

# **Opinion regarding the reasonable method of indicating the speed of internet access services**

Klaus Nieminen and Niko Aarnio

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# 1 Foreword

The purpose of this opinion is to indicate how the Finnish Transport and Communications Agency (Traficom) assesses the fairness of the method of indicating the data transfer rate of internet access speed in contracts made by telecommunications operators (hereinafter referred to as operators) with consumers and of whether the method is in accordance with the [EU Open Internet Regulation](#)<sup>1</sup>.

The requirement that the method of indicating speed be fair to the consumer is based on section 107 of the [Act on Electronic Communications Services](#) (917/2014, hereinafter AECS), in the interpretation of which the [Directive](#)<sup>2</sup> on unfair terms in consumer contracts may be taken into account.

The openness of the internet, or net neutrality, is guaranteed by the EU Open Internet Regulation (hereinafter also referred to as "the Regulation"). In Finland, compliance with the Regulation is monitored by the Finnish Transport and Communications Agency (Traficom). The Regulation governs the traffic management methods, provision of optimised services and content of contractual terms used by operators. The Regulation also contains reporting obligations regarding the indication of data transfer rates. The Regulation is also binding with regard to corporate subscriptions. Under the Regulation, BEREC<sup>3</sup> has issued [guidelines](#)<sup>4</sup> to the interpretation of the EU Open Internet Regulation (hereinafter the "BEREC guidelines"), of which Traficom shall take account in interpreting and applying the Regulation.

Traficom supervises operators' contracts closely based on the BEREC guidelines and the present opinion. The opinion is not legally binding on operators as such.

## Summary of key guidelines:

As a rule, Traficom considers contractual terms in which the minimum and normally available speeds are specified at least in accordance with the table below to be acceptable and fair to the consumer. As technology and the market evolve, Traficom will update its view of the reasonable method of indicating speed as necessary.

Specifying speeds in fixed networks		
	Maximum speed 100 Mbit/s or less	Maximum speed over 100 Mbit/s
<b>Maximum speed</b>	The speed that an end-user can expect to achieve at least some of the time	
<b>Normally available speed</b>	Fair and reasonable (recommendation: normally available speed 90% of the maximum speed; available 90% of the	Fair and reasonable, see section 3.2

<sup>1</sup> REGULATION (EU) 2015/2120 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

<sup>2</sup> COUNCIL DIRECTIVE 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Terms Directive).

<sup>3</sup> BEREC is the European cooperative body of regulators for electronic communications, in whose operations Traficom participates.

<sup>4</sup> BEREC Guidelines on the Implementation of the Open Internet Regulation (BoR (20) 112).

	time during each 4-hour period)	
<b>Minimum speed</b>	70% of the maximum speed	Fair and reasonable, see section 3.3

Below is a summary of the key guidelines presented in this opinion:

- **The maximum speed of a fixed connection** must be such that the end-user can expect to receive it at least some of the time (e.g. once per 24-hour period).
- The specified **minimum speed** of a **fixed connection offered to a consumer** must be at least 70% of the maximum speed when the maximum speed is not more than 100 Mbit/s.
- Traficom recommends that the **normally available speed of fixed connections offered to a consumer** with a maximum speed of 100 Mbit/s be specified as 90% of the maximum speed so that it is achieved 90% of the time during each four-hour period. Nevertheless, the normally available speed should always be in reasonable proportion to the maximum speed.
- At this point, Traficom does **not** issue a more specific opinion on the reasonable **minimum speed for fixed connections offered to a consumer with a maximum speed of more than 100 Mbit/s**. However, the minimum speed must always be in reasonable proportion to the maximum speed. Moreover, specifying the minimum speed must not lead to a worse situation than if the maximum speed was not more than 100 Mbit/s.
- The **estimated maximum speed of a mobile connection** must be possible to be realistically achieved in actual usage conditions. Therefore, the maximum speed cannot be the theoretical maximum speed indicated for the subscription.
- The maximum speed or estimated maximum speed may not lower than the **advertised speed** of the internet access service. An exception is made for **gigabit connections** if the communication ports of network equipment limit the speed to 1 Gbit/s at network level.
- The principles concerning the specifying of speed apply to **both incoming and outgoing** traffic, and the required speeds must be indicated for both.
- All speeds shall be indicated on the basis of the **transport layer protocol payload** as **single numerical values** in bits per second.
- Speeds shall be defined so that they may be legitimately measured at e.g. a **national internet exchange point** or against a network interconnected there.
- Certain **hybrid subscriptions** that combine fixed and mobile network connections and **Fixed Wireless Access (FWA)** subscriptions are, under the Regulation, considered fixed-network subscriptions as regards the obligation to indicate speeds.
- The minimum and normally available speeds of **FWA subscriptions** must be in reasonable proportion to the maximum speed, and for **hybrid subscriptions** these must be determined at least on the basis of the speed of the fixed network. The maximum speeds of both must be the speed an

end-user can expect to achieve at least some of the time, e.g. once per 24-hour period.

## **2 Starting point for indicating the data transfer speed of internet access services**

The Open Internet Regulation lays down provisions on the information that an internet access service provider must report in their contracts. Pursuant to Article 4, paragraph 1, point d of the Regulation, the contracts shall, among other things, include a clear and comprehensible explanation of the following matters with regard to the internet access service:

- Minimum, normally available and maximum speed in the case of fixed networks
- Estimated maximum speed in the case of mobile networks
- For both types of networks, the advertised speed of the internet access service.

Operators shall indicate in their contracts the speeds which they can realistically deliver<sup>5</sup>. Under the Regulation, the above-mentioned information concerning the data transfer rate must be reported for both uploading and downloading. The principles laid down in the BEREC guidelines and this opinion must both be complied with.

In accordance with the BEREC guidelines:

- All speeds shall be reported as single numerical values in bits per second (bit/s, e.g. megabits per second).
- Speeds shall be specified on the basis of the transport layer protocol payload<sup>6</sup>.

In order for a user to be able to select a subscription that matches their needs, there must be sufficient comprehensible information about the properties of the internet access service in the contractual terms and available otherwise. In addition to the information required by the Open Internet Regulation, the agreements must contain information required by other legislation.

Under the AECS, a communications service agreement must mention the quality and key properties of the internet access service. The data transmission rate, as well as other key properties of the internet access service, must be defined extensively and in detail in the contractual terms so that it is possible to determine based on the terms and conditions of the contract whether the service provided complies with the contract or whether there is a defect. The data transmission rate shall thus be defined so that it can be verified. The quality and properties of the service shall be defined as unambiguously and concretely as possible so that the consumer understands what kind of service they are purchasing.<sup>7</sup>

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<sup>5</sup> Recital 18 of the Regulation.

<sup>6</sup> BEREC guidelines, paragraph 140. This method more closely reflects the speeds experienced by the end-user than the volume of data transferred by a lower-layer protocol. Thus, the speed cannot be specified based on the capacity of the data link layer or the line speed/sync speed of an xDSL subscription. The data transmitted by the link layer would include header fields and retransmission of packets, which are not visible to the user.

<sup>7</sup> See government proposals 231/2005 (p. 26) and 272/2009 (p. 11). – Moreover, all essential information about the quality and properties of services needed by the consumer to make the

The terms and conditions of the contract as well as pricing information shall be published.

## **2.1 Fairness, comprehensibility and clarity of contractual terms**

In defining the properties and quality of the communications service agreement and the allowed restrictions in the contractual terms, the terms and restrictions must be reasonable from the consumer's point of view under the AECS. A contract term may be considered unfair, if it favours the seller to the extent that there is no longer a fair balance between the parties<sup>8</sup>. The contractual terms shall also be worded in clear and understandable language<sup>9</sup>. The contractual terms may not be open to interpretation, ambiguous or misleading.

In order for the information provided to be considered comprehensible and clear, users must be able to understand the significance of the speed information defined based on the information provided in the contract, and what the speed of the internet access service should be to comply with the contract. The definition of speed must be so unambiguous that the consumer can verify that it is achieved in practice.

## **2.2 Taking the verification of the speed into account in specifying the speed**

The speed specified in the contract and any limitations of liability may not contradict the measurement method according to the Open Internet Regulation<sup>10</sup>.

By adopting a regulation, Traficom may specify criteria for the certified measurement mechanism referred to in Article 4(4) of the Regulation, which the consumer must be able to use in establishing a defect. When such a measurement mechanism is available, it can be utilised to ascertain whether the performance of the service deviates significantly from that indicated in the contract, and whether the service is defective. Traficom is in the process of producing a measurement tool for this purpose, and will update this section once the project is completed.

The aforementioned means, inter alia, that a provider of internet access services may not limit the achievement of the contractual speed to only within its own network. The speed must thus be defined so that it can be legitimately measured e.g. at a national internet exchange point or against a network interconnected there<sup>11</sup>. This is based on the fact that the telecommunications provider provides connectivity specifically to the internet and not only to its own network and therefore the telecommunications operator is responsible for ensuring that its transit traffic capacity is sufficient. In contrast, an internet access service provider is not responsible for the capacity of other service providers' networks. See also section 3.6.

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purchase decision or other decision on consumer goods must be disclosed in accordance with the Consumer Protection Act.

<sup>8</sup> Government proposal 8/1977, p. 34. Furthermore, pursuant to Article 3, paragraph 1 of the Unfair Terms Directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

<sup>9</sup> AECS, section 107(1). The explanation of the speed must be clear and comprehensible also in accordance with the Open Internet Regulation (Article 4(1), point d).

<sup>10</sup> See the instructions related to the measurement of speed provided in the BEREC guidelines (paragraphs 161–166).

<sup>11</sup> See also the BEREC guidelines, paragraph 166.

Currently, telecommunications operators must have the ability to measure the data transmission rate of internet access services they provide to a customer under FICORA [Regulation 58](#) on the quality and universal service of communications networks and services<sup>12</sup>.

### 3 Specifying the speed of fixed-network internet access service

This guideline covers data transmission services implemented with both fixed technologies and (certain) fixed mobile technologies (see section 3.4).

#### 3.1 Maximum speed

According to the BEREC guidelines (paragraphs 145 and 146), the **maximum speed specified in the contract is the speed that an end-user could expect to receive at least some of the time**, e.g. once a day.

Operators are not under an obligation to technically limit the speed of the service to the maximum speed specified in the contract.

#### 3.2 Normally available speed

The normally available speed is understood to be the speed that an end-user could expect to receive most of the time when accessing the service. According to the BEREC guidelines (paragraph 148), the normally available speed has two dimensions:

- the numerical value of the speed mentioned in the contract (e.g. megabits per second) and
- the availability of the normally available speed during a specified period (time and percentage).

The contract shall therefore indicate not only the actual normally available speed but also the period of time during which the availability of the normally available speed can be assessed. In addition, a percentage value shall be defined for the duration when the defined normally available speed should be available within the period in question. It should be noted that the normally available speed is not an average.

The normally available speed should be **in fair and reasonable proportion to the maximum speed**. In the assessment, both the specified normally available speed and the percentage value defined for its availability are taken into account.

In Traficom's view, a contractual term in which the normally available speed is only defined over a long period is unfair to the consumer, as it does not guarantee the quality of the service during peak hours. Traficom considers the period of time to be reasonable to the consumer at least if, according to the contract, **the normally available speed is reached during each four-hour period**. This allows the consumer to make the decision regarding the time period during which a defect occurred, and ensures that a normally available speed is also defined for peak times. In addition, the contract shall mention a percentage value of the time during which the normally available speed is available within the period of time.

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<sup>12</sup> Regulation 58 B/2014 on the quality and universal service of communications networks and services, section 6(1): a telecommunications operator shall have the ability to measure the data transmission rate, latency, latency variation and packet loss of the internet access service it provides to a customer. The Explanatory notes describe in more detail how the measurement shall be conducted.

Traficom recommends that **the normally available speed be defined as 90% of the maximum speed** for internet access services with a maximum speed of no more than 100 Mbit/s. Traficom recommends that operators additionally define the **achievement percentage of the normally available speed as 90%** to make comparisons between different companies easier. It can be considered a minimum requirement that the normally available speed be **markedly higher than the minimum speed**, if the minimum speed has been specified as 70% of the maximum speed.

- For example, the normally available speed of a subscription with a maximum speed of 100 Mbit/s would be 90 Mbit/s, and it would be reported to be achieved during 90% of each four-hour period. In this case, the data transmission rate may be under 90 Mbit/s for a maximum of 24 minutes during any 4 hours. The variation of the speed within the normally available speed is also limited by the minimum speed specified in the contract.

At this point, Traficom is not issuing a more detailed opinion concerning the level of normally available speed to be considered reasonable, but will monitor telecommunications operators' contractual practices and the development of the market. If necessary, Traficom will intervene in unreasonable specifications of normally available speeds on a case-by-case basis.

### 3.3 Minimum speed

The minimum speed specified in the contract may not be so low in proportion to the maximum speed of internet access service indicated in the contractual terms so as to be unfair to the consumer, as such an imbalance in the parties' obligations would favour the telecommunications operator to the detriment of the consumer. This Decision follows from section 107 of the AECS.

Contracts on data speeds may not restrict the exercise of the rights of end-users pursuant to Article 3(2) of the Open Internet Regulation. This is possible, e.g. if the speed has been defined so loosely that the user's possibility of using or offering the desired services may be compromised. Therefore, the Regulation also requires the minimum speed to be in reasonable proportion to the maximum speed.

Traficom is not aware of technical differences between different fixed network technologies due to which technology-specific opinions should be issued regarding the minimum speed considered reasonable. There is no need for a separate opinion on xDSL subscriptions, for example, because it is required, as mentioned above, that the user can expect to receive the maximum speed specified for the internet access service at least some of the time. This is regardless of it being more complicated to estimate the maximum speed to be achieved with those subscriptions than e.g. with fibre subscriptions.

In principle, Traficom considers it acceptable and reasonable to the consumer if **the minimum speed** indicated for a fixed consumer subscription, whose maximum speed is no more than 100 Mbit/s, **is at least 70% of the maximum speed**.

### 3.4 Fixed-network subscriptions provided via the mobile network

In accordance with the BEREC guidelines (paragraphs 141–141b), Traficom's view is that hybrid subscriptions that combine fixed and mobile connections as well as Fixed Wireless Access (FWA) subscriptions are, under the Regulation, considered fixed-network subscriptions as regards the obligation to indicate speeds when the following conditions are met.



- Fixed wireless access subscriptions, whose quality has been ensured by means of terminal device or antenna arrangements and capacity reservations or frequency ranges reserved for this purpose.
- Hybrid subscriptions sold as a single subscription for a fixed location, which include both fixed (e.g. xDSL) and mobile (e.g. 4G or 5G) connections.

While not required to do so under this opinion, operators may also specify fixed-network quality indicators such as minimum speeds for other subscriptions provided via the mobile network.

Furthermore, this opinion does not place limitations on the sale of separate fixed and mobile subscriptions to users. In such cases, separate guarantees regarding quality and speed shall be given for each.

With regard to **hybrid subscriptions**, Traficom considers acceptable and fair to the consumer the definition of the

- **minimum and normally available speeds** of a subscription at least on the basis of the speed of the fixed subscription, with an additional assessment by the operator as to how much the guarantees regarding speeds can be adjusted upwards on the basis of the mobile network component.
- The **maximum speed** is the speed that the end-user can expect to achieve at least some of the time (e.g. once per 24-hour period).

With regard to **fixed wireless access subscriptions**, Traficom considers acceptable and fair to the consumer the definition of the

- **minimum and normally available speeds** so that they are in reasonable proportion to the maximum speed. At this point, Traficom is not issuing a more detailed opinion concerning the level of normally available speed to be considered reasonable, but will monitor telecommunications operators' contractual practices and the development of the market. If necessary, Traficom will intervene in unreasonable specifications of normally available speeds on a case-by-case basis.
- The **maximum speed** is the speed that the end-user can expect to achieve at least some of the time (e.g. once per 24-hour period).

### 3.5 Impact of the speed category on the assessment of fairness

This section presents Traficom's view on the minimum speed to be considered fair by speed category. The division based on the speed categories of subscriptions has been made between broadband (maximum 100 Mbit/s) and high-speed broadband (in this opinion, over 100 Mbit/s). Thus, the minimum speed to be considered fair depends on the maximum speed of the internet access service.

According to Traficom's estimate, in the current market situation it is a key issue for the user with regard to subscriptions of a maximum of 100 Mbit/s that the minimum speed has been defined in a way that safeguards the user's rights. When different speed categories are assessed based on the current speed requirements for internet services, it can be estimated that the minimum speed of internet access service is most important with regard to subscriptions with a maximum speed of no more than 100 Mbit/s. With regard to high-speed broadband faster than this, the variation in data transmission rate does not currently limit or affect users' possibilities of using the various internet services of their choice in the same way.

Gigabit or even higher speeds are increasingly available. Therefore, it is reasonable to estimate that momentary, burst-like fast data transfer is the most essential

for these subscriptions when high-speed data transfer is needed. Thus, it is not currently necessary to issue an opinion on the lowest minimum speed of high-speed broadband considered reasonable with regard to continuous data transfer to safeguard users' rights. Nevertheless, the minimum speed must be reasonable in proportion to the maximum speed with these subscriptions as well.

As stated above, the maximum speed must be available to the end-user at least some of the time. According to Traficom's information, the data transfer speeds of fixed-network internet access services do not exhibit significant variation between peak hours and other times. As there is no significant variation of speed in fixed network and the maximum speed must be available, a minimum speed that allows extensive variation in speed cannot be considered justified.

At this time, Traficom does not issue an opinion on the minimum speed to be considered fair for internet access services with a maximum speed of over 100 Mbit/s (upload and download speeds shall be considered separately if only one of the two exceeds 100 Mbit/s). **With regard to maximum speeds of over 100 Mbit/s, however, the minimum speed shall comply** with both of the following principles:

- the minimum speed must be in reasonable proportion to the maximum speed of the subscription; taking into

account the reasoning provided above as regards the level of a minimum speed considered fair, in principle, 40% of the maximum speed could be deemed an unfairly low minimum speed.

- the specification of the minimum speed must not in any case lead to a worse result than if the maximum speed had been 100 Mbit/s<sup>13</sup>.

### 3.6 Assessing service defects

If the maximum speed is not available to the user as mentioned in section 3.1, the service may have a defect, at least if the discrepancy is significant.

In accordance with the BEREC guidelines (paragraph 143), the actual data transfer speed of internet access service should not be lower than the minimum speed, except in cases of interruption. Congestion in the network, for example, does not constitute an exception to this principle. Should the actual speed of the subscription be significantly, and continuously or regularly lower than the minimum speed, this would indicate that the service is not in conformity with the contract in accordance with the guidelines. The normally available speed is also a binding part of the contract.

Any momentary or temporary deviation from the agreed specified performance cannot, however, be considered a defect in service in Traficom's view. Moreover, occasional and short-time interruptions corrected quickly by the operator are not considered to constitute a defect<sup>14</sup>. The competent authority, such as the Consumer Disputes Board, will evaluate the existence of the defect on a case-by-case basis. Acknowledging a defect in communications service does not fall within the competence of Traficom.

See Article 4(4) of the Open Internet Regulation, according to which any significant discrepancy, continuous or regularly recurring, between the actual perfor-

<sup>13</sup>In particular, this should be taken into account with regard to internet access services with a maximum speed of only slightly over 100 Mbit/s.

<sup>14</sup> Government proposal 231/2005, p. 28.

mance of the internet access service regarding speed and the performance indicated by a certified monitoring mechanism shall be deemed to constitute non-conformity of performance.

Traficom is planning the certification of such a monitoring mechanism, and will update this section in due course.

## 4 Specifying the speed of mobile internet access service

This section concerns internet access services provided via a mobile network. The rules apply regardless of the particular terminal device in question, and cover internet access services accessed via e.g. a separate mobile broadband modem, mobile phone, tablet, or laptop computer. The charging basis of the service is irrelevant: the opinion concerns both mobile broadband subscriptions sold for a fixed monthly fee and internet access services priced by data transfer volume or otherwise (such as on a daily or hourly basis).

### 4.1 Estimated maximum speed

In accordance with the BEREC guidelines (paragraph 153), the contract shall indicate the maximum speed realistically available to the user in different locations. This is the estimated maximum speed, and it must be available in **realistic conditions of use**.

The estimated maximum speed cannot be the theoretical maximum speed of the subscription, but must be based on the volume of transferred useful data in actual conditions of use.

Mobile broadband primarily facilitates the use of data transfer service with several network technologies. In this case, the available speed depends on the network technology available in the location of use. Operators must therefore report the estimated maximum speed in the contract **separately for each network technology**. In addition, it may be necessary to specify the estimated maximum speed area-specifically if there are significant and permanent differences in the regionally available speeds.

The estimated maximum speed must be disclosed comprehensibly, which requires mentioning the factors influencing its availability. Achieving the estimated maximum speed by a specific end-user depends on a variety of factors, such as the location of use and the terminal device used. The definition of estimated maximum speed does not require a specific end user to achieve the estimated maximum speed in any specific location of use: it is sufficient that the estimated maximum speed is realistically available in realistic conditions of use.

Operators shall inform the user clearly of the effect of the different network technologies on the data transmission rate. Such factors can include the network technologies supported by the end-user's terminal device and the coverage of networks implemented using different network technologies.

### 4.2 Coverage maps and availability of the estimated maximum speed

It must be possible for the end-user to understand based on information provided in the contract the locations in which the estimated maximum speed can be achieved in the service.

A company that offers internet access services in a mobile network shall provide information about the data transmission rate available in each location. In the case of mobile networks, describing the estimated maximum speed in a clear and

comprehensible manner usually requires the use of a coverage map. The availability of estimated maximum download and upload speeds by technology can be reported using coverage maps. The coverage map shall indicate the regional availability of service by network technology.

The operator shall mention in its contractual terms where the consumer can find up-to-date information regarding the coverage areas of the mobile network and thus the speed available with the subscription in different areas or addresses. The operator can maintain up-to-date coverage area and speed maps on its website, for example. There is no need to indicate estimated maximum speeds of subscriptions on the actual coverage map.

Traficom recommends that the coverage area map also illustrate reception at several different quality levels. Measured speeds may also be reported.

The coverage area map should also clearly indicate if the coverage area has been calculated using specific antenna requirements requiring an additional antenna to be connected to the terminal device. In principle, in this case a coverage map without the requirement of an additional antenna should also be available.

A competent authority can use information provided in the coverage area map in assessing whether there is a defect in the service, in accordance with section 120 of the AECS.

## 5 Advertised speed

The Open Internet Regulation does not directly regulate advertising or marketing. However, the Regulation requires internet access service providers to ensure that the contractual terms specify the advertised speed of the internet access service covered by the contract. Traficom has interpreted that it is not necessary to expressly mention advertised speed in a contract if it is the same as the maximum speed specified in the contract.

The speed specified in the contract must be one that the operator can realistically deliver. The explanation of the advertised speed and of (estimated) maximum speed must also be clear and comprehensible. The explanation cannot, in principle, be regarded comprehensible, if the advertised speed of an internet access service is higher than the maximum or estimated maximum speed of the same service. In accordance with the BEREC guidelines (paragraph 156), users should be able to make reasonable purchase decisions based on the advertised speed and assess the significance of the advertised speed in proportion to the available speed. Therefore, **the maximum speed or estimated maximum speed** defined in the contract in accordance with sections 3.1 and 4.1 above **may not be lower than the advertised speed of the same internet access service.**

### 5.1 Gigabit connections

The advertised speed shall be specified on the basis of the transport layer protocol payload, like other speeds. However, as an exception to this rule, Traficom considers that the advertised speed of gigabit connections may also be specified based on the network-level (L2) speed, if ports of network equipment limit the speed to 1 Gbit/s at network level (and correspondingly, to 10 Gbit/s in 10 Gbit/s connections).

This exception does not apply to connections of less than 1 Gbit because in such cases 1 Gbit/s ports may be used and the connection may be overprovisioned at network level to achieve 100 Mbit/s at L4, too.

Without such an exception, it would not be practical to provide gigabit connections, and providing speeds that deviate slightly from 1 Gbit/s would be likely to

confuse consumers. The practical effect of the speed difference between the network level and the transport layer protocol payload on using the internet access service may be regarded as very limited. Therefore Traficom considers that making an exception in this case benefits consumers when assessed as a whole.

If operators apply the exception, their contractual terms and marketing shall explain the reason for the difference between the advertised speed and the maximum speed in a clear and comprehensible manner.

## **5.2 Advertised speed in marketing materials**

If a value referring to speed is included in the name of the internet access service used in marketing (product name), it is deemed to be the advertised speed referred to in the Regulation. Otherwise, the advertised speed is the speed presented in connection with the promotion of that internet access service in an advertisement or, for example, on the business' website a) most conspicuously (which cannot exceed the maximum or estimated maximum speed) or if there is no such speed, b) the highest mentioned speed.

Legislation on marketing, such as the Consumer Protection Act, also results in requirements for marketing that refers to the speed of the internet access service.

## **6 Factors influencing the actual data transmission rate and limitations of liability for defects**

Significant factors that may have an effect on the actual speed must be mentioned in the contractual terms (both those for which the operator is responsible and those outside its responsibilities). Telecommunications operators shall also mention the key factors attributable to the user or their devices that may influence the data transmission rate in the contractual terms.

The user must also be informed if the terminal devices offered by the telecommunications operator upon the delivery of the internet access service, such as mobile broadband modems or package deal phones, have a limiting impact on the data transmission rate of the subscription.

The contractual terms shall also mention the assumptions that have essential effects on the data transmission rate pursuant to the contract. This includes any requirements related to antennas or internal networks.

It is possible that the data transmission rate specified in the contract is not available for a variety of reasons. An operator can limit its liability only with regard to factors influencing speed that are genuinely beyond its scope of influence or that it could not have anticipated. Limitations of liability may not be too extensively defined.

The contractual terms shall clearly indicate the extent to which the factors influencing the available speed mentioned in the contract are such that the operator is not liable for them (in which case the speed specified in the contract can be justifiably not achieved because of them). This can include factors for which the consumer is responsible, for example. It must be possible for the consumer to understand the relationship between the allowed limitations of liability made by the operator in the contract and the specified speed information and available speed.

The contractual terms may not use factors which are within the scope of the operator's influence, such as the capacity of the network used for providing the service (its own or lease) or other similar properties as factors that limit the liability for defects regarding the data transmission rate. Such factors must be taken into account when confirming the availability of the ordered internet access service at a specific address.

The effect of the user's internal network and terminal devices on the data transmission rate is not generally included in the scope of the operator's influence. Therefore, it is possible for the operator to prepare in the contractual terms for situations in which the internal network of the property has not been built in accordance with Traficom [Regulation 65](#)<sup>15</sup> and situations in which the user's terminal device, apartment network or applications used by the user impair the data transmission rate experienced by the user and the measurement results (when they are not included in the operator's responsibilities). However, it would be unfair for an operator to maintain that the contract is binding if the speed deviated substantially from expectations due to a reason outside the parties' control, for example, due to the internal network of a housing company.

An operator may not use the sole fact that coverage area maps are computed as a factor limiting the liability for defects concerning the data transmission rate of mobile broadband, as the service promise given to the user is essentially based on coverage data disclosed in the coverage area maps. This applies regardless of the fact that the operator may be unable to predict the actual reception. When concluding the contract, the user cannot know whether their home or summer cottage is located in an individual shadow zone of the coverage area even if the coverage area map would indicate good reception at the address. If the speed reported in the coverage area map is not available in all of the locations covered by the coverage area map or under all conditions, the telecommunications operator must mention any matters that limit the speed that are beyond the telecommunications operator's scope of influence.

Traficom considers it good practice for operators to offer a trial period for mobile broadband subscriptions so that the user can test the suitability of the subscription for their needs. However, Traficom emphasises that offering a trial period cannot be used as a factor that will mitigate or eliminate the operator's liability for defects. An operator cannot waive its liability for defects by claiming that the data transmission rate of the subscription was at the same level falling short of the contractual terms already during the trial period.

## **7 Data transmission quotas, latency and other quality of service parameters**

### **7.1 Reporting the speed when using data transmission quotas**

In accordance with the Regulation, the contractual terms shall provide an explanation on how any volume restrictions of data transmission can influence the internet access services and in particular the use of content, applications and services in practice.

The consequences of exceeding the data transmission quota shall be described. The contract must specify whether the data transmission rate is limited in some way or whether a surcharge will be charged for data transmission exceeding the quota, for example.<sup>16</sup> The contract shall indicate, among other things, whether data transmission is blocked entirely when the quota is exceeded or the speed of the internet access service lowered. The consumer shall be informed clearly of such conditions upon concluding the contract (the obligation to provide information exists also under the Consumer Protection Act in both marketing and the sale situation).

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<sup>15</sup> Traficom Regulation 65 on internal networks and telecommunications contracting in real estate buildings

<sup>16</sup> In addition, in accordance with section 133 of the AECS, a telecommunications operator in a mobile telephone network shall provide a subscriber and user with a free-of-charge opportunity to monitor the fees resulting from the use of the subscriber connection.

A provider of internet access service shall also indicate the data transmission rate of the service following the limitation of the speed in accordance with the provisions concerning the network in question. A provider of internet access service shall also explain in the contractual terms how the limitation of speed influences the use of the services, such as the internet services that can still be used with the limited speed, or which services can no longer be used. The use of concrete examples is recommended<sup>17</sup>.

If the telecommunications operator offers internet access services that have a data transmission quota, Traficom recommends that the telecommunications operator describe the quotas using different user profiles. This way, the consumer can choose the internet access service that suits their needs, as it is difficult for most consumers to estimate the data transmission volume they use or need.

## 7.2 Informing about the effects of latency and other quality of service parameters

In accordance with the Regulation, the contractual terms shall also explain how speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services. As a result of the Regulation, the effects of service latency, latency variation and packet loss on the internet access service shall also be mentioned, if necessary. Disclosing the effect of such quality of service parameters is an obligation if they can have practical effects on the use of the internet access service and various applications (see paragraph 137 of the BEREC guidelines).

## 8 Examples of prohibited contractual practices

In accordance with Traficom's previous guidelines, the below are examples of contractual practices concerning data transmission rates that violate the provisions of the Open Internet Regulation or are otherwise considered unreasonable:

- Specifying the theoretical maximum speed or the average speed does not meet the requirements of the Regulation.
- "Full rate" subscriptions do not meet the requirements of the Regulation. In full rate subscriptions, the user is given access to the entire capacity allowed by the connection, with the available data transfer rates depending inter alia on the length and quality of the subscriber connection and any external disturbances. If not all of the speed data pursuant to the Regulation has not been specified in the contractual terms or they are not reasonable from the consumer's point of view, the contractual terms do not meet the statutory requirements.
- Describing the speed as being "typically" available does not meet the requirement for the unambiguity of the definition of speed and for it being possible to use the speed in determining a defect in performance.
- As a general rule, a contractual term or similar procedure according to which the subscription type agreed upon with the consumer is changed to a slower one or changing it to a slower one is agreed upon in case the data transmission rate of the internet access service not corresponding to what was agreed due to a reason attributable to the operator shall also be considered unreasonable from the consumer's point of view. Because the provisions of the AECS on the consequences of a defect in communications services are compelling legislation in favour of the consumer, an operator

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<sup>17</sup>Such as: "After the data transmission quota has been exceeded, the speed of your subscription connection will be limited, after which you will not be able to watch TV broadcasts via streaming..."

cannot, inter alia, restrict the consumer's right to claim the correction of a defect. The possibility of changing the speed category can be mentioned in the terms and conditions only if the consumer is simultaneously also informed that this does not restrict the consumer's right to demand the defect to be corrected or to claim other consequences of the defect, such as to cancel the communications agreement in case of an essential defect.

- An operator may not agree on data transmission rates with a consumer without measuring or estimating before the contract becomes binding whether the telecommunications operator's network is capable of offering the service with the agreed quality. An operator therefore cannot transfer to the consumer the responsibility for investigating whether the provided internet access service corresponds to what was agreed.

## 9 Essential legislation on the matter

### 9.1 Open Internet Regulation (EU) No 2015/2120

In accordance with Article 4(1) of the [Regulation](#), providers of internet access services shall ensure that any contract which includes internet access services specifies at least the following:

- a) information on how traffic management measures applied by that provider could impact the quality of the internet access services, the privacy of end-users, and the protection of their personal data;
- b) a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services;
- c) a clear and comprehensible explanation of how any services referred to in Article 3(5) to which the end-user subscribes might in practice have an impact on the internet access services provided to that end-user;
- d) a clear and comprehensible explanation of the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users' rights laid down in Article 3(1);
- e) a clear and comprehensible explanation of the remedies available to the consumer in accordance with national law in the event of any continuous or regularly recurring discrepancy between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated in accordance with points (a) to (d).

In accordance with Article 4(4) of the Regulation, any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated by the provider of internet access services in accordance with points (a) to (d) of paragraph 1 shall, where the relevant facts are established by a monitoring mechanism certified by the national regulatory authority, be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law.



In accordance with recital 18 of the Regulation, providers of internet access services should inform end-users in the contract of the speed which they are able realistically to deliver to empower end-users in such situations. The normally available speed is understood to be the speed that an end-user could expect to receive most of the time when accessing the service. Providers of internet access services should also inform consumers of available remedies in accordance with national law in the event of non-compliance of performance. Any significant and continuous or regularly recurring difference, where established by a monitoring mechanism certified by the national regulatory authority, between the actual performance of the service and the performance indicated in the contract should be deemed to constitute non-conformity of performance for the purposes of determining the remedies available to the consumer in accordance with national law.

The methodology should be established in the guidelines of the Body of European Regulators for Electronic Communications (BEREC) and reviewed and updated as necessary to reflect technology and infrastructure evolution. National regulatory authorities should enforce compliance with the rules in this Regulation on transparency measures for ensuring open internet access.

## **9.2 Act on Electronic Communications Services (917/2014)**

In accordance with section 107(1) of the AECS, a telecommunications operator has an obligation to draw up standard agreement terms for consumer agreements on communications services and to use them when entering into agreements with consumers. The agreements shall not include any terms or limitations unfair to the consumer. The terms of the agreement shall be worded in clear and understandable language.

In accordance with subsection 2, a telecommunications operator shall publish standard agreement terms and tariff information on communications services and ensure that they are easily available to users without charge.

In accordance with section 108(1) of the AECS, a communications service agreement between a telecommunications operator and a subscriber shall be made in writing.

In accordance with subsection 2(2), the contract shall specify the nature and features of the services and the types of maintenance service provided.

In accordance with section 110(2) of the AECS (as amended by 456/2016), Traficom may issue regulations necessary for supervising and enforcing the EU's Telecoms Single Market Regulation on:

- 1) requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures referred to in Article 5(1) of the Regulation;
- 2) documentation and statistical reporting of information referred to in Article 5(2) of the Regulation as well as the form of related documents and retention of information.

In accordance with subsection 3, Traficom may issue further regulations concerning the certification of a mechanism used to verify the quality of the internet access service referred to in Article 4(4) of the EU's Telecoms Single Market Regulation.

## **9.3 Consumer Protection Act (38/1978)**

The Consumer Ombudsman also supervises the use of contractual terms from the point of view of consumer protection. In accordance with Chapter 3, section 1 of the Consumer Protection Act, a business offering consumer goods or services shall

not make use of a contract term which, considering the price of the good or service and the other relevant circumstances, is to be deemed unfair from the point of view of consumers.

In accordance with Chapter 2, section 6(1) of the Consumer Protection Act, false or misleading information shall not be conveyed in marketing or the customer relationship if the information contributes to the consumer making the purchase decision or other decision relating to the consumer goods or service that the consumer would not have made without the information provided.

In accordance with Chapter 2, section 7 of the Consumer Protection Act, it is not allowed in marketing or customer relationship not to give essential information that the consumer needs to make the purchase decision or other decision related to the consumer goods or services and the lack of which contribute to the consumer making a decision that the consumer would not have made with sufficient information.

In accordance with Chapter 2, section 8(1) of the Consumer Protection Act, when offering specified consumer goods at a specific price, marketing shall indicate the main features of the consumer goods to the extent appropriate considering the consumer goods in question and the media used.

## 10 Sources

Regulation (EU) 2015/2120 of the European Parliament and of the Council laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, <https://eur-lex.europa.eu/eli/reg/2015/2120/oj>

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**Finnish Transport and Communications Agency (Traficom)**

PO box 320, FI-00059 TRAFICOM  
tel. +358 29 534 5000

[traficom.fi](http://traficom.fi)

ISBN 978-952-311-708-2  
ISSN 2669-8757 (online publication)

**TRAFICOM**  
Liikenne- ja viestintävirasto