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Net neutrality: the Bulgarian experience

The Bulgarian internet access market has generally enjoyed a high degree of competition in the recent past. As of the end of 2009, the enterprises that have notified the Bulgarian regulatory authority in the electronic communications sector – the Communications Regulation Commission (CRC) – of their intention to provide data transmission services and/or internet access reached 724 in number,¹ which corresponds to a market share of BGN 295 million for a population of less than eight million.² Nearly 60 per cent of the internet connections in 2009 were carried out with a speed of more than ten Mbps, where the most widespread technology appears to be local area network (LAN) or radio local area network (RLAN) (54 per cent of the total number of customers), followed by asymmetric digital subscriber line (ADSL) (31 per cent) and cable access (12 per cent).³

In view of such high degree of competition in the local access market, the issues of net neutrality seem not to have arisen more prominently in Bulgaria in the recent past compared with other EU jurisdictions, and net neutrality has not been intensively discussed in the public domain. Nevertheless, recent attempts of governmental authorities to require internet service providers (ISPs) to block internet access to certain websites have drawn the public attention to net neutrality issues, unifying the rare voices of few professionals into a more distinct, yet theoretical, direction. These two events have shown that net neutrality issues in Bulgaria arise within the context of the attempts of governmental authorities to combat violations of various laws (and in particular to restrict illegal content and illegal gambling), rather than within the context of matters relating to traffic/network management, quality of service, transparency or human rights.

The regulatory framework

It is a common understanding among professionals in Bulgaria that net neutrality refers to the principle that all data packets should be treated equally, independent of their content, source and destination. Such common understanding has evolved in

relation to the technological changes in the recent past that considerably increased the provision of services requiring enormous data transfer, through the (Internet Protocol television – IPTV, Voice over IP – VoIP, etc) network of ISPs. Nevertheless, the Bulgarian electronic communications law does not define or use the term ‘net neutrality’.

The current Bulgarian electronic communications law is harmonised with the 2002 EU regulatory framework for electronic communications. Thus, the policy objectives of the law include ensuring the proper functioning of competitive market forces (including by promoting infrastructure investments and stimulating innovations), and protecting consumer rights. In compliance with the EU legislation, Bulgarian electronic communications law envisages regulatory measures to preserve effective competition. Every two years, the CRC has the obligation to identify the relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation (under the ‘three criteria test’) and to carry out an analysis of these markets to determine whether a relevant market is effectively competitive. Where the CRC determines that a relevant market is not effectively competitive, it identifies undertakings with significant market power (SMP) on that market and on such undertakings imposes appropriate specific regulatory obligations or maintain or amend such obligations where they already exist.

The specific regulatory obligations which may be imposed on SMP undertakings include, inter alia:

- transparency;
- non-discrimination;
- an obligation to give third parties access to specified network elements and/or facilities (including unbundled access to the local loop);
- an obligation not to withdraw access to facilities already granted;
- an obligation to provide specified services on a wholesale basis for resale by third parties; and
- an obligation to provide co-location or other forms of facility sharing (including duct, tower, buildings or other equipment and technical facilities sharing). In general

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terms, these measures are particularly relevant to the concept of net neutrality, as they affect network access.

Thus, the regulator has imposed on the Bulgarian Telecommunications Company (BTC), the former incumbent, in its capacity as an SMP operator, specific regulatory obligations, including obligations related to interconnection, provision of special access, provision of unbundled access, and co-location.

Currently, the Bulgarian electronic communications law does not explicitly govern traffic/network management issues. However, as such management seems necessary to ensure a well operating and effective network, network operators and ISPs apparently apply such management as a matter of practice. Given the lack of related legal requirements, and based on publicly available information (such as general terms and conditions, and standard end-user agreements used by operators), it is unclear precisely how traffic/network management is carried out. In view of such intransparency, the risk that major market players may enter into agreements dealing with constraints related to traffic (irrespective of whether it is based on origin, content or other criteria), although not yet a live issue, still remains.

The 2009 amendments to the EU regulatory framework that aim to ensure net neutrality have not yet been transposed into national law. Pursuant to the Electronic Communications Policy of the Republic of Bulgaria, adopted by the Council of Ministers in December 2010,⁴ such transposition should take place by 25 May 2011. It could reasonably be expected that when transposed (even with some delay, as the case may turn out to be), these amendments, and in particular transparency, non-discrimination, information and quality of service requirements, will continue to contribute towards preserving the openness and neutrality of the internet.

Specific net neutrality issues in Bulgaria

As mentioned above, two recent events show that issues concerning net neutrality in Bulgaria are related to attempts by governmental authorities to combat illegal practices, and in particular to restrict illegal content and illegal gambling.

Net neutrality and restriction of illegal content

Both in Bulgaria and on a global level, copyright advocates, irrespective of whether they are affiliated with the film or audio industries, are craving to impose severe statutory rules intended to limit internet piracy and the distribution of unauthorised content. In the search for an instrument to restrict the considerable amount of content with unsettled copyright that has been downloaded by users from the torrent tracker 'arena.bg' in March 2007, the Chief Directorate 'Combating Organized Crime' (CDCOC), along with the Bulgarian Ministry of Interior, issued an injunction addressed to all Bulgarian ISPs, by which the latter were obliged to block the internet access to the servers of the American hosting company Layered Technologies Inc. For several hours, Bulgarian ISPs, respected the terms of the injunction, and blocked the access to the IP address 72.36.255.202, however after the respective analyses of the injunction and its legal grounds, most ISPs, apart from the incumbent operator BTC, restored access to the IP address.

The formal reason for the lack of success was a technical mistake in the injunction, which stated that the internet access should be blocked 'until 12 am on 16 March 2007', as opposed to 'after 12 am on 16 March 2007'. The reason police authorities did not attempt to rectify the technical omission was that only a few hours after the ISPs shared their views on the issue, it became clear that they had united on the position that such injunction had no legal grounds and was in contradiction with the net neutrality principle.

Pursuant to the current Bulgarian law, the only circumstances under which an obligation for ISPs to block the access to information further to an order of a competent authority relates to the narrow situation where the provider is keeping information to itself – that is, in the cases of caching or hosting services.

Accordingly, the CDCOC could not lawfully impose an obligation to block the access to information with respect to access or data transmission services on an ISP, as such an obligation has not been provided for by Bulgarian law. It became evident that the order was not related to caching or hosting services of Bulgarian ISPs as in this particular case the information (the IP of Layered Technologies Inc) is information that is entered by the customer on its web browser

and does not constitute an IP address from the ISP's network.

The endeavour of the CDCOC to safeguard copyrights by imposing obligations to ISPs has not been renewed, and the police authorities have abandoned this particular approach. However, the inadequate efforts by various governmental authorities to impose upon ISPs obligations for filtering or blocking information in pursuit of instruments to combat crimes and administrative violations still continues.

Net neutrality and illegal gambling

In the past few years, foreign online gambling operators have been actively targeting consumers in Bulgaria. However, the current Bulgarian gambling law does not regulate online gambling, so that such activities are considered prohibited. However, there have been a number of attempts to adopt appropriate regulation of online gambling, and presently the Bulgarian Ministry of Finance is working on a new draft law on gambling that will replace the current law, and will regulate online gambling, among other matters. Pursuant to this draft bill, the regulatory authority in the gambling sector shall be entitled to 'pass resolutions on filtering websites of organisers of gambling games, which are not authorised under this law and on restricting the access of internet users to such sites'. As the vesting of such powers in a governmental authority would be novel under Bulgarian law, the issue has been subject to numerous discussions among the regulatory bodies, representatives of the network operators, ISPs and non-governmental organizations.

The representatives of the network operators, ISPs and non-governmental organisations⁵ have united on the position that any provision authorising the authority of the gambling regulator to impose on ISPs obligations related to the access and data transmission services would constitute a measure that is disproportionate, unnecessary

and potentially ineffective and, accordingly, a measure that will constrain consumers' access to information. They have stated that the possibility of controlling the traffic to and from particular websites is in contradiction with the net neutrality principle, as well as with Article 15, item 5 of Directive 2000/31/EC. This provision was considered a poor attempt to sanction illegal activity (unauthorised gambling) by limiting the access of the end consumer through filtering the traffic, instead of by simply elimination of the violation of the law. But, regardless of the discussions and the strong reaction of the public and the interested parties, the current draft bill has preserved this provision.

Conclusion

It appears that network operators and ISPs support the view that currently in Bulgaria the traffic management is directed to the provision of efficient services, and the statutory regulations provide for sufficient measures, so that the principle of net neutrality is adhered to. In the Bulgarian context, issues related to net neutrality have pertained mainly to various inadequate attempts by governmental authorities to combat illegal behaviour, and in particular illegal content and illegal gambling.

Notes

- 1 Pursuant to the latest Annual Report on the Activity of the Communications Regulation Commission for 2009 available at: www.crc.bg/section.php?id=817&lang=bg (Bulgarian version only).
- 2 According to the data posted by the Bulgarian National Statistic Institute available at: www.nsi.bg/eventbg.php?n=386 and quoted also in an article about the demographic features of Bulgaria at: http://en.wikipedia.org/wiki/Demographics_of_Bulgaria.
- 3 Also pursuant to the Annual Report on the Activity of the Communications Regulation Commission for 2009.
- 4 Resolution No 972 dated 29 December 2010 of the Council of Ministers, published in State Gazette, issue 4, dated 12 January 2011.
- 5 The position of the Association for Electronic Communications for example is available at: <http://bgsec.org:8080/activities/-/blogs>.