



Analysis of the Latvian Proposal for the Telecoms Single Market regulation from 4th February 2015

[1] *[Explaining “terminal equipment”]*

End-users should be free to choose between various types of terminal equipment (defined in Directive 2008/63/EC on competition in the markets in telecommunications terminal equipment) to access the internet. Providers of internet access service should not impose restrictions on the use of terminal equipment connecting to the network, in addition to those imposed by terminal equipment's manufacturers or distributors in compliance with Union law.

[2] *[Explaining “substantially all end points”]*

Internet access service is any service that provides connectivity to the internet, irrespective of the network technology and terminal equipment used by end-user. However, for reasons outside the control of internet access service providers, some end points of the internet may not always be accessible, for instance due to measures taken by public authorities. Therefore, a provider is offering an internet access service within the meaning of this Regulation when that service provides connectivity to substantially all end points of the internet.

Comments: If the intention is only to make an exception for “all legally permitted” end-points, then it might be easier to say this in the text.

[3] *[Explaining Article [23] (2) and (2a)]*

In order to exercise their rights set out in Article [23](1), end-users should be free to agree with providers of internet access services on tariffs with specific data volumes and speeds or on other technical or commercial characteristics of the internet access service. Such agreements should not impose limitations to the rights set out in Article [23](1), except when limitations are implemented in accordance with Article [23](3).

Such agreements, as well as other practices by providers of internet access service, should not amount to commercial practices that restrict or distort competition in the internet ecosystem and thus circumvent provisions of this Regulation on safeguarding internet access, including the end-users right to access the open internet.

While monitoring internet access service providers' compliance with Article [23], competent national authorities should also ensure that there is no distortion or restriction of competition in the electronic communications sector. Competent national authorities should in particular consider in this respect commercial practices which consist in allowing end-users to access particular content, service or application without being charged or counted for that specific data usage ("zero rating" or "data sponsoring").

Comments: The reference to the "internet ecosystem" in connection with measures against distorting competition is unclear. It could be interpreted as competition between ISPs or competition between providers of content services that end-users of a given ISP want to access. If the intention is to regulate commercial practices of an ISP that treat similar content services differently, either through zero-rating (mentioned in the last sentence of this explanatory note) or by offering specialised services in accordance with 23(2b) that are functionally equivalent to other content services delivered over the internet access service, we welcome that objective. However, we would suggest a more precise formulation in that case.

[4] *[Explaining Article [23] (2b)]*

There is demand on the part of content, applications and services providers, as well as on the part of end-users, for the provision of electronic communication services based on specific quality of service levels. Agreements in this respect could also play an important role in the provision of services with a public interest as well as in the development of new services such as machine-to-machine communications. At the same time, such agreements should allow providers of electronic communications to the public to better balance traffic and prevent network congestion. Providers of content, applications and services and end-users should therefore remain free to conclude agreements with providers of electronic communications to the public, including providers of internet access service, on specific levels of quality of service as long as such agreements do not appreciably impair the quality of internet access services for other end-users. National regulatory authorities should ensure that providers of electronic communications comply with this provision, as set out in Article [24].

Comments: Both end-users and content, applications and service providers (CAP) have time and time again argued against a too wide specialised service definition, which risks allowing net neutrality to be circumvented. Allowing ISPs in case of congestion to balance traffic according to paid quality of service agreements with CAPs will reduce their incentive to avoid congestion and invest in infrastructure to ensure adequate quality for all CAPs. This will lead to new market entry barriers and establish gatekeepers which will hinder future growth and innovation in the online economy.

[5] *[Explaining Article [23] (3)]*

Reasonable traffic management contributes to an efficient use of network resources. At the same time, end-users should be able to use their preferred content, services and applications, and innovation by content service and application providers should be fostered. In order to be considered reasonable, traffic management measures applied by providers of internet access services should be transparent, proportionate, non-discriminatory and should not constitute anti-competitive behaviour. The requirement for traffic management measures to be non-discriminatory does not preclude providers of internet access services to implement traffic management measures which take into account objectively different quality of service requirements of certain traffic (for example, latency or high bandwidth).

Blocking, slowing down, altering, degrading or discriminating against specific content, applications or services or specific categories thereof should be prohibited, subject to justified and defined exceptions laid down in this Regulation. Not only individual content, services and applications should be protected but also categories of content, services and applications because the impact of blocking or other restrictive measures on end-user choice and innovation would be even greater. Rules against altering content, services or applications refer to a modification of the content of the communication, but do not ban non-discriminatory data compression techniques which reduce the size of a data file without any modification of the content. Such compression enables a more efficient use of scarce resources and serves the end-users' interest in reducing data volumes, increasing speed and enhancing the experience of using the content, services or applications in question.

[6] *[Explaining Article [23] (3) a) and b)]*

Reasonable traffic management should also allow actions to protect the integrity of the network, for instance in preventing cyber-attacks through the spread of malicious software or end-users' identity theft through spyware.

In the operation of their networks, providers of internet access services should be allowed to implement reasonable traffic management measures to avoid congestion of the network. Exceptionally, more restrictive traffic management measures affecting certain categories of content, applications or services may be necessary for the purpose of preventing network congestion, i.e. situations where there is a high risk of imminent congestion. Moreover, minimising the effects of actual network congestion should be considered reasonable provided that

network congestion occurs only temporarily or in exceptional circumstances. This includes situations, especially in mobile access networks, where despite operators' efforts to ensure the most efficient use of the resources available and thus prevent congestion, demand occasionally exceeds the available capacity of the network, for example in large sport events, public demonstrations and other situations where a very large number of users is trying to make use of the network at the same time.

<p><i>Comments:</i> The reference to “temporarily or in exceptional circumstances” implies that ongoing in episodes of temporary, non-exceptional congestion would be acceptable.</p>

[7] *[Explaining Article [23] (5)]*

This Regulation does not seek to regulate the lawfulness of the information, content, application or services, nor the procedures, requirements and safeguards related thereto. These matters remain thus subject to Union legislation or national legislation in compliance with Union law, including measures giving effect to such Union or national legislation (for example, court orders, administrative decisions or other measures implementing or applying such legislation). If those measures entail specific obligations on internet access service providers, they should abide by those obligations by virtue of and in accordance with that Union or national law.

[8] *[Explaining Article [24]]*

National regulatory authorities play an essential role in ensuring that end-users are effectively able to exercise the right to avail of open internet access. To this end, national regulatory authorities should have monitoring and reporting obligations, and should ensure compliance of providers of electronic communications to the public with the obligation to ensure sufficient network capacity for the provision of non-discriminatory internet access services of high quality which should not be impaired by provision of services with a specific level of quality. In their assessment of a possible appreciable negative impact on internet access services for other end-users, 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 services with a specific level of quality, and quality as perceived by end-users. National regulatory authorities should enforce compliance with Article [23], and should have powers to impose minimum quality of service requirements on all or individual providers of electronic communications to the public if this is necessary to prevent degradation of the quality of service of internet access services for other end-users. In doing so, national regulatory authorities should take utmost account of relevant guidance from BEREC.

Article 2 - Definitions

[] “Internet access service” means a publicly available electronic communications service that provides access to the internet, and thereby connectivity ~~between to~~ ~~substantially~~ all **possible** end points of the internet, irrespective of the network technology and terminal equipment used;

Comments: We understand the objective pursued by the Presidency in this article. However, for legal clarity we recommend replacing “to substantially all end points” with “between all possible end points”. If there are legal restrictions on providing access to a specific end-point, it is not legally possible to provide connectivity to that point. There is absolutely no risk that any ISP would be prosecuted for breaching net neutrality in such cases

Article [23] - Safeguarding of ~~open~~ internet access ~~and traffic management~~

Comments: This change bring legal clarity.

1. End-users shall have the right to access and distribute information and content, use and provide applications and services and use terminal equipment 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 in accordance with this Article.

Comments: The phrase “in accordance with this Article” is slightly redundant as provisions for users' rights provided in this paragraph should of course abide by all the provisions laid down under this Regulation.

2. Providers of internet access services and end-users may agree on ~~commercial and technical conditions and characteristics of internet access services.~~, **such as price, volume and speed of internet access services. Such agreements shall not limit the right of end-users as set out in paragraph 1, except in accordance with paragraph 3.**

Comments: We welcome the addition made by the Presidency regarding the authorisation for internet access services and end-users to enter into agreements on “price, volume and speed”. For legal clarity, we suggest deleting the vague reference to “characteristics” and amend the text as proposed.

- 2a. **Providers of internet access services shall not conduct commercial practices that restrict or distort competition ~~related to the provision of internet access services.~~**

Comments: We welcome the Latvian Presidency objective to introduce rules safeguarding competition in the market. However, the final part of the sentence is

redundant as this whole article is about “internet access services”, therefore it should be deleted.

- 2b.** Providers of electronic communications to the public, including providers of internet access services, shall be free to enter into agreements with end-users and/or providers of content, applications and services to deliver a service other than internet access services, which requires a specific level of quality, provided that sufficient network capacity is available so that the availability and ~~general~~ quality of internet access services **for other end-users** are not impaired ~~in a material manner~~.

Comments: As this whole article refers to “internet access services” the sentence “service other than internet access service” can only logically mean “an access service other than the internet access service”. That renders the rest of the paragraph incomprehensible. On the basis of the explanatory statement of the Presidency, we assume that it means “access to a service that requires a specific level of quality”. This being the case, the text is extremely unclear. As the text currently stands, it could either refer to services that cannot be provided over a state of the art internet connection OR that cannot be provided over the quality of internet connection being offered OR that offers (and therefore requires) a specific connection speed.

In any case, these services are not covered under Article 23. Therefore, the proposed Article 23 2a would not apply to them which would not explicitly prohibit these services to enter into anti-competitive behaviour at the detriment of both end-users and the European digital single market.

3. Subject to this paragraph, providers of internet access services shall ~~equally~~ treat all ***all*** traffic ***equally in the operation of their networks***. ~~equally in the operation of their networks. when providing internet access services.~~

Comments: The suggested changes by the Presidency risks causing confusion and undermining legal clarity. We recommend the Presidency to go back to the previous text.

Providers of internet access services may implement ~~traffic~~ ***network*** management measures. Such measures shall be transparent, ***targeted***, non-discriminatory, proportionate and shall not constitute anti-competitive behaviour. ~~In the implementation of~~ ***When implementing*** these measures, providers of internet access services shall not block, slow down, alter, degrade or discriminate ~~against~~ ***between*** specific content, applications or services or specific ~~classes~~ ***categories*** of traffic, except as necessary, and only for as long as necessary, to:

Comments: We suggest changing “against” for “between” and adding “***targeted***” in the list of criteria for reasonable traffic management measures to ensure that no

discrimination would be possible on the network during the implementation of these measures.

- ~~a) implement a legislative provision or an order by a court or other public authority vested with relevant enforcement powers under national and/or Union law;~~

Comments: We welcome the deletion of this paragraph bringing needed clarity.

- ~~ba) preserve the integrity and security of the network, services provided via this network, and the end-users' terminal equipment;~~
- ~~eb) prevent imminent network congestion and *or* mitigate the effects of exceptional network congestion, provided that equivalent types of traffic are treated equally;~~

Comments: We welcome the objectives of the proposed paragraph and recommend modifying as suggested for further clarity.

- ~~de) comply with an explicit request from the end-user, including but not limited to, in order to prevent transmission of unsolicited communication and *or* to implement parental control measures.~~

Comments: Many parents, for a wide variety of valid reasons, wish to block access of their children to certain kinds of content, based on their own specific priorities. The control needs to be in the hands of the parents due to the changing needs and developmental stages of the child. This is not part of an “internet access service” as it can be installed separately using third party software, entirely independently of the internet access service. **As a result, such activities fall outside the scope of the Regulation.**

Services installed in the network, which are not chosen by individuals and are not easily configurable by the end-user of an internet access service cannot be classified as “parental controls” as they do not offer control to parents. Instead they offer a “one-size-fits-all” solution, which cannot realistically be described as “control”. In such circumstances, the internet access provider has the control, not giving parents any actual choice. **As a result, such activities fall outside of any normal understanding of the term “parental controls” and therefore fall outside the scope of the current Presidency text.**

We therefore recommend deleting this paragraph.

4. Traffic management measures may only entail processing of personal data that is necessary and proportionate to achieve the objectives of paragraph 3 (a – ~~dc~~). Such processing shall be carried out in accordance with Directive 95/46. Traffic management measures shall **also** comply with Directive 2002/58, ~~in particular with respect to confidentiality of communications.~~

Comments: We welcome the changes brought to this paragraph.

5. ~~This Article is without prejudice to Union law or national legislation law, in compliance with Union law, related to the lawfulness of the information, content, application or services and of the terminal equipment connected.~~

Comments: We welcome the clarifications brought by the Presidency regarding the scope and application of this Regulation. However, the value and objectives of this paragraph remain unclear as nothing in this Regulation would make any EU or national legislation illegal. We therefore suggest removing this paragraph.

Article [24] - Safeguards for quality of service and the availability of internet access services

1. National regulatory authorities shall closely monitor and ensure compliance with Article [23], and shall promote the continued availability of internet access services at levels of quality that reflects advances in technology. For those purposes national regulatory authorities may impose technical characteristics and minimum quality of service requirements. National regulatory authorities shall publish reports on an annual basis regarding their monitoring and findings, and provide those reports to the Commission and BEREC.
2. Providers of **public electronic communication services, including providers of** internet access services, shall make available, at the request of the national regulatory authority, information about how their network traffic and capacity are managed, as well as justifications for any traffic management measures applied. Article 5 of the Framework Directive shall apply, *mutatis mutandis*, in respect of the provision of information under this Article.
3. No later than ~~six~~ **nine** months after this {Regulation} enters into force, in order to contribute to the consistent application of this {Regulation}, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, lay down guidelines for the implementation of the obligations of national competent authorities under this Article, including with respect to the application of traffic management measures set out in Article [23] (3) and for monitoring of compliance.

Comments: We welcome the removal of brackets on the word "Regulation".

Regarding the proposal on Article 24 point 1 on the possibility for national regulatory authorities to impose technical characteristics and minimum quality of service requirements, the establishment of such requirements should be made in consultation with BEREC and the Commission.