



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND
TECHNOLOGY

Electronic Communications Networks and Services
Electronic Communications Policy

Brussels,
CNECT.B.1/SL

European Digital Rights
20 Rue Belliard
BE-1040 Bruxelles

Dear Mr Penfrat,

Thank you for your joint letter of EDRi and various co-signatories of 15 May 2019, addressed to Vice-President Ansip, Commissioner Gabriel and Commissioner Jourová. Vice-President Ansip asked me to reply to you on his behalf.

In your letter concerning the prohibition of monitoring of specific content in the open internet access provisions of Regulation (EU) 2015/2120, you expressed your conviction that the practise of Deep Packet Inspection (DPI) allows providers of internet access service to both bill packets differently and throttle or prioritise them over other traffic. You recall that examining domain names or the addresses (URLs) of visited websites and other internet can reveal sensitive information about a user. You claim that you identified many products with differential pricing that potentially make use of the DPI technology. You also urge regulatory authorities to take into account the GDPR in the interpretation of Article 3(3) of Regulation (EU) 2015/2120 and to organise the collaboration between relevant regulatory authorities.

Firstly, I would like to re-iterate our commitment to protect European internet users that we expressed in the Report published on 30 April 2019¹.

The practises you mention of throttling and prioritising certain traffic over other traffic are addressed in Article 3(3). In particular slowing down or discriminating traffic is explicitly prohibited, subject to specific exceptions as mentioned in points a, b and c. Cases under point c, i.e. traffic management in order to “prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion”, are only authorised “provided that equivalent categories of traffic are treated equally.” National regulatory authorities are enforcing these rules and the Commission is monitoring such enforcement.

¹ Report from the Commission to the European Parliament and the Council on the implementation of the open internet access provisions of Regulation (EU) 2015/2120. COM(2019) 203 final.

As regards the treatment of zero-rating offers, I would like to recall that Article 3(2) states in particular that agreements on commercial conditions such as price shall not limit the exercise of the rights of end-users laid down in paragraph 1. As we wrote in our April Report, the fact of billing different elements of traffic differently is not *per se* prohibited but should rather be examined on a case-by-case basis.

Regarding the prohibition of monitoring specific content, Article 3(3) addresses it in the case of reasonable traffic management. The privacy and data protection concerns are the subject of Article 4. As you point out, the rules laid down in the General Data Protection Regulation (GDPR) and in the ePrivacy Directive 2002/58/EC are relevant for this matter, so addressing them requires consistency of interpretation between the different regulatory authorities involved.

As regards the way forward, the Commission is working in close collaboration with BEREC on updating the Guidelines. BEREC has planned to publicly consult on the updates to the Guidelines in October. I hope that stakeholders from the civil society will take part in that public consultation so that their interpretation and their arguments will be expressed and taken into account in the further steps of drafting of the updates to the Guidelines.

Yours faithfully,

e-signed
Stefan Lechler
Head of Unit (acting)