from the general prohibition stated in the Net Neutrality Regulation, the ISPs will need to interpret the possibility to take exceptional traffic management measures in a restrictively manner. According to BEREC, in such situation, the ISPs should consider the following:

- (i) to objectively assess that the levels of traffic are very high compared to a similar reference period, and that absent the envisaged measures users would be negatively affected by the congestion;
- (ii) if the exceptional congestion is caused, for example, by multiple technical failures, unexpected changes in routing of traffic not under the ISP’s control, or large increases in network traffic linked to the current pandemic crisis or other emergency situations beyond the control of ISPs;

¹ For more information see: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9250-berec-summary-report-on-the-status-of-internet-capacity-in-light-of-covid-19-crisis

- (iii) the implemented exceptional traffic management measures are proportionate to the problem observed and guarantee access to Internet to all users, are limited in time to the strict necessary and ensure that equivalent categories of traffic are treated equally.

Moreover, the European Commission and BEREC call on ISPs to closely cooperate with the national regulatory authorities (“NRAs”) and to inform the same, in a timely manner, on the taken traffic management measures in order to ensure the necessary transparency and to allow for such measures to be monitored for compliance with the Net Neutrality Regulation.

3. Conclusion

How these traffic management measures will be implemented in practice and how the cooperation between ISPs and NRAs will work remain to be seen. These exceptional times will require exceptional measures, especially when it comes to ensuring that the internet access services continue to be operational. It is for the ISPs, alongside the European Commission, BEREC and the NRAs to find the proper solutions to continue to have a functional and open internet.



Cristina Crețu

Senior Privacy & Technology Consultant

cristina.cretu@mprpartners.com