EDRI's Comments to ITRE Compromise amendments

EDRi welcomes the compromise amendments to the ITRE draft report tabled by the Rapporteur, Pilar del Castillo, but would like to make some comments on selected proposed amendments below.

1402~~1307~~

Draft CA 4
Open internet

The CA covers Art 2(14)-(15), Arts 23-24, Art 30a and recitals 45-51. All relevant AMs, including AMs 322, 340, 345-346, 32, 248, 263, 249-251 and all AMs to Art 2(14)-(15), Arts 23-24 and recitals 45-51, fall.

Recitals

(45) The internet has developed over the past decades as an open platform for innovation with low access barriers for end-users, content and application providers and internet service providers. ***The principle of "net neutrality" means that equivalent traffic should be treated equally, without discrimination, restriction or interference, independent of the sender, receiver, type, content, device, service or application. ~~Indeed,~~ a~~A~~s stated by the European Parliament resolution of 17 November 2011 on the open internet and net neutrality in Europe 2011/2866, the internet's open character has been a key driver of competitiveness, economic growth, social development and innovation – which has led to spectacular levels of development in online applications, content and services – and thus of growth in the offer of, and demand for, content and services, and has made it a vitally important accelerator in the free circulation of knowledge, ideas and information, including in countries where access to independent media is limited.*** The existing regulatory framework aims at promoting the ability of end-users to access and distribute information or run applications and services of their choice. ~~***A way of ensuring this ability is to treat equal types of traffic equally.***~~ Recently, however, the report of the Body of European Regulators for Electronic Communications (BEREC) on traffic management practices published in May 2012 and a study, commissioned by the Executive Agency for Consumers and Health and published in December 2012, on the functioning of the market of internet access and provision from a consumer perspective, showed that a significant number of end-users are affected by traffic management practices which block or slow down specific applications. These tendencies require clear rules at the Union level

to maintain the open internet and to avoid fragmentation of the single market resulting from individual Member States' measures.

Comment: These changes are positive and welcome

Suggestion: Accept, if the word "equivalent" (which has no agreed meaning) is deleted. The text would be clearer without that word or with the word "all".

(46) The freedom of end-users to access and distribute information and ***(deletion)*** content, run applications and use services of their choice is subject to the respect of Union and compatible national law. This Regulation defines the limits for any restrictions to this freedom by providers of electronic communications to the public but is without prejudice to other Union legislation, including copyright rules**,** ***Directive 1995/46, Directive 2002/58,*** Directive 2000/31/EC ***and Directive 2011/93/EC, in particular Article 25 thereof, which allows Member State measures to block access to web pages containing or disseminating child pornography, subject to safeguards***.

This entire paragraph adds absolutely no meaning. The first sentence and the references to privacy legislation are broadly redundant but can be left in the text as a compromise. The words "copyright rules" makes little sense.

Article 23 makes it crystal clear that providers may comply with court orders. Therefore, there is no need to reference Directive 2011/93.

The references to copyright "rules", the E-Commerce Directive and the Child Exploitation Directive add nothing but may lead to misinterpretations. All should therefore be deleted.

Suggestion: Delete all text after the first sentence and keep references to data protection legislation.

(46a) The Charter of Fundamental Rights of the European Union requires that limitations to the respect for private life, right of confidentiality of communications, right to data protection or freedom to receive or impart information must be provided for by law and respect the essence of those rights and freedoms. In the context of traffic management measures, the CJEU in Case C-70/10, SABAM v. Tiscali (Scarlet), with respect to general monitoring of electronic communications, states that an imposition of an obligation on an Internet service provider of electronic communications or services to indiscriminately monitor communications would constitutes not only a serious infringement on the freedom of the provider to conduct its business, but may also infringe the fundamental rights of the customers of the provider. Any scheme involving general monitoring of communications by providers of electronic communications

~~***or services should therefore be specifically provided for by Union law, or national law adopted in conformity with Union law.***~~

Comment: We support this change. No text is better than the misleading text that was proposed.

Suggestion: Accept

~~***(46b) An internet access service should be a publicly available electronic communications service enabling connectivity through any terminal to virtually all end points connected to the internet. A specialised service using the internet protocol should provide the end user with the capability of accessing and using specific content, applications or services at an enhanced level of optimised quality compared to an internet access service. In order for an optimised, enhanced level of service quality to be assured, the provision of specialised services may require implementation of traffic management measures such as limitations on the number of users or end-to-end control of service characteristics, or it may require dedicated capacity. Furthermore, while a specialised service may be provided using the same infrastructure as an internet access service, it should be provided over a closed network. A specialised service may be provided by an internet access provider, by another provider of electronic communications services or, by means of an agreement with the internet access provider or another provider of electronic communications services, by the provider of the specific content, application or service.***~~

In the absence of a comprehensive definition of “specialised service” in this recital, the next best option is no definition at all, with clear protections against discrimination inside the network and against discrimination based on billing (in and out of bundle discrimination, for example)

Suggestion: Accept

(47) In an open internet, providers of ***internet access services*** should, within contractually agreed limits on data volumes and speeds for internet access services ***and the general characteristics of the service***, not block, slow down, degrade or discriminate against specific content, applications or services or specific classes thereof except for a limited number of ***(deletion)*** traffic management measures. Such measures should be ***technically necessary,*** transparent, proportionate and non-discriminatory. ***Addressing network congestion should be allowed*** provided that network

congestion occurs only temporarily or in exceptional circumstances ***and if equivalent types of traffic is treated equally.*** ***National Regulatory Authorities should be able to require that a provider demonstrates that equal treatement of traffic will be substantially less efficient.***

Comments: This is an improvement.

The logical sense of "temporary *or* in exceptional circumstances" is unclear. How can something be temporary and not be exceptional or vice versa?

It is not clear what "equivalent types of traffic" might mean. Does this mean different protocols fulfilling equivalent functions or just that all services using the same protocol?

To close the loopholes in this paragraph, the conditional formulations "In an open internet," and ", within contractually agreed limits on data volumes and speeds for internet access services and the general characteristics of the service," have to be amended. **Suggestion**: Accept "technically"

Change "temporary or" to "temporary and".

Delete "In an open internet,".

Replace "against specific" with "between", otherwise the text implies that discrimination would be possible once data caps have been reached.

Delete "equivalent" (or explain what it means). It would make more sense to refer to "all" traffic, as this is clearer and more meaningful than "equivalent".

Make the final sentence active. Providers must demonstrate that any such unequal treatment of traffic was temporary and exceptional and was substantially more efficient.

(48) Volume-based tariffs should be considered compatible with the principle of an open internet as long as they allow end-users to choose the tariff corresponding to their normal data consumption based on ***clear,*** transparent ***and explicit*** information about the conditions and implications of such choice. At the same time, such tariffs should enable providers of ***internet access services*** to better adapt network capacities to expected data volumes. It is essential that end-users are fully informed before agreeing to any data volume or speed limitations and the tariffs applicable, that they can continuously monitor their consumption and easily acquire extensions of the available data volumes if desired.

Comment: Volume-based tariffs can only be considered to be compatible with the principle of the open internet when they treat all traffic equally.

Suggestion: Add a new second sentence - "Such volume-based tariffs must treat all traffic equally." The sentence starting "at the same time" should be deleted as it is entirely superfluous.

(49) ***It should be possible to meet end***-user demand for services and applications requiring an enhanced level of assured service quality ***(deletion)***. Such services may comprise inter alia broadcasting ~~via Internet Protocol (IP-TV)~~, video-conferencing and certain health applications. End-users should therefore also be free to conclude agreements on the provision of specialised services with an enhanced quality of service with either providers of ***internet access services, providers of*** electronic communications to the public or providers of content, applications or services. ***Where such agreements are concluded with the provider of internet access, that provider should ensure that the enhanced quality service does not cause material detriment to*** ~~***not impair***~~ ***the general quality of internet access***~~***, except to the minimum necessary, considering the state of the art and technology deployed, to ensure the delivery of the enhanced quality service***~~***. Furthermore, traffic management measures should not be applied in such a way as to discriminate*** ~~***against***~~ ***between*** ~~***services***~~ ***competing services***~~***with those offered by the provider of internet access***~~***.***

Comment: "Material detriment to the general quality" establishes two ill-defined criteria. If the text simply says "does not impair the quality of internet access" then NRAs will quite logically only ever know of and investigate/punish impairments that are of a level that merits such investigations. A certain degree of respect for the common sense that NRAs can exercise can be accorded.

The amendments to the final sentence are a significant improvement, although not quite perfect.

Suggestions: Replace "not cause material detriment to the general quality" with "does not impair the quality".

Replace "applied in such a way as to discriminate" with "in a way that discriminates". "In such a way as to" implies the need to prove intent.

(50) In addition, there is demand on the part of content, applications and services providers, for the provision of transmission services based on flexible quality parameters, including lower levels of priority for traffic which is not time-sensitive. ~~***Such agreements are allowed and may be necessary in order to meet end-user demand for services and applications requiring an enhanced level of assured service quality.***~~ The possibility for content, applications and service providers to negotiate such flexible quality of service levels with providers of electronic communications ***(deletion) may also be*** necessary for the provision of ***certain*** services such as machine-to-machine (M2M) communications. ***(deletion)*** Providers of content, applications and services and providers of electronic communications ***(deletion)*** should therefore ***continue to*** be free to conclude specialised services agreements on defined levels of quality of service ***as long as such agreements***

do not impair the general quality of internet access service. ~~***(deletion).***~~

Comment: The logic of the recital is very unclear. It is referring to lower levels of priority, legislating the existence of demand *and* referring for higher levels of priority (implicitly).

Suggestion: The recital should be made much clearer. Unfortunately, as it is difficult to guess what the Commission was trying to achieve with this text, it is impossible to suggest improvements.

Delete “general”.

(51) National regulatory authorities play an essential role in ensuring that end-users are effectively able to exercise this freedom to avail of open internet access. To this end national regulatory authorities should have monitoring and reporting obligations, and ensure compliance of providers of ***internet access services, other providers of*** electronic communications ***and other service providers*** and the availability of non-discriminatory internet access services of high quality ***which are not impaired by specialized services***. In their assessment of a possible general impairment of internet access services, national regulatory authorities should take account of quality parameters such as timing and reliability parameters (latency, jitter, packet loss), levels and effects of congestion in the network, actual versus advertised speeds, performance of internet access services compared with ***enhanced quality*** services, and quality as perceived by end-users. National regulatory authorities should ***establish complaint procedures providing effective, simple and readily available redress mechanisms for end users and*** be empowered to impose minimum quality of service requirements on all or individual providers of ***internet access services, other providers of*** electronic communications ***and other service providers*** if this is necessary to prevent general impairment/degradation of the quality of service of internet access services.

Comment: The word freedom has no clear meaning.

The reference to “other service providers” has no obvious meaning.

The word “general” reduces clarity. The same comments apply as given above in relation to recital 49.

It is not clear what “enhanced quality” services means.

“Establish complaint procedures providing effective...” is a very positive addition.

Suggestion: Replace “freedom” with “right”.

Delete all uses of the word “general”.

Either explain or remove the first reference to “other service providers”.

Articles

Article 2 – Definitions

(14) "internet access service" means a publicly available electronic communications service that provides connectivity to the internet, and thereby connectivity between virtually all end points ***of*** the internet, irrespective of the network ***technologies or terminal equipment*** used;

(15) 'specialised service' means an electronic communications service ~~***operated within closed electronic communications networks using the IP protocol*** that provides ***access by a determined number of parties to***~~***optimized for*** specific content, applications or services, or a combination thereof, ***provided over logically distinct capacity with a view to ensuring*** ~~***relying on strict admission control by deploying traffic management to ensure an appropiate level of network capacity and***~~ ***enhanced quality*** ~~***relying on admission control***~~ and that is not marketed or ***usable*** as a substitute for internet access service;

Comment: This text is improved but still inadequate. The core problem is that this is trying to solve problems already broadly solved by BEREC. **Suggestion:** Delete “virtually”. We would suggest the following for Paragraph 15 based on the BEREC Definition and the work of the other committees: (15) 'specialised service' means an electronic communications service operated **and provided** within closed electronic communications networks **that is separated from the open internet**. **These services** provide access for a determined number of parties to specific content, applications or services, or a combination thereof, **are not replacing functionally identical services available over internet access service, are** relying on strict admission control by deploying traffic management to ensure an appropiate level of network capacity and **adequate** quality ~~relying on admission control~~ and **they are** not marketed or **used** as a substitute for internet access service;

Article 23 - Freedom to provide and avail of open internet access, and reasonable traffic management

1. End-users shall be free to access and distribute information and content, run ***and provide*** applications and services ***and use terminals*** of their choice***, irrespective of the end-user’s or provider’s location or the location, origin or destination of the service, information or content,*** via their internet access service.

Suggestion: Add “type” after “origin”.

[2nd subpar deleted]

2. ***Providers*** of ***internet access, of*** electronic communications to the public ***and*** providers of content, applications and services ***shall be free to offer*** specialised services ***to end-users***. ***Such services shall only be offered if the network capacity is sufficient to provide them in addition to internet access services and they are not to the material detriment of the availability or quality of internet access services. Where such agreements are concluded with the provider of internet access, that provider shall take measures to ensure that the enhanced quality service does not impair the general quality of internet access, except to the minimum necessary taking into account the state of the art and technology deployed, in order to ensure the delivery of the enhanced quality service. Providers of internet access to end-users shall not discriminate against services from other sources that are competing with their own specialized services.***

Comment: The quality of the additional "internet access service" is not specified. It would need to be clear that this is "state of the art" as this otherwise generates an obvious loophole.

The words "material detriment" are unclear. NRAs would quite obviously not investigate or prosecute infringements where the detriment was not "material". The final sentence implicitly accepts discrimination in all circumstances other than those described. The definition offered for "specialised service" suggests that it is an access service (see last sentence in particular).

Suggestions: Delete "material"

Add "network capacity is sufficient, i**ncluding having adequate levels of redundancy to cope with peak traffic**".

Change the final sentence to: Providers of internet access to users shall not discriminate between services"

[2nd subpar deleted]

3. This Article is without prejudice to Union or national legislation related to the lawfulness of the information, content, application or services transmitted.

Comment: This text adds nothing except confusion and should be deleted.

4. ***End-users shall be provided with*** complete information in accordance with Article ***20(2), Article 21(3) and Article 21a of Directive 2002/22/EC, including information on any (deletion) traffic management measures applied that might affect***

access to and distribution of information, content, applications and services as specified in paragraphs 1 and 2 of this Article. [IMCO adopted text AM 42 – IMCO exclusive competence. "Reasonable" deleted as not used in 23(5), exclusive ITRE competence, as the word adds nothing.]

Comment: Agree with deletion of "reasonable". This deletion of redundant wording is best practice and should be rigorously implemented throughout the text – particularly as the Commission's drafting in this case is exceptionally bad.

5. Within the limits of any contractually agreed data volumes or speeds for internet access services, ***and subject to the general quality characteristics of the service,*** providers of internet access services shall not restrict the freedoms provided for in paragraph 1 by blocking, slowing down, ***altering or*** degrading specific content, applications or services, or specific classes thereof, except in cases where it is necessary to apply ***(deletion)*** traffic management measures. ***Traffic management measures shall not be applied in such a way as to discriminate for commercial reasons against services competing with those offered by the provider of internet access. Traffic*** management measures shall be transparent, non-discriminatory, proportionate and necessary ~~***in particular***~~ to:

Comment: The addition of "for commercial reasons" adds no public policy benefit and creates a new barrier for NRAs to enforce respect for the open Internet.

There is no reason to restrict the prohibition of discrimination to cases where the service being discriminated against is competing directly against a service provided directly by the access service.

The first part of the first sentence circumvents the whole Paragraph in the case of exceeded data caps (insofar as different services can still be treated differently once the – possibly very low – data cap has been exceeded) and should therefore - following the good example of the other committees - be deleted.

Suggestion: Delete "for commercial reasons".

Replace " against services competing with those offered by the provider of internet access" with "between traffic from different sources"

Delete "Within the limits of any contractually agreed data volumes or speeds for internet access services, and"

a) implement ***(deletion)*** a court order ***(deletion)***;

Comment: We support this amendment.

b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminals;

~~c) prevent the transmission of unsolicited~~ ***commercial*** ~~communications to end-users~~ ***(deletion)***~~;~~

Comment: This provision appears redundant and we therefore accept this amendment.

d) ***prevent*** ~~***network congestion***~~ ***or mitigate*** the effects of temporary or exceptional network congestion provided that equivalent types of traffic are treated equally.

Without prejudice to Directive 95/46, traffic management ***measures shall*** only entail ***such*** processing of ***personal*** data that is necessary and proportionate to achieve the purposes set out in this paragraph***, and shall also be subject to Directive 2002/58, in particular with respect to confidentiality of communications***.

[Providers of internet access services ~~***(and others?)]***~~ ***shall put in place appropriate, clear, open and efficient procedures aimed at addressing complaints alleging breaches of this Article.*** ~~***If s***~~***Such procedures*** ***shall be without prejudice to the end-users right*** ~~***tohave not resolved the complaint within [three] months, the end-user may***~~ ***refer the matter to the national regulatory authority.***

Comment: The additional text is helpful. However, it would be helpful to include some text to explain the role of the NRA in providing harmonisation, guidance and approval for such procedures.

Suggestion: Replace “aimed at addressing” to “to address”.

Article 24 - Safeguards for quality of service

1. ***In exercising their powers under Article 30a with respect to*** Article 23***, national regulatory authorities shall closely monitor compliance with Article 23(5) and*** the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. They shall, in cooperation with other competent national authorities, also monitor the effects on cultural diversity and innovation. National regulatory authorities shall ***publish reports*** on an annual basis ***regarding their monitoring and findings, and provide those reports to the Commission and BEREC***.

Comment: The first sentence is unduly complicated. Also, NRA reports should be available for the public.

Suggestion: Replace the wording after “23(5) with “and that internet access services are non-discriminatory and offer levels of quality that reflect advances in technology”.

After “the Commission” add “the public”

2. In order to prevent the general impairment of quality of service for internet access services or to safeguard the ability of end-users to access and distribute content or information or to run applications***,*** services ***and software*** of their choice, national regulatory authorities shall have the power to impose minimum quality of service requirements***, and where appropriate, other quality of service parameters, as defined by the national regulatory authorities,*** on providers of electronic communications to the public.

National regulatory authorities shall, in good time before imposing any such requirements, provide the Commission with a summary of the grounds for action, the envisaged requirements and the proposed course of action. This information shall also be made available to BEREC. The Commission may, having examined such information, make comments or recommendations thereupon, in particular to ensure that the envisaged requirements do not adversely affect the functioning of the internal market. ~~The envisaged requirements shall not be adopted during a period of two months from the receipt of complete information by the Commission unless otherwise agreed between the Commission and the national regulatory authority, or the Commission has informed the national regulatory authority of a shortened examination period, or the Commission has made comments or recommendations.~~ National regulatory authorities shall take the utmost account of the Commission’s comments or recommendations and shall communicate the adopted requirements to the Commission and BEREC.

[IMCO adopted text AM 45 – IMCO exclusive competence. IMCO text on complaint procedures addressed substantively identically in Art 30a. IMCO text on BEREC guidelines in Art 24(3), maintained by ITRE.]

Comment: This appears vastly bureaucratic and hardly adapted to a fast-moving market. In order for a problem to be solved, the envisaged solution is:

a. The end user or another party identifies the problem.

b. The NRA investigates and analyses the problem.

c. The NRA produces a set of countermeasures to address the problem.

d. The NRA communicates the proposed solution(s) to the Commission

e. The NRA communicates the proposed solution to BEREC.

f. The NRA waits for the Commission's response.

g. The NRA finally takes “utmost” account of the Commission's comments

and implement the measure.

Suggestion: A specific timetable for the Commission to respond to single market concerns should be established (as is the case for national legislation in general already). Measures considered necessary by NRAs which do not undermine the single market should not be delayed in order to wait for a response from the Commission, not least because this appears to be a breach of subsidiarity.

3. ***Within six months of adoption of this regulation, BEREC shall, after consulting stakeholders and in close cooperation with*** the Commission***, lay down general guidelines*** defining uniform conditions for the implementation of the obligations of national competent authorities under this Article***, including with respect to the application of traffic management measures and for monitoring of compliance***.

Comment: This seems positive.

Article 24a – Review

The Commission shall, in close cooperation with BEREC, review the functioning of the provisions on specialised services and, after a public consultation, shall report and submit any appropriate proposals to the European Parliament and the Council by [insert date three years after the date of applicability of this regulation].

Comment: This compromise amendment is very unclear and apparently impossible to implement. It would not be possible to start this process until at least a year after entry intro force of the Regulation. Then, the Commission and BEREC would need to organise and launch a public consultation. Then the results of the public consultation would need to be analysed. Then, next steps would need to be discussed between the Commission and BEREC. Then, if legislation was needed, a comprehensive impact assessment would need to be prepared. On the basis of the impact assessment the Commission would need to prepare draft legislation. This timetable seems unrealistic. It would be somewhat better to produce credible legislation now, than relying on a non-credible timetable to fix the legislation in three years.

Article 30a

Supervision and enforcement

1. National regulatory authorities shall have the necessary resources to monitor and supervise compliance with this Regulation within their territories.

2. National regulatory authorities shall make up-to-date information on the application of this Regulation publicly available in a manner that enables interested parties to have easy access to it.

3. National regulatory authorities shall have the power to require undertakings subject to obligations under this Regulation to supply all information relevant to the implementation and enforcement of this Regulation. Those undertakings shall provide such information promptly on request and in accordance with time limits and the level of detail required by the national regulatory authority.

4. National regulatory authorities may intervene on their own initiative in order to ensure compliance with this Regulation.

5. National regulatory authorities shall put in place appropriate, clear, open and efficient procedures aimed at addressing ~~unresolved~~ complaints alleging breaches of Article 23. National regulatory authorities shall respond to complaints without undue delay.

Comment: Very positive addition to the Regulation. We strongly support this. We wonder, however how the fast efficient procedures foreseen in sub-paragraph 5 fit with the slow inefficient proposed procedures for taking action foreseen in article 24.2.