



Draft Recommendation CM/Rec(2014)___ of the Committee of Ministers to member States on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality

1. In information society, the exercise and enjoyment of the right to freedom of expression by individuals, including the right to receive and impart information and ideas as well as their participation in democratic life is increasingly reliant upon accessibility and quality of an Internet connection.

2. Providers of Internet access services have the ability to manage information and data flows (Internet traffic) transiting through the networks that they operate. They may engage in Internet traffic management for specific legitimate purposes such as to preserve the integrity and security of the network. They may also take action to prevent access to, or the dissemination of, unlawful or harmful content, for example through self-regulatory systems in co-operation with public authorities. However, other interferences with Internet traffic may affect the quality of the Internet service delivered to users and may result in blocking, discrimination or prioritisation of specific types of content, applications or services. Moreover, some of the techniques used in this context permit inspection or monitoring of communications, which can undermine users' trust in the Internet.

3. These matters raise concerns in respect of the protection and promotion of the right to private life and the right to freedom of expression, which are guaranteed respectively by articles 8 and 10 of the European Convention on Human Rights (ETS No. 5, hereinafter the ECHR), as well as in the light of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No.108). In addition, there are implications for access to diverse and pluralistic information and public service media content on the Internet, which are fundamental for democracy and cultural diversity. The right to freedom of expression, including the right to receive and impart information is not an absolute right. However, any restrictions to this right must meet the requirements of Article 10, paragraph 2 of the ECHR.

4. The principle of network neutrality underpins non-discriminatory treatment of Internet traffic and users' access to information and services of their choice. It reinforces the full exercise and enjoyment of the right to freedom of expression since Article 10 of the ECHR applies not only to the content of information but also to the means of its dissemination. Also, the principle of network neutrality supports technological innovation and economic growth.

5. The Committee of Ministers recalls Article 1 of the Statute of the Council of Europe and relevant Council of Europe standard-setting instruments¹. With a view to protecting and promoting the right to private life and the right to freedom of expression in full compliance with Articles 8 and 10 of the ECHR as well as to promoting the full delivery of the public service value of the Internet, the Committee of Ministers recommends that member states:

- take all the necessary measures, in co-operation with all relevant stakeholders, to safeguard the principle of network neutrality in their policy frameworks having due regard to the guidelines set out in this recommendation;

¹ Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration (31 January 2007); Recommendation Rec(2007)3 on the remit of public service media in the information society; Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet; Recommendation CM/Rec(2008)6 on measures to promote the respect for freedom of expression and information with regard to Internet filters; Declaration of Committee of Ministers on network neutrality (29 September 2010); Declaration by the Committee of Ministers on Internet governance principles (21 September 2011); Recommendation CM/Rec (2014)6 to member States on a Guide to human rights for Internet users.

- promote these guidelines in other international and regional fora that deal with the issue of network neutrality.

Guidelines on network neutrality

1. General principles

1.1. In the exercise of their right to freedom of expression, in compliance with Article 10 of the ECHR, Internet end-users have the right to access and distribute information, applications and services and to use devices of their choice. This right must be enjoyed without discrimination on any ground such as gender, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

1.2. Internet traffic should be treated equally, without discrimination, restriction or interference irrespective of the sender, receiver, content, application, service or device. This is understood as the network neutrality principle for the purpose of this recommendation.

1.3. Internet users' freedom of choice should not be restricted by favouring or hindering the transmission of Internet traffic associated with particular content, services, applications or devices or traffic associated with services provided on the basis of exclusive arrangements or tariffs.

1.4. The network neutrality principle should be applied to all services that provide Internet connectivity to Internet users (Internet access services) irrespective of the infrastructure or the network used for Internet connectivity and regardless of the underlying technology used to transmit signals.

2. Traffic management

2.1. Providers of Internet access services should not restrict Internet users' freedom of choice by blocking, slowing down, altering, degrading or discriminating against specific content, applications or services.

2.2. Internet traffic management measures, wherever applicable, should be non-discriminatory, transparent, necessary and proportionate:

- in giving effect to a court order or an order of a regulatory authority
- to preserve the integrity and security of the network, services provided via the network and end-users' terminal equipment;
- to prevent the transmission of unsolicited communications for marketing purposes to end-users who have given their prior consent to such restrictive measures;
- to minimise the effects of temporary or exceptional network congestion, provided that equivalent types of traffic are treated equally;
- in fulfilling contractual obligations with an end-user to deliver a guaranteed level of quality of service to that end-user provided that this does not impair the quality of open Internet access and does not constitute a discriminatory or anti-competitive practice.

2.3. Internet traffic management measures should be maintained no longer than strictly necessary and traffic management policies should be subject to periodic review by competent authorities within each member state.

3. Pluralism and diversity of information

3.1. Internet service providers should not discriminate against traffic from other providers of content, applications and services which compete with their own content, applications and services. This requires that traffic management decisions be strictly dissociated from content-related decision-making processes of the operator in the spirit of the 2007 Committee of Ministers Declaration on protecting the role of the media in democracy in the context of media concentration.

3.2. Preferential treatment of traffic on the basis of arrangements between Internet service providers and providers of content, applications and services should not diminish or affect the affordability, performance or quality of users' access to the Internet. Such arrangements should not have a negative impact on users' ability to access and use information, diverse and pluralistic content that is publicly available, applications and services of their choice.

3.3. In managed networks, states may consider imposing reasonable, transparent and proportionate obligations to carry content which meets general interest objectives.

4. Privacy

4.1. Traffic management measures should involve processing of personal data only to the extent that is necessary and proportionate to achieve the purposes set out in the second section of this recommendation and should be in accordance with applicable legislation on the right to private life and personal data protection.

4.2. Some techniques for the purpose of Internet traffic management are capable of assessing the content of communications. The way in which such techniques are used can be an interference with the right to private life. Therefore, such use must be fully in line with Article 8 of the ECHR, be tested against applicable legislation on the right to private life and personal data protection and reviewed by a competent authority within each member state in order to assess compliance with legislation.

5. Transparency

5.1. Internet service providers should provide users with clear, complete and publicly available information with regard to any traffic management practices that they have applied which might affect users' access to and distribution of content, applications or services. Internet users should be enabled to obtain information from Internet service providers about Internet traffic management and Internet speeds.

5.2. Competent authorities within each member state should monitor and report on Internet traffic management practices. Reports should be prepared in an open and transparent manner and made available to the public for free.

6. Accountability

6.1. Internet service providers should put in place appropriate, clear, open and efficient procedures to respond within reasonable time limits to complaints of Internet users alleging breaches of the principles included in the foregoing provisions. Internet users should be enabled to refer the matter to competent authorities within each member state.

6.2. States should ensure in their policy frameworks the accountability of Internet service providers with regard to respect for the principle of network neutrality. Accountability also includes that appropriate mechanisms are in place to respond to network neutrality complaints.

