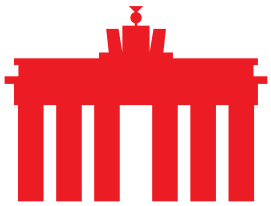

WE ARE SHAPING THE INTERNET.
YESTERDAY.TODAY.BEYOND TOMORROW.

eco

Contribution BEREC Consultation "Net Neutrality Regulatory Assessment Methodology" – BoR (17) 112

Berlin, 05.07.2017

eco is thankful for the opportunity to contribute to the BEREC Consultation. Our members consist of many Telcos, carriers, host providers as well as many content and application providers. They cover a broad spectrum of the whole value chain of the internet. That`s why net neutrality is a key issue for our members.

The draft aims to start a discussion and provides some orientation towards positive approaches. We refer to the outline of your draft. Before providing a detailed overview in response to the public consultation we would like to make an initial comment on the crowd sourced approach, about the scope and the methodology.

- Crowd-Sourced tests

eco welcomes the repeated commitment of BEREC to a crowd sourced approach. In such approach tests and methodologies, which are certified by independent scientific institutions, could be improved because of the continuous input of ISP, end-users and regulatory experts due to identify and decrease flaws. It helps also to adjust the software and methods analogue to technical progress and fosters transparency and could lead to acceptance by all parties.

- Enterprise services

We regret that the draft BEREC Guidelines have not clarified that the aim of the Regulation and the Net Neutrality (NN) principle is to safeguard best effort Internet Access for consumers and other users (small enterprises) that rely primarily on consumer-like services. The lack of clarification of the scope relating to enterprise services runs a substantial risk of placing a disproportionate burden on the business communications market and negatively impacting innovation and investment. It needs to be taken into account that businesses not only have bi-laterally negotiated tailor made contracts that are different from consumer contracts but businesses also require and demand different services than those used by consumers. Indeed we believe that questions around traffic management practices make little sense in the enterprise context.

In spite of Consumer services there is no demand or interest of business customers business IAS to be informed about the minimum, regular or maximum speeds in advertisements. The specific interface speed required by the individual enterprise as customer is agreed as essential part of contract. Not achieving this can be a breach of contract and the ISP might be liable. Furthermore the contracts for business customers do not limit service „up-to-XX-MBit/s“ or „if available. The contracted speed is negotiated between the customer and the ISP. Additionally we recommend that BEREC should emphasize the importance for NRA to acknowledge all circumstances of a specific case, especially if businesses as end-users are involved. This would be a helpful guidance. Furthermore that could lead to just and proportionate decisions and orders of NRA in business cases and therefore serve the net neutrality best.

- Methodology

BEREC indicates that NRAs may have several objectives in measuring in its point 3.. For example the results of the measurements might be used for empowering the end user to validate the commitments made to them from their IAS provider, increasing transparency (interactive maps for showing performance in a geographic area), or monitoring the development of IAS evolution. Not all objectives require the same level of accuracy but it is of utmost importance when it comes to Art. 4 (4) Regulation (EU) 2015/2120. Nevertheless the drafted methodology does not fulfil the requirements on accuracy. In order to support the broadest range of platforms/devices competing demands of accuracy have not been taken in account as much as necessary. The drafted methodology is not a “compromise”. Simple implementation and transparency are rated higher than accuracy.

I. Regarding to 3.1 IAS Speed Measurement

We have strong doubts TCP is the best choice of protocol to test the maximum download speed of an Internet Access Service. Nevertheless, we acknowledge that BEREC has made several suggestions to compensate the flaws of TCP. TCP has many functions, which are likely to prevent problems in the data transfer, i. e error detection, flow control and congestion control, dupack based retransmission, timeout based retransmission, the maximum window size. However, these functions decrease the suitability of TCP to test the maximum download speed. If TCP was suited for that kind of test, why it should be necessary to make so many suggestions compensates its flaws.

Therefore eco recommends a free choice of the protocol for testing the download speed, whereas the following conditions and prerequisites must be fulfilled at any time:

- Transparency of methodology of the test
- The test used as monitoring mechanism referring to Art. 4 (4) TSM regulation must be certified by an independent scientific institution
- The test software has to be Open Source Code an public available
- A clear and comprehensible explanation of binding test conditions (i. e., no use WiFi in fixed networks, exclusion of false data typed in measurement tool by users)
- Measurement results are to be transmitted to the end user and the ISP (only then the ISP is able to help the end user at all and quickly, analogue fair trial)
- Objective, technical correct measuring, neutral to all kind of infrastructure
- Deactivation of LAN-Interfaces (to exclude cross traffic)

These requirements and prerequisites have to be seen also as necessary in reference to point 5.2 End user environment and point 7. Certified monitoring mechanism.

II. Concerning 6.3.2 Effect of specialised services on IAS

eco sees the risk that the suggested comparison of neighbours in the same network element can be an indicator for prioritisation of special services to the disadvantage of IAS. There are a lot more of factors, which have to be taken in account. That`s why BEREC should specify the conditions for the neighbour comparison. Without the necessary specification the suggested comparison would be misleading.

III. Referring to 6.4 Individual applications using IAS

We doubt that a test over vpn services can be a strong indicator for traffic management. BEREC therefore should add some more criteria to ensure the results are not misleading.

IV. Regarding 7. Certified monitoring mechanism

7.1 Guidance on criteria regarding certified monitoring mechanism and 7.1 e)

We strongly support BEREC in its position, that only several tests, also of third parties, are helpful for the execution of the TSM Regulation 2015/2120 and furthermore in the interest of end users. These tests have to be certified by neutral scientific institutes. In relation to the possible legal consequences monitoring mechanisms according to Art. 4 (4) TSM regulation have to deliver exact, correct and reliable results. Otherwise neither the consumers, NRA, nor the ISP will achieve any benefit.

7.1 c) Straightforward comparison

BEREC should specify its understanding of a straightforward comparison between measurements results and contractual speeds. When is the condition of a straightforward comparison fulfilled? This lacks legal certainty. Additionally it is important that in general advertised speed shall not be confused with individually agreed speeds.

7.1 d), second sentence - Noncompliance

It is unclear, what BEREC means with “Noncompliance on a single indicator is sufficient to give the user the right to use the remedies available to the consumer in accordance with national law“. In the interest of legal certainty BEREC should state explicitly, what its understanding of a “single indicator” is. Furthermore there is a not to be underestimated risk that interpretation of the NRAs leads to disproportionate decisions.

About eco

eco - Association of the Internet Industry represents the interests and fosters all companies that create economic value with or in the Internet. The association currently represents more than 1,000 member companies. These include, among others, ISPs (Internet Service Providers), carriers, hardware and software suppliers, content and service providers, and telecommunication companies. eco is the largest national Internet Service Provider association in Europe.