

12 July 2018

Re: Addressing shortcomings in net neutrality enforcement in the EU

Dear Commissioner Vice-President Ansip,
Dear Commissioner Gabriel,
Dear Member State Ambassadors and Ministries,

We would like to bring to your attention grave shortcomings in the implementation of the net neutrality protections included in Regulation (EU) 2015/2120 on open internet access and we would like to underline the necessity to ensure compliance with EU law in all member states. Attached to this letter is a dataset of the national penalty provisions of all EU countries. 62% of them have not implemented effective and dissuasive penalties (AT, BG, CY, DE, DK, EE, ES, FI, GR, HR, IE, IT, LU, LV, NO, PT, SE, SI).

In 2015, the European Union (EU) adopted legal safeguards that guarantee free and equal access to the Internet. Over half a million EU citizens, businesses and academics participated in the debate over the Regulation to protect the principle of net neutrality in Europe. The Regulation itself represents a fundamental pillar of the Digital Single Market and should remain unchanged as it is a model example on how to provide a sufficient basis to safeguard non-discriminatory and equal access to the internet. National regulatory authorities are tasked with supervision and enforcement of these safeguards, but they must rely on competences and remedies established by Member states' national law.

We have identified three major shortcomings related to penalties against net neutrality infringements:

1. Lack of "effective, proportionate and dissuasive penalties" against net neutrality violations

Following Article 6 of Regulation 2015/2120, Member states were obliged to establish all relevant enforcement powers for their NRAs and lay down rules that implement "effective, proportionate and dissuasive" penalties, by 30 April 2016. However, more than half of the Member states have at the moment of writing not laid down rules that comply with this Article.

Three Member states (AT, IE, PT) have completely failed to establish penalties, which ultimately means that only repeated offences can be penalised. Eight countries (BG, CY, DE, EE, HR, LV, NO, SI) have set their penalties at a very low amount. Four countries (ES, GR, IT, LU) have set their penalties at a seven figure amount, and three countries (DK, FI, SE) have not set fixed amounts at all. In fact, only eleven countries (BE, CZ, FR, GB, HU, LT, MT, NL, PL, RO, SK) have fulfilled their obligations under Article 6 of the Regulation as they have set penalties at a percentage of the annual turnover of the infringing company.

In order to be dissuasive and proportionate, a penalty has to be measured against the annual turnover of the company found in violation. This has proven effective in other fields of ex-post regulation like competition and data protection. Such penalties act as an effective and equal deterrent for both small and big companies. Most citizens and internet application providers make use of the Internet access services of the big European telecom companies with annual revenues in the eight figures and above range. To such companies, a four to seven figure penalty is neither dissuasive nor effective as a deterrent for economically lucrative but infringing activity. Fixed

penalties are either disproportionately burdensome for smaller companies or ineffective for larger ones. Setting no amount is also problematic, as such a regime lacks a clear dissuasive effect.

2. Zero rating is not included in the penalty provisions of all Member States

The commercial practice of price discrimination when providing access to specific application providers (zero-rating) falls under the supervision and enforcement duty of the national regulators and needs to be addressed by national provisions on penalties. Sadly, two countries (BG, DE) have failed to do so and have excluded illegal commercial practices from their penalty provisions. This is particularly worrisome as zero-rating is the most common net neutrality violation in Europe and needs urgent intervention.

3. Net neutrality violations are not being dealt with by independent national regulators in two Member states

Additionally, in two countries (DK, ES), consumer complaints are not dealt with by independent regulators, but by competent ministries which, almost by definition, cannot be seen as politically independent. Recent negotiations on the European Electronic Communications Code have not resulted in a solution to this problem.

As telecom regulation will become ever more important with the implementation of the upcoming 5G standard, ensuring compliance with Europe's regulatory regime needs to be taken more seriously. Therefore, the signatories to this letter call on the European Commission to further investigate this matter to ensure Member states' compliance with Union law. We also call for Member states to adapt penalties in their national legislation to be measured against the annual turnover of the company found in violation in order to enable effective and dissuasive enforcement by their respective telecom regulators.

Sincerely,

epicenter.works – for digital rights (Austria)

Bits of Freedom (The Netherlands)

European Digital Rights (Europe)

X-net (Spain)

Initiative für Netzfreiheit (Austria)

Fitug e.V (Germany)

Electronic Frontier Norway (Norway)

The Federation of German Consumer Organisations – vzbv (Germany)

IT-Political Association of Denmark (Denmark)

Access Now (International)

New America's Open Technology Institute (USA)

Altroconsumo - Italian Consumer Organisation (Italy)

KEPKA - Consumers Protection Centre (Greece)

Forbrugerrådet Tænk (Denmark)

Associação D3 - Defesa dos Direitos Digitais (Portugal)

Attachments:

- Data sheet about the national provisions on the penalties for net neutrality infringements according to Article 6 of the Telecom Single Market Regulation 2015/2120.¹

CC: The 31 National Regulatory Authorities of the EEA.

¹ See <https://epicenter.works/document/1255> for .ods data file.