



**Comments to the consolidated text on net neutrality in the Regulation concerning the open internet proposed by the Latvian Presidency on February 25<sup>th</sup>**

We would like to reiterate our deep disappointment at the deterioration in legal certainty in the proposed consolidated version of the text. Not only does the text undermine basic principles of law and the EU Charter of Fundamental rights but it also enables network discrimination that blatantly contradicts the objective of this Regulation laid down in several recitals.

It is of deep concern that the Council is prepared to actively undermine and ignore the Charter and establish a market for electronic communication that would limit competition and end-users' rights to receive and impart information. We urge the Presidency and the member state delegations to address these critical issues in the text.

To do so, find below our comments and proposed amendments to the text. For ease of reading, both have included in a text box below each relevant paragraph where ***additions*** are in bold and italic and ~~deletions~~ appear with a strike-through.

*For more information, please contact:*

*Raegan MacDonald ([raegan@accessnow.org](mailto:raegan@accessnow.org))*

*Joe McNamee ([joe.mcnamee@edri.org](mailto:joe.mcnamee@edri.org))*

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

laying down measures concerning open internet and amending Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) This Regulation aims at harmonising rules on safeguarding access to open internet by ensuring end-users' right to access and distribute information and lawful content, run applications and use services of their choice, as well as by establishing common rules on traffic management which not only protect end-users but simultaneously guarantee the continued functioning of the Internet ecosystem as an engine of innovation. Reforms in the field of roaming should give end-users the confidence to stay connected when they travel in the Union, and should become over time a driver of convergent pricing and other conditions in the Union.

---

1 OJ C , , p. .

2 OJ C , , p. .

- (2) The measures provided in this Regulation respect the principle of technological neutrality, that is to say they neither impose nor discriminate in favour of the use of a particular type of technology.
- (3) 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 existing regulatory framework aims at promoting the ability of end-users to access and distribute information or run applications and services of their choice. 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~~ **common** rules at the Union level to maintain the open internet and to avoid fragmentation of the single market resulting from individual Member States' measures.

**Comments:** The recital clearly identifies existing issues regarding traffic management practices. Nevertheless, the proposed text of the Regulation, in particular the vague and broad measures on blocking, would still allow traffic management practices that could limit end-users' right to access lawful content, services or applications.

- (4) 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.
- (5) 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:** Access to an end point cannot be restricted by "measures taken by public authorities" but by "legal obligations".

**Proposed amendment:** 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 *legal obligations* ~~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.

- (6) In order to exercise their right set out in Article 3(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, as well as ~~other commercial~~ **commercial** practices conducted by providers of internet access service, should not ~~amount to commercial practices that~~ limit the exercise of the right set out in Article 3(1) and thus circumvent provisions of this Regulation on safeguarding internet access. Commercial practices ~~might amount to such a limitation when should not~~, 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:** The removal of “other” means that the first sentence does not refer to commercial practices, which makes the sentence difficult to understand. Importantly, this recital clearly creates a right for internet access providers to provide commercial offers that undermine open internet access, such as zero rated services. These practices would restrict end-users' right to access the open internet, thus contradicting the objective of the Regulation and potentially limiting end-users' freedom to receive and, in particular, impart information.

**Proposed amendment:** In order to exercise their right set out in Article 3(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, ~~as well as other commercial practices conducted by providers of internet access service,~~ should not limit the exercise of the right set out in Article 3(1) and thus circumvent provisions of this Regulation on safeguarding internet access. ~~Commercial practices might amount to such a limitation when should not, 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.~~

- (7) 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, which require specific levels of quality of service. Such services should not 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 requirement, as set out in Article 4. **In this respect, national regulatory authorities should assess whether the negative impact on the availability and quality of internet access services is material by analysing, inter alia, 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.**

**Comments:** The purpose of this recital appears to define unspecified services that are not covered by the Regulation.

To avoid discrimination, it must be clear that the “electronic communications services” requiring “specific quality of services” referred to in the text are not or do offer functionally identical services than online services. In addition, “in a material manner” should be removed, as this does not add clarity to the text.

**Proposed amendment:** 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 **that are functionally different from online services, and require** ~~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, which require specific levels of quality of service.

Such services should not 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 requirement, as set out in Article 4. In this respect, national regulatory authorities should assess ~~whether~~ the negative impact on the availability and quality of internet access services ~~is material~~ by analysing, inter alia, 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.

- (8) 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 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 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” (i.e. discriminating *for* a particular service). As a result, the text should refer to discrimination “*between*” services rather than “*against*”.

**Proposed amendment:** 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. Reasonable traffic management contributes to an efficient use of network resources 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 *between* ~~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.

- (9) 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, **or legislation related to public safety**), 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, **or other measures ensuring compliance with such legislation** (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. 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 **is pending**. 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:** A significant portion of this recital is unnecessary and creates confusion. Nothing in this Regulation would prevent ISPs from complying with Union law, or national law in compliance with Union law, or measures implementing these laws or court orders. There is no need to mention it once, let alone reiterate it three times in the text, in different and contradictory ways. We particularly regret the wording on “national measures of general application” and “other measures”, whose meaning appears to be deliberately obscure.

Furthermore, the new changes on congestion adds confusion and therefore we recommend changing back to the previous text from (provide date).

**Proposed amendments:** 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, or legislation related to public safety), 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, or other measures ensuring compliance with such legislation (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 which require restrictions to be provided for by law. 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 *imminent* congestion ~~is pending~~. 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 large number of users is trying to make use of the network at the same time.

- (10) 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 or **ensuring compliance with** such legislation). If those measures prohibit end-users to access 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:** The second part of this recital is unnecessary and contradictory. Nothing in this text would prevent ISPs from not complying with court orders or measures implementing Union law or national law in compliance with Union law. Furthermore, in the eventuality of ISPs prohibiting access to unlawful content, there is no way for the end-users not to comply with this decision as the access to the unlawful content wouldn't be available. It is also incoherent to refer to formal, law-based orders or “other measures” and then use those formal, law-based orders as an example of those “other measures”.

**Proposed amendment:** 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, applying or ensuring compliance with such legislation). If those measures prohibit end-users to access 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.~~

- (11) 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 3, 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.
- (12) The mobile communications market remains fragmented in the Union, with no mobile network covering all Member States. As a consequence, in order to provide mobile communications services to their domestic customers travelling within the Union, roaming providers have to purchase wholesale roaming services from operators in a visited Member State.
- (13) Regulation No 531/2012 establishes the policy objective that the difference between roaming and domestic tariffs should approach zero. However, the ultimate aim of eliminating the difference between domestic charges and roaming charges cannot be attained in a sustainable manner with the observed level of wholesale charges. Therefore, a transitional period is needed, allowing roaming providers to adapt to wholesale market conditions while providing their customers with a possibility to satisfy their communications needs. During the period concerned, roaming providers should offer roaming services at levels not exceeding those applicable for domestic services, with a possibility to add a surcharge. The relevant domestic retail price should be equal to the retail per-unit domestic charge. However, in situations where there are no specific domestic retail prices that could be used as a basis for a regulated roaming service (for example, in case of domestic unlimited tariff plans, bundles or domestic tariffs which do not include data), operators should offer a reference domestic price for regulated roaming services.
- (14) Moreover, with a view to ensuring basic mobile phone usage for consumers when periodically travelling, the Regulation should determine the minimum level of a basic roaming allowance. This transitory basic roaming allowance should be simple and transparent, and set at a level which ensures that consumers' basic communication needs are facilitated while travelling within the EU, until the necessary review of underlying wholesale roaming market conditions has been undertaken. The basic roaming allowance should mirror the variety of services included in the tariff plan of the customer, and should take account of the average travelling and domestic consumption patterns of all Europeans, it being understood that such an average pattern will not reflect the practices of all individual consumers.

- (15) With a view to improving competition in the retail roaming market, Regulation (EU) No 531/2012 requires domestic providers to enable their customers to access regulated voice, SMS and roaming services, provided as a bundle by any alternative roaming provider. Given that the retail roaming regime set out in Articles 6a and 6b of this Regulation is expected to substantially decrease the retail roaming charges set out in Articles 8, 10 and 13 of Regulation (EU) No 531/2012, it would no longer be proportionate to oblige operators to implement this type of separate sale of regulated roaming services. Providers which have already enabled their customers to access regulated voice, SMS and roaming services, provided as a bundle by any alternative roaming provider, may continue to do so. On the other hand, while the basic roaming allowance and the mechanism which limits the surcharge over the domestic retail price provide data roaming customers with certain safeguards against excessive roaming charges, it may not allow roaming customers to confidently replicate the domestic consumption patterns for data roaming services. Given the increasing demand and importance of data roaming services, roaming customers should be provided with alternative ways of accessing data roaming services when travelling. Therefore, the obligation on domestic and roaming providers not to prevent customers from accessing regulated data roaming services provided directly on a visited network by an alternative roaming provider as provided for in Regulation (EU) No 531/2012 should be maintained.
- (16) In accordance with the calling party pays principle mobile customers do not pay for receiving domestic mobile calls, instead the cost of terminating a call in the network of the called party is covered in the retail charge of the calling party. The convergence of mobile termination rates across the Member States should allow for the implementation of the same principle for regulated roaming calls. However, since this is not yet the case, this Regulation allows roaming providers, after the respective basic roaming allowance is exceeded, to charge a retail roaming fee for incoming calls, provided it does not exceed the average maximum wholesale mobile termination rate set across the Union. This is considered to be a transitory regime until the Commission addresses this outstanding issue. In addition, in order to prevent anomalous or abusive usage of regulated roaming calls received, roaming providers may apply appropriate usage policies. These usage policies may include limitations on the volumes of roaming calls received in case those volumes significantly exceed the average volumes of domestic calls received.
- (17) Regulation (EU) No 531/2012 should therefore be amended accordingly.

- (18) This Regulation should constitute a specific measure within the meaning of Article 1(5) of Directive 2002/21/EC<sup>3</sup>. Therefore, where providers of Union-wide roaming services make changes to their retail roaming tariffs and to accompanying roaming usage policies in order to comply with the requirements of this Regulation, such changes should not trigger for mobile customers any right under national laws transposing the current regulatory framework for electronic communications to withdraw from their contracts.
- (19) This Regulation complies with the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the protection of personal data, the freedom of expression and information, the freedom to conduct a business, non-discrimination and consumer protection.
- (20) Since the objective of this Regulation, namely to establish common rules necessary for safeguarding open internet and decreasing retail roaming charges, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

HAVE ADOPTED THIS REGULATION:

---

3 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33).

### *Article 1 – Objective and scope*

1. This Regulation establishes common rules on **open internet access** safeguarding ~~access to open internet~~ **related end-user’s rights and ensuring non-discriminatory treatment of traffic in provision of internet access services.**

2. This Regulation sets up a new retail pricing mechanism which decreases retail charges for Union-wide regulated roaming services.

### *Article 2 – Definitions*

For the purposes of this Regulation, the definitions set out in Directive 2002/21/EC shall apply.

The following definitions shall also apply:

(1) “internet access service” means a publicly available electronic communications service that provides access to the internet, and thereby connectivity to substantially all end points of the internet, irrespective of the network technology and terminal equipment used;

**Comments:** The sentence “substantially all end points” lacks legal clarity. There is no need to say “substantially” to cover situations where there is a legal obligation not to provide access, because an ISP clearly cannot be held liable for a complying with a legal obligation.

**Proposed amendments:** “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;

(2) “provider of electronic communications to the public” means an undertaking providing public electronic communications networks or publicly available electronic communications services.

### *Article 3 – Safeguarding of open 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” as this adds no meaning.

**Proposed amendment:** 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.~~

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.

**Comments:** In accordance to the relevant recital and due to the risk the undefined “commercial practices conducted by providers of the internet access services” creates to the open internet, this part of the paragraph should be deleted.

**Proposed amendment:** 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.

3. 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:** In accordance with the relevant recital, it should be clarified that those services “other than internet access services, which requires a specific level of quality” must be functionally different from online services. In addition, we recommend deleting “in a material manner” as it creates confusion. Allowing “fast lanes” to functionally identical services to online services is antithetical to the notion of an open internet.

**Proposed amendment:** 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 **and are functionally different from online services**, 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~~.

4. Subject to this paragraph, providers of internet access services shall equally treat equivalent types of traffic when providing internet access services.

**Comments:** This paragraph lacks legal clarity and could complicate the work of the ISPs. Do the ISPs have to treat traffic equally when they offer equivalent functions or use equivalent protocols, or both?

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

Providers of internet access services may implement traffic management measures. Such measures shall be transparent, 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 specific content, applications or services ~~or specific categories of traffic~~, except as necessary, and only for as long as necessary, to:

**Comments:** We welcome the proposed deletion and suggest small edits to further strengthen the text.

**Proposed amendment:** Providers of internet access services may implement traffic 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 *between* ~~against~~ specific content, applications or services, except as necessary, and only for as long as necessary, to:

- a) comply with legal obligations to which the internet access service provider is subject;
- b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminal equipment;
- c) prevent ~~imminent~~ **pending** network congestion and mitigate the effects of exceptional **or temporary** network congestion, provided that equivalent types of traffic are treated equally;

**Comments:** The change of “imminent” for “pending” creates confusion. We suggest keeping “imminent”.

**Proposed amendment:** prevent *imminent* ~~pending~~ network congestion and mitigate the effects of exceptional **or temporary** network congestion, provided that equivalent types of traffic are treated equally;

- d) comply with an explicit request from the end-user, in order to prevent transmission of unsolicited communication **within the meaning of Article 13 of Directive 2002/58/EC**<sup>4</sup> or to implement parental control measures.

**Comments:** The services in question are optional add-on services. Consequently, when not imposed on the end-user by default they are fully compliant with the definitions above.

---

4 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201 , 31.07.2002, p. 37).

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.

***Proposed amendment:*** ~~comply with an explicit request from the end-user, in order to prevent transmission of unsolicited communication within the meaning of Article 13 of Directive 2002/58/EC<sup>5</sup> or to implement parental control measures.~~

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:*** The proposed text gives an entirely new meaning to the text of point a. “Measures giving effect” appears to refer to ad hoc, arbitrary blocking/filtering by intermediaries. Inclusion of such a provision in the Regulation would be in obvious contradiction to Article 52 of the Charter of Fundamental Rights of the EU.

***Proposed amendment:*** 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.~~

---

5 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201 , 31.07.2002, p. 37).

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

**Comments:** Voluntary measures, as appear to be permitted by point 4 and point 6, would be implemented to achieve public policy goals that are outside the control of intermediaries. They are therefore not in a position to measure necessity or proportionality in any meaningful way, which means that any such measure would create restrictions on individuals' Charter-based rights that would be both unpredictable and difficult to prevent.

6. 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 and could be deleted.

#### *Article 4 – Safeguards for quality of service and the availability of internet access services*

1. National regulatory authorities shall closely monitor and ensure compliance with Article 3, 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 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 3(4) and for monitoring of compliance.

#### *Article 5 – Penalties*

Member States shall lay down the rules on penalties applicable to infringements of the provisions in Articles 3 and 4 and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 30 June 2016 at the latest and shall notify it without delay of any subsequent amendment affecting them.

#### *Article 6 – Amendments to Regulation (EU) No 531/2012*

Regulation (EU) No 531/2012 is amended as follows:

- (1) In Article 1, paragraph 7 is deleted.
- (2) In Article 2, paragraph 2 is amended as follows:
  - a) points (i), (l) and (n) are deleted;
  - b) the following points are added:

- (r) “*domestic retail price*” means roaming provider’s retail per unit domestic charge applicable to calls made and SMS sent (both originated and terminated on different public communications networks within the same Member State), and to data consumed by a customer. In case there is no specific domestic retail price per unit, roaming providers shall offer a reference domestic price for regulated roaming services;
- (s) “*basic roaming allowance*” means a certain number of minutes of regulated roaming voice calls made and received, a certain number of regulated roaming SMS sent and a certain amount of megabytes of regulated data roaming services, which the roaming provider must offer to its roaming customers for a certain number of not necessarily consecutive days per calendar year at a price which shall not exceed the respective domestic retail price;
- (t) “*separate sale of regulated retail data roaming services*” means the provision of regulated data roaming services provided to roaming customers directly on a visited network by an alternative roaming provider.

(3) Article 4 is amended as follows:

- (a) the title of Article 4 is replaced by the following:

Separate sale of regulated retail *data* roaming services.

- (b) paragraph 1, the first subparagraph is deleted;

- (c) paragraphs 4 and 5 are deleted.

(4) Article 5 is amended as follows:

- (a) the title of Article 5 is replaced by the following:

Implementation of separate sale of regulated retail *data* roaming services.

- (b) paragraph 1 is replaced by the following:

Domestic providers shall implement the *obligation related to* separate sale of regulated retail *data* roaming services provided for in Article 4 so that roaming customers can use separate regulated *data* roaming services. Domestic providers shall meet all reasonable requests for access to facilities and related support services relevant for the separate sale of regulated retail *data* roaming services. Access to those facilities and support services that are necessary for the separate sale of regulated *data* roaming services, including user authentication services, shall be free of charge and shall not entail any direct charges to roaming customers.

(c) paragraph 2 is replaced by the following:

In order to ensure consistent and simultaneous implementation across the Union of the separate sale of regulated retail *data* roaming services, the Commission shall, by means of implementing acts and after having consulted BEREC, adopt detailed rules on a technical solution for the implementation of the separate sale of regulated retail *data* roaming services. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 6(2).

(d) in paragraph 3, the introduction is amended as follows:

The technical solution to implement the separate sale of regulated retail *data* roaming services shall meet the following criteria:

(5) Articles 8, 10 and 13 are deleted and replaced as follows:

#### *Article 6a*

##### *Retail roaming charges*

*1. Roaming providers shall include in all tariff plans containing regulated roaming services a basic roaming allowance referred to in Article 6b(1). For consumption within the basic allowance, roaming providers may not levy any surcharge in comparison to the domestic retail price for mobile communications services on roaming customers in any Member State for any regulated roaming call made or received, for any regulated roaming SMS/MMS message sent and for any regulated data roaming services used, nor any general charge to enable the terminal equipment or service to be used abroad.*

*2. Without prejudice to the third subparagraph, if roaming providers apply a surcharge for the consumption of regulated roaming services in excess of the basic roaming allowance, it shall meet the following requirements:*

*(a) the surcharge applied for regulated roaming calls made, regulated roaming SMS messages sent and regulated data roaming services shall not exceed the maximum wholesale charges provided for in Articles 7(2), 9(1) and 12(1), respectively.*

*(b) the surcharge applied for regulated roaming calls received shall not exceed the weighted average of maximum mobile termination rates across the Union set out in accordance with paragraph 3.*

*Roaming providers may implement usage policies necessary to prevent anomalous or abusive usage of calls received.*

*Roaming providers shall not apply any surcharge to a regulated roaming SMS message received or to a roaming voicemail message received. This shall be without prejudice to other applicable charges such as those for listening to such messages.*



*Roaming providers shall charge roaming calls made and received on a per second basis. Roaming providers may apply an initial minimum charging period not exceeding 30 seconds to calls made. Roaming providers shall charge its customers for the provision of regulated data roaming services on a per-kilobyte basis, except for Multimedia Messaging Service (MMS) messages which may be charged on a per-unit basis.*

*This paragraph shall not preclude offers which provide roaming customers, for a per diem or any other fixed periodic charge, a certain volume allowance consistent with ordinary domestic usage and typical travel periods provided that the amount of the consumption of the full amount of the volume included in the offer leads to a unit price per regulated roaming calls made, calls received, SMS messages sent and data roaming services which does not exceed the respective domestic retail price and the maximum surcharge as set out in the first subparagraph.*

*3. By 1 January 2016, BEREC shall set out the weighted average of maximum mobile termination rates referred to in point (b) of paragraph 2 on the basis of (i) the maximum level of mobile termination rates imposed in the market for wholesale voice call termination on individual mobile networks by the national regulatory authorities in accordance with Articles 7 and 16 of the Framework Directive and Article 13 of Directive 2002/19/EC, and (ii) total number of subscribers in Member States. At the request from BEREC, national regulatory authorities shall communicate to BEREC the information referred to in (ii). BEREC shall review the average of maximum mobile termination rates set out in accordance with this Article every year from the date of application of this Regulation.*

*4. Roaming providers may offer and roaming customers may deliberately choose a roaming tariff other than the one set out in paragraphs 1 and 2, by virtue of which roaming customers benefit from a different tariff for regulated roaming service than they would have been accorded in the absence of such a choice. The roaming provider shall remind those roaming customers of the nature of the roaming advantages which would thereby be lost.*

*Without prejudice to the previous subparagraph, roaming providers shall apply the tariff set out in paragraphs 1 and 2 to all existing and new roaming customers automatically.*

## Article 6b

### Basic roaming allowance

1. The basic roaming allowance shall be available at minimum for [a] days per calendar year and shall allow a minimum daily consumption of [b] minutes of regulated roaming voice calls made, [b] minutes of regulated roaming voice calls received, [c] regulated roaming SMS messages sent and [d] megabytes of regulated data roaming services.

2. Roaming providers shall publish and include in their contracts detailed quantified information on how the basic roaming allowance is applied, by reference to its main pricing or volume parameters.

(6) In Article 14, paragraphs 1 and 3 are replaced as follows:

1. To alert roaming customers to the fact that they *may* be subject to roaming charges when making or receiving a call or when sending an SMS message, each roaming provider shall, except when the customer has notified the roaming provider that he does not require this service, provide the customer, automatically by means of a Message Service, without undue delay and free of charge, when he enters a Member State other than that of his domestic provider, with basic personalised pricing information on the roaming charges (including VAT) that apply to the making and receiving of calls and to the sending of SMS messages by that customer in the visited Member State.

That basic personalised information shall include *information on the basic roaming allowance (volume and availability in number of days) and on the charges which apply in excess of the basic roaming allowance within the EU* (in the currency of the home bill provided by the customer's domestic provider) to which the customer may be subject under his tariff scheme for:

(a) making regulated roaming calls within the visited Member State and back to the Member State of his domestic provider, as well as for regulated roaming calls received; and

(b) sending regulated roaming SMS messages while in the visited Member State.

*[Subparagraphs 3-5 unchanged]*

The first, second, fourth and fifth subparagraphs, *with exception of the reference to the basic roaming allowance therein*, shall also apply to voice and SMS roaming services used by roaming customers travelling outside the Union and provided by a roaming provider.

3. Roaming providers shall provide all users with full information on applicable roaming charges, when subscriptions are taken out. They shall also provide their roaming customers with updates on applicable roaming charges without undue delay each time there is a change in these charges.

They shall send a reminder at reasonable intervals thereafter to all customers who have opted for another tariff.

(7) In Article 15, paragraphs 2 and 6 are replaced as follows:

2. An automatic message from the roaming provider shall inform the roaming customer that the latter is *using regulated data roaming services and provide basic personalised information on the basic roaming allowance (volume and availability in number of days) and on the charges which apply in excess of the basic roaming allowance* (in the currency of the home bill provided by the customer's domestic provider), expressed in price per megabyte, applicable to the provision of regulated data roaming services to that roaming customer in the Member State concerned, except where the customer has notified the roaming provider that he does not require that information.

*The basic personalised information shall be delivered to the roaming customer's mobile device, for example by an SMS message, an e-mail or a pop-up window on the mobile device, every time the roaming customer enters a Member State other than that of his domestic provider and initiates for the first time a data roaming service in that particular Member State. It shall be provided free of charge at the moment the roaming customer initiates a regulated data roaming service, by an appropriate means adapted to facilitate its receipt and easy comprehension.*

*[Subparagraph 3 unchanged]*

6. This Article, with the exception of paragraph 5 *and of the reference to the basic roaming allowance in paragraph 2*, and subject to the second and third subparagraph of this paragraph, shall also apply to data roaming services used by roaming customers travelling outside the Union and provided by a roaming provider.

*[Subparagraphs 2 and 3 unchanged]*

(8) Article 16 is amended as follows:

a) in the first paragraph, the following subparagraph is added:

*National regulatory authorities shall monitor in particular whether roaming providers availing of Article 6a(4) engage in business practices which amount to circumvention of Articles 6a and 6b.*

b) paragraph 2 is replaced by the following:

*National regulatory authorities shall make up-to-date information on the application of this Regulation, in particular Articles 6a, 6b, 7, 9, and 12 publicly available in a manner that enables interested parties to have easy access to it.*

(9) Article 19 is replaced by the following:

*1. Upon entry into force of this Regulation, the Commission shall initiate a review of the wholesale roaming market with a view to assessing measures necessary, if any, to ensure phasing out of retail roaming surcharges. The Commission shall review, inter alia, the degree of competition in national wholesale markets, and in particular assess the level of wholesale costs incurred and wholesale charges applied, and the competitive situation of operators with limited geographic scope, including the effects of commercial agreements on competition as well as the ability of operators to take advantage of economies of scale. The Commission shall also assess the competition developments in the retail roaming markets. In particular, the review shall take into account the extent to which roaming providers have supplemented the basic roaming allowance, also in light of the BEREC assessment referred to in paragraph 5, and the development of the level of the roaming surcharges.*

*2. The Commission shall, by 30 June 2018, after a public consultation, report to the European Parliament and the Council on the findings of the review referred to in paragraph 1.*

*3. If the report referred to in paragraph 2 shows that there is no level playing field between roaming providers and consequently that there is a need to amend wholesale roaming charges or to provide for another solution to address the issues identified at wholesale level with a view to phase out retail roaming surcharges, the Commission shall, after consulting BEREC, make appropriate legislative proposals to the European Parliament and the Council to address this situation.*

4. In addition, the Commission shall submit a report to the European Parliament and the Council every two years after the report referred to in paragraph 2. Each report shall include a summary of the monitoring of the provision of roaming services in the Union and an assessment of the progress towards achieving the objectives of this Regulation.

5. In order to assess the competitive developments in the Union-wide roaming markets, BEREC shall regularly collect data from national regulatory authorities on the development of retail and wholesale charges for regulated voice, SMS and data roaming services. Those data shall be notified to the Commission at least twice a year. The Commission shall make them public.

*On the basis of collected data, BEREC shall also report regularly on the evolution of pricing and consumption patterns in the Member States both for domestic and roaming services and the evolution of actual wholesale roaming rates for unbalanced traffic between roaming providers. BEREC shall annually publish information on market developments and provide their assessment on how these developments might affect the volume and availability of the basic roaming allowance.*

BEREC shall also annually collect information from national regulatory authorities on transparency and comparability of different tariffs offered by operators to their customers. The Commission shall make those data and findings public.

*Article 7 – Review clause*

The Commission shall review articles 3, 4 and 5 of this Regulation and report to the European Parliament and the Council. The first report shall be submitted no later than 30 June 2018. Subsequent reports shall be submitted every four years thereafter. The Commission shall, if necessary, submit appropriate proposals with a view to amending this Regulation.

*Article 8 – Entry into force*

1. This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.
2. It shall apply from 30 June 2016, except for point (c) of Article 6(4) which shall apply from the date of entry into force of this Regulation.
3. The provisions of Regulation 1203/2012 related to the technical modality for the implementation of accessing local data roaming services on a visited network shall continue to apply for the purposes of separate sale of retail regulated data roaming services until the adoption of the implementing act referred to in point (c) of Article 6(4) of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*

*For the Council*

*The President*

*The President*