

## Regulation laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent

### 1. Are volume-based offers the end of the open internet?

No. There is no net neutrality issue as long as there is no interference, discrimination or restriction of specific types of traffic.

In the explanatory memorandum, the Commission believes that “[v]olume-based tariffs should be considered compatible with the principle of an open internet as long as they allow end-users to choose the tariff”. Unfortunately, this text could also mean that everything is fine as long as end-users can choose between a restricted offer or a very restricted offer. In addition, there are also loopholes in the current Regulation (see point 3 below) that need to be fixed in order to eliminate the risk of discriminatory or preferential measures.

### 2. Are specialised services the end of net neutrality in Europe?

It depends on the definition. It is rather positive, that the European Commission has the intention to distinguish between internet access and specialised services. But the devil is in the detail. Article 2 (15) defines specialised services as “an electronic communications service or any other service that provides the capability to access specific content, applications or services (...); and that is not marketed or widely used as a substitute for internet access service”.

Specialised services would not be problematic as long as they are completely distinct from Internet access and not marketed as such. However, the word “widely” can be interpreted in many different ways. Moreover, recital 50 of the draft Regulation states that these services should not “substantially impair the general quality of internet access services” thereby permitting a two-tier Internet.

### 3. So net neutrality is safeguarded by the proposal?

No. Network Neutrality means that every point on the network can connect to any other point on the network, that there is no discrimination on the basis of origin, destination or type of data. Article 23 of the proposal, however, states that access and service providers “shall be free to enter into agreements with each other” to transmit “specialised services” - as long as they do not “impair in a recurring or continuous manner the general quality of internet access services”.

In short, these “specialised services” mean that prioritisation of certain types of traffic will be explicitly allowed and, logically, that other traffic will be discriminated against. It means for example, that apps and services will have to pay the network operators in order to have their content delivered more quickly to customers. This type of agreement already exists in [Germany where Spotify and Telekom](#) have struck a deal to give preferential treatment to the digital music platform to the detriment of its competitors.

Kroes' proposals to allow specifically that internet access providers and content providers enter into commercial agreements did not only face vehement criticism from civil society and net neutrality proponents but from inside the Commission itself. As a result, there has been a slight improvement with regards to the previous leaks in which the text still approved of such deals if these do not, “in a recurring or continuous manner the general quality of internet access services”. The Commission does not define the words “recurring” and “continuous” thereby leaving the sentence open to interpretation. Experience unequivocally shows that the oversight proposed in recital 51 will not work.

#### **4. What about the prohibition for access providers to block or slow down traffic?**

The proposed Regulation requires that “internet access services shall not restrict the freedoms provided for in paragraph 1 by blocking, slowing down, degrading or discriminating against specific content, applications or services”.

Unfortunately, this becomes toothless by adding the condition that this prohibition only applies “within the limits of any contractually agreed data volumes” - in reality, contractual conditions often lack clarity. Moreover, there are a couple of exceptions to the prohibition, for instance to prevent (undefined) “serious crimes”. This permits allowing restrictions on freedom of communication that would be imposed arbitrarily by internet access providers, in quite obvious breach of Article 52 of the European Charter on Fundamental Rights.

#### **5. Is the Commission's proposal helpful for European business and innovation ?**

No. If adopted, quite the contrary might prove to be true. By allowing access providers and content providers to enter into agreements, the Regulation is likely to be counter-productive for Europe's innovators since only bigger companies can financially afford to enter into such agreements with the operators. Individual blogs, politicians' personal websites or smaller start-ups cannot.

A recent study ([pdf](#)) showed that there is a desire for an improved overall speed and for an increase in the variety of online activities. It would be detrimental for the online market to limit the availability of online content and possibility to innovate by explicitly permitting that providers shall be free with regards to the transmission of traffic as specialised services. Allowing preferential treatment of traffic leads to the fragmentation of the market. Special deals would add new barriers of entry and shut out competing services that would previously have had an unlimited range of potential customers beforehand.

#### **6. What is “reasonable” traffic management?**

Good news is that article 23 of the proposed Regulation aims at defining “reasonable traffic management measures” in order to explain measures that are prohibited. Unfortunately, the provision also introduces a broad range of (sometimes undefined) exceptions in points a) to d). According to the draft Regulation, traffic management measures could be acceptable to:

- a) implement a legislative provision or a court order, or prevent or impede serious crimes;
- 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 communications to end-users who have given their prior consent to such restrictive measures;
- d) minimise the effects of temporary or exceptional network congestion provided that equivalent types of traffic are treated equally.

#### **7. But who will pay for infrastructure?**

It seems the Commission has caved in to a large amount of pressure in order to meet its ambitious high-speed broadband targets. Internet access providers have been arguing that they will not be able to invest in infrastructure if they do not have the right to interfere in traffic and experiment with “new business models”.

However, once you allow access providers to become gatekeepers and to decide what we can access and send over the internet, investment in the development and launch of new content and services is very likely to go down – reducing demands for better Internet connections and ultimately damaging the access providers themselves. Today, the diverse offer in content is creating a demand for faster Internet connections, which indirectly means more revenue for access providers and which, ultimately, fuels investment in infrastructure. By contrast, direct cross-subsidisation can have serious negative impacts on both network and content markets.