Comments to the consolidated text on net neutrality in the Telecoms Single Market Regulation proposed by the Latvian Presidency on February 18th

We would like to express our surprise and deep disappointment at the deterioration in legal certainty in this version. It is entirely inappropriate to undermine basic principles of law on the basis of incoherent and legally dubious demands from a single member state.

The Presidency has already identified serious legal questions surrounding ad hoc, arbitrary restrictions on fundamental rights. As these legal doubts have not been resolved, it is of deep concern that the Council is prepared to actively undermine and ignore the Charter.

Please find below our comments to the proposed text and suggested modifications highlighted in yellow for ease of reading.

ANNEX

[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 **deemed to comply with its obligation related to the** 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: This text confirms our argument that there is no need to provide an exception to cover legal obligations of ISPs in Article 23.3.a.
However, measures taken by public authorities do not make internet end-points unavailable, legal obligations make them unavailable.

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

In order to exercise their right 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 **conducted** by providers of internet access service, should not amount to commercial practices that ~~restrict or distort competition in~~ **limit** the ~~internet ecosystem~~ **exercise of the right set out in Article [23](1)** and thus circumvent provisions of this Regulation on safeguarding internet access. **Commercial practices might amount to such a limitation when, given their scale, they would influence end-users' behaviour to use certain content, applications or services in preference to others in a way which might lead to situations where end-users' choice is significantly reduced in practice. Since the right to open**

internet is based on end-user's choice to access preferred content and information, such practices would therefore result in undermining the essence of this right.

Comments: This is a very messy formulation. If these practices influence end-user behaviour, this means a barrier of access *to* these individuals. This means that it is not just the end-user's choice that is being undermined (and at least they have a relationship with their ISP), but also the freedom of expression of everyone (and freedom to conduct business for companies) seeking to communicate with those individuals.

~~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").~~

[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~~ **which require** specific levels of quality of service ~~as long as such agreements do~~**. Such services should** not ~~appreciably~~ **be offered as a replacement for internet access services, and their provision should not** impair **in a material manner** the **availability and** quality of internet access services for other end-users. National regulatory authorities should ensure that providers of electronic communications **to the public** comply with this ~~provision~~ **requirement**, as set out in Article [24].

> *Comments:* This text is not clear, when it refers to "such services", if it is talking about the access service or the service being accessed.
> "In a material manner" removes sense from the text. There is no "material" risk of an NRA or court imposing sanctions (or an individual complaining), it the impairment is not "material".

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

End-users should have rights to access their preferred content and information, to use and provide preferred services and applications, as well as terminal equipment. This Regulation should lay down specific limitations to those rights in order to protect the rights and freedoms of others. 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~~ **and thus also protects the freedom of internet access service providers to conduct a business. 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~~ ***between*** 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.

Comments: Anti-competitive behaviour can also involve giving content a "fast lane". As a result, the text should refer to discrimination "*between*" services rather than "against".

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

Providers of internet access service may be subject to legal obligations requiring, for example, blocking of specific content, applications or services or specific categories thereof. Those legal obligations should be laid down in Union or national legislation (for example, Union or national legislation related to the lawfulness of information, content, applications or services), in compliance with Union law, ~~**or they should be established in measures implementing or applying such legislation, such as national measures of general application, courts orders, decisions of public authorities vested with relevant powers (for example, obligations to comply**~~

~~with court orders or orders by public authorities requiring to block unlawful content).~~ The requirement to comply with Union law relates, among others, to the compliance with the requirements of the Charter of Fundamental rights of the European Union in relation to limitations of fundamental rights and freedoms.

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.

Comments: The text from "or they should be established" to "block unlawful content" is entirely unnecessary and creates confusion. The Presidency text on paragraph 2 (above) explains why references to legal obligations are not necessary. "National measure of general application" appears to be deliberately confusing and misleading and suggests that the "general" nature of a particular activity is a criterion for establishing its legality.

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.

Comments: The text should clarify that measures to tackle "imminent" congestion need to be exceptional. Otherwise, permanent claims of "imminent congestion" could be exploited for commercial purposes.

[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~~ **prohibit end-users to** ~~access service providers; they~~ ~~**unlawful content (such as, for example, child pornography), end-users** should abide by those obligations by virtue of and in accordance with that Union or national law~~.

Comments: This proposal is quite obviously contrary to the Charter of Fundamental Rights. It sees another unspecified level of implementing measure that goes below court orders or even, the legally questionable practice of using administrative decisions of, for example, national regulatory authorities, to make quasi-judicial decisions on blocking. The final sentence of the paragraph is quite obvious nonsense. "**Any** limitation on the exercise of the rights and freedoms recognised by this Charter **must be** provided for by law and respect the essence of those rights and freedoms". Article 52.1

[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: The proposed modification to this article brings greater legal clarity.

[] “Providers of electronic communications to the public” means an undertaking providing public electronic communications networks or publicly available electronic communication services;

Comments: This definition, introduced by the European Commission, is in line with the Framework Directive 2002/21/EC.

Article [23] - Safeguarding of ***~~open~~*** *internet access*

Comments: The title of this article makes a reference to “open internet access” which is not defined in the text. Therefore, the title should be changed for “Safeguarding of internet access”.

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: To avoid redundancy, we suggest deleting “in accordance with this Article”.

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. Such agreements~~, **and any commercial practices conducted by providers of internet access services**,~~ shall not limit the **~~exercise of~~** **the** right of end-users set out in paragraph 1~~, except in accordance with paragraph 3~~.

Comments: The proposed addition is vague and creates confusion. As indicated by their name, “providers of internet access services” offer “internet access services” as defined in article 2. It is unclear what “commercial practices” are referring to in this Article, therefore we recommend deleting this addition.

~~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 regret the Council decision to delete this paragraph. This text would have needed to be further strengthened by deleting "or distort" and "related to the provision of internet access service", however it would have been a valuable addition to the Regulation to outlaw all types of discrimination on the network.

~~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 quality of internet access services for other end-users are not impaired~~ ~~**in a material manner**~~.

Comments: Article 23 refers to "safeguarding the open internet access". The language proposed in this paragraph suggests that "providers of electronic communications to the public" could offer services "other than internet access services" that could impair the "availability and quality of internet access services in a material" of the end-users entering into this agreement, thus contradicting the objective of this article. It is difficult to understand the objective of the Council (and Commission) that adds text that undermines the object and purpose of the article.

3. Subject to this paragraph, providers of internet access services shall equally treat ***all*** ~~**equivalent types of**~~ traffic when providing internet access services**.**

Comments: The changes to the text add confusion. For instance, if two competing services offer the same function but use two different protocols – are they equivalent types (as they are serving the same function) or not equivalent (as they are different protocols)?

Providers of internet access services may implement ~~traffic~~ ***network*** management measures. Such measures shall be transparent, ***narrowly targeted,*** non-discriminatory, proportionate and shall not constitute anti-competitive behaviour. 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 categories of traffic, except as necessary, and only for as long as necessary, to:

Comments: We suggest changing, "traffic" for "network", "against" for "between" and adding "targeted" in the list of criteria for reasonable traffic management measures in order to provide greater specificity and legal clarity in this paragraph.

a) **comply with legal obligations to which the internet access service provider is subject;**

Comments: This new paragraph is acceptable, on its own. However, the explanatory recitals do not respect this text..

~~a~~b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminal equipment;

~~b~~c) prevent imminent network congestion and mitigate the effects of exceptional network congestion, provided that equivalent types of traffic are treated equally;

~~c~~d) ~~comply with an explicit request from the end-user, in order to prevent transmission of unsolicited communication or to implement parental control measures.~~

Comments: We recommend deleting this paragraph as its content falls outside the scope of this Regulation.

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.

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, and not the parents, thereby undermining the intentions of this article.

The legal obligations referred to in point (a) shall be laid down in Union legislation or national legislation, in compliance with Union law~~, or in measures giving effect to such Union or national legislation, including orders by courts~~ ~~**or public authorities vested with relevant powers**~~**.**

Comments: To ensure compliance with the Charter of Fundamental Rights, the second part of this paragraph should be deleted.

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

~~5. This Article~~ ~~**Paragraph 1**~~ ~~is without prejudice to Union law or national law, in compliance with Union law, related to the lawfulness of the information, content, application or services.~~

Comments: This paragraph is superfluous. Nothing in this Regulation contradicts Union law or national law in compliance with Union law. We recommend deleting 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 **to the public**, 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 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.