

Net Neutrality: an Italian Perspective

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Strongly debated in the EU, the idea of Net Neutrality is now rapidly catching the attention of regulatory authorities and of the electronic communications operators in Italy.

Regulatory Proposal

In February 2011 Senator Alessio Butti presented a bill to Parliament to promote the development of broadband services under a three-year investment programme and to ensure transparency for consumers in respect of internet access. Butti's proposal assigns a key role to the communications authority, AGCOM, requiring it to:

- ensure that suppliers and providers of internet connection services comply with new transparency rules;
- promote cooperation between operators; and
- monitor user satisfaction in relation to services from specific suppliers.

On February 28 2011 AGCOM published a consultation on key questions concerning net neutrality.¹ AGCOM has decided to focus on the problems connected with it, highlighting in particular:

- the evolution of net neutrality – specifically, the problems that may arise in future in relation to the different ways in which internet services are used and the intervention by national regulatory authorities;
- the transparency of service conditions for consumers;
- the necessary conditions to ensure effective competition and the structural characteristics of the Internet; and
- the values inherent in net neutrality and the political, cultural and social dimension of the debate.

¹ Annex B to AGCOM Resolution 40/11/CONS, *Public Consultation on Net Neutrality*. Further details are available at www.agcom.it.

The public consultation is intended to contribute to the international debate on the issue; however, AGCOM's questionnaire focuses particularly on certain traffic management practices and their potentially unfair effects on users. It represents an opportunity for stakeholders to indicate the anti-competitive effects of traffic management systems and to propose regulatory measures to protect consumers from misleading or unfair conduct by operators. With reference to these issues, AGCOM's consultation paper notes the proposals by the Body of European Regulators for Electronic Communications (BEREC) on addressing such issues. BEREC has highlighted the importance of seeking to:

- adopt regulations or individual provisions to protect consumers; and
- monitor the conduct of operators with significant market power in a relevant market (including in cases where de facto market power may exist, but remains unproven).

With the aim of consumer protection in mind, the use of traffic management techniques must be made as transparent as possible. Consumers may not necessarily be able to detect the application of discriminatory traffic management techniques and may find it difficult to distinguish between the effects of such techniques on service quality and the influence of other factors.

Article 22 (2) of the EU Universal Service Directive (2002/22/EC) empowers national regulatory authorities to set minimum quality of service requirements.² From a competition perspective, AGCOM emphasises that the regulation of content distribution networks (CDNs) is aimed at preventing discrimination, such as blocking access to specific content or price discrimination on the basis of service quality or other elements (so-called 'access tiering').

Although AGCOM is aware that net neutrality will be regulated in the international context and at EU level, it has invited stakeholders to contribute to an international debate, with particular reference to the EU initiative, in the coming months.

Net Neutrality and Traffic Management

Net neutrality is based on the principle that all electronic communications passing through a network are treated equally. However, in recent years this principle has been undermined by the behaviour of operators who manage traffic according to varying standards, depending on time, content, transmission service, the sender's address and the recipient's address.

Traffic management can be legitimate and may be useful in ensuring service quality for the benefit of users. Thus, traffic management is not in itself a deviation from the net neutrality principle.

In a recent European consultation on the open Internet and net neutrality, BEREC explained the close relationship between net neutrality and traffic management, drawing a distinction between best-effort and managed services. In relation to different traffic management techniques:

*"best-effort service means that there is no guaranteed level of performance (nor is priority guarantee for the data to be delivered) without necessarily implying proof of low quality. Having said this, the general principle is that all traffic demands are accepted - this is fundamentally based on an 'openness feature'. In cases where the maximum transport capacity is reached, this will, in turn, result in an overall decrease in quality. Managed services are therefore designed to provide guaranteed characteristics (eg, end-to-end quality or security)."*³

² Article 22(2): "National regulatory authorities may specify, *inter alia*, the quality of service parameters to be measured, and the content, form and manner of information to be published, in order to ensure that end users have access to comprehensive, comparable and user-friendly information. Where appropriate, the parameters, definitions and measurement methods given in Annex III could be used."

³ BEREC – "Response to the European Commission's consultation on the open Internet and net neutrality in Europe", page 9, September 30 2010.



According to BEREC, operators should provide both best-effort and managed services. Therefore, it is important that end users be guaranteed:

- information, transparency and awareness of service characteristics;
- competition in the relevant market;
- easy switching; and
- acceptable quality for best-effort internet access.

In short, such an approach may provide a paradigm for solving net neutrality concerns in practice.

Operators' Initiatives

On March 1 2011 Telecom Italia, the incumbent telecommunications operator, announced that it would adopt a bandwidth management and traffic-shaping system. Telecom Italia will limit the connection speed for more bandwidth-intensive applications (eg peer-to-peer and file-sharing applications), but not for Voice over Internet Protocol (VoIP) applications.

The Italian Association of Internet Providers has filed a complaint with AGCOM, alleging that Telecom Italia's initiative breaches the net neutrality principle.

It is not the first time that an Italian telecommunications operator has adopted network management measures. In February 2011 Vodafone Italia decided to increase the fees for VoIP services on mobile phones.

Although commentators and consumer associations claim that these measures are detrimental to competition, the president of the Italian Competition Authority, Antonio Catricalà, expressly took a stand against the "net neutrality taboo" at a conference in Capri on October 7 2010. In Catricalà's opinion, net neutrality stifles the creation of next-generation networks – operators should be allowed to discriminate between content depending on the bandwidth capacity that such services require, thereby encouraging efficient investment in infrastructure and promoting innovation.

However, despite varying opinions, the Electronic Communications Regulatory Framework makes it necessary to ensure certain values:

- **Transparency** – this ensures that consumers and other end users have the ability to make informed choices between competing service providers. Information must be detailed and technical, but also simple enough for the average user to understand.
- **Competition** – the transparency of technical and economic conditions of different operators encourages a competitive market.
- **Net freedom** – the new business models could limit the free flow and exchange of information and thus restrict freedom of expression.

The challenge is to balance the interests of users and customers in accessing online content and services against those of content providers and internet service providers (ISPs). Three issues are particularly significant in this context.

First, from a **privacy standpoint**, traffic management may breach the fundamental right to confidentiality of communications in relation to the so-called 'right to be forgotten' – an increasingly significant concern.



Viviane Reding, as European commissioner with responsibility for justice, fundamental rights and citizenship, memorably summed up the problem: "God forgives and forgets, but the web never does." This problem is also demonstrated by a decision of the Spanish Data Protection Authority on January 19 2011 after a Spanish plastic surgeon complained that a Google search of his name produced results about a dispute over a botched operation, which had been covered by Spanish newspaper El Pais 20 years ago.

Second, the relationship **between search engines and advertisers** gives cause for concern. Search engines could use technical measures to favour certain operators without ensuring transparency for consumers: this issue is called 'search neutrality'. On January 17 2011 the Italian competition regulator closed an investigation into Google's news service for alleged abuse of dominant position and accepted commitments proposed by the company. On November 30 2010 the European Commission opened an antitrust investigation to verify whether Google Inc had abused its dominant position for online searches. The opening of formal proceedings followed complaints by search service providers about allegedly unfavourable treatment of their services in Google's free and sponsored search results, coupled with alleged preferential placement for Google's own services. In 2010 the French competition authority ruled in Google's favour on a similar point, stating that its online advertising operations did not breach antitrust rules. "Search ads are one of many options for advertisers," Google said responding to such complaints. "If the price of search ads rises, advertisers can and do switch to other formats, both online and offline. That's the sign of a competitive and dynamic industry."

Finally, **vertical integration applications for traffic management** could create incentives for network operators and ISPs to integrate on content, applications and services markets. There may be an incentive for operators or ISPs to discriminate against a competitor's equivalent services.

