

EDRI's proposal for Amendments to the Council text of 4 March 2015 on Net neutrality

European Digital Rights is an umbrella organisation which represents 33 civil society organisations* with offices in 19 European countries. We would like to make some comments on the text adopted by the Council on 4 March 2015 regarding net neutrality and suggest amendments to the text.

For ease of reading, ~~deletions~~ are strike-through and **additions** are highlighted in bold. Each amendment is provided with an *explanation*.

(...)

Whereas:

(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 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 **or non-discriminatory treatment of traffic**. Commercial practices should not, ~~given their scale~~, 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~~ **right to send and receive** content and information **without discrimination**, such practices would therefore result in undermining the essence of this right.

Explanation: Agreements on data volumes are frequently used to discriminate between different types of content. For example, data from some sources are not covered by additional data charges while others are subject to such charges. This is discriminatory and, in obvious practical terms, restricts end-user's choice. The deletions concerning commercial practices are proposed as adding three qualifiers ("given their scale", "significantly" and "in practice") would make the text impossible to interpret. The ability to send as well as receive information is crucial to the functioning of the internet. The final sentence of the recital has been amended to reflect this fact and to maintain consistency with the first sentence of recital 8 (on the end users' right to use and provide services and applications).

(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 other than internet access 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. End-users, including providers of content, applications and services, should therefore remain free to conclude agreements with providers of electronic communications to the public, ~~which to provide access to services for which require~~ specific levels of quality of service **are indispensable due to their technical characteristics**. 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 other than internet access services, and quality as perceived by end-users.

Explanation: It needs to be clear that specific agreements and guaranteed quality of service are indispensable for the service being accessed. This is the case, for example, for certain telemedicine applications.

The deletion of "in a material manner" is necessary as the latter adds no meaning. NRAs are not going to intervene in circumstances where the impairment is not significant. In any event, there is also a reference to "material" in the final sentence.

The word "other" has been deleted as this implies that the availability and quality of internet access services could be impaired for the person availing of the additional services.

(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. ~~Reasonable traffic management contributes to an efficient use of network resources.~~ In order to be considered reasonable, traffic management measures applied by providers of ~~internet access~~ **electronic communications** 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~~ **electronic communication** 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 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 against blocking or other restrictive measures** because of their negative 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.

Explanation: The reference to “preferred” content and services could be interpreted as permitting discriminatory agreements, whereby access is allowed to specific content, applications or services on a discriminatory basis. This would lock the end-user into using that content, applications or services and restrict the side of the market for SMEs and start-ups. The European regulator has already had to act to limit the length of mobile contracts, in order to prevent other lock-in techniques that are prevalent in the market.

The reference to non-discriminatory reasonable traffic management by internet providers seems unnecessarily narrow. We therefore propose changing “internet access services” to “electronic communications services”.

The text on reasonable traffic management is deleted as it appears to be an assertion of a technical fact, which is incongruous in a legal text.

The statement about innovation being fostered generates confusion and it is unclear how NRAs would be expected to make policy decisions on the basis of this instruction, as it falls outside the scope of their activities.

*Discrimination is also possible by promoting specific content, application or services. Therefore, for clarity, it needs to be clear that discrimination **between** content, applications and services is prohibited.*

(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 **temporary** 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 congestion is **imminent 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 **exceptional** 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.~~

Explanation: The first deletion seeks to reduce the extreme lack of clarity of the sentence. There is no particular need to explain what a legal obligation laid down in Union or national legislation is. It is also unhelpful in the extreme to make references to undefined “measures” which, in context, are measures that are laid down by Union or national legislation, but are not court orders, not order of legally mandated authorities and are, nonetheless (based on the subsequent sentence on Charter obligations), provided for by law and necessary and genuinely meet objectives of general interest. This makes no obvious sense.

“Temporary” is added in order to prevent the possibility of permanent congestion being used as a tool for implementing potentially discriminatory traffic management.

“Pending” is unclear and can refer to a rather broad time period. According to BEREC’s guidelines for quality of services from 2012, “Congestion in IP networks can occur as a result of unpredictable/unavoidable situations or as a result of a failure of the ISP to provide sufficient capacity.” The first type of congestion is the one being addressed in this paragraph. As the situation is “unpredictable”, there is no way to identify the congestion as “pending” but they would rather have to react to this “immediate” situation.

Regarding the second type of congestion mentioned, this is not a situation that can be fixed by traffic management only, but by ISPs increasing their network capacity as recommended by BEREC’s guidelines.

As technologies continue to improve and as, in particular, mobile services continue to develop, it is inappropriate to legislate for specific failures of mobile networks. The deletion does not change the recognition that problems may arise and should be treated appropriately, however.

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, 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.~~

Explanation: The first deleted sentence duplicates the unclear text from the previous paragraph. The second sentence indicates that end-users should respect national and Union law. This is entirely redundant, adding no meaning whatsoever.

Article 2- Definitions

(new) 2 (3). “Parental controls” refer to functionality available either on the end-user’s device or in the network, which permit the end-user to configure their network connection, for example to limit access to particular types of content, to restrict the length of time the connection can be used, to establish different levels of access for different users or limit the types of content that can be shared.

Explanation: Parental control measures are configured by the end-user and implemented in response to an explicit request of that end-user. Parental controls cannot be considered as a restriction imposed by the internet access provider any more than the power switch on the internet router could be considered a restriction. Any system that does not give the end-user the ability to configure the restrictions being implemented would clearly fall outside the concept of parental control.

If the legislator considers it essential to legislate on a technology that is outside the scope of the Regulation, it is important to have a clear definition, to avoid problems interpreting the text in the future.

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 **have the right to** 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.

Explanation: The amendment seeks to avoid the ambiguity of the sentence, which could imply support for restrictive services that provide access to certain content, application and services. See the analysis of the amendments to recital 8, above.

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 **be non-discriminatory and shall** not limit the exercise of the right of end-users set out in paragraph 1.

Explanation: Commercial agreements and, in particular, agreements on volume can be used in a discriminatory way, if some services are counted towards a data limit (and therefore incur a charge, when the limit is exceeded) and others are not.

3. Providers of electronic communications to the public, including providers of internet access services, shall be free to enter into agreements with end-users, including and/or providers of content, applications and services to ~~deliver a service other than internet access~~ **provide access to**

services ~~for which requires~~ a specific level of quality **is indispensable**. Providers of electronic communications to the public, including providers of internet access services, shall ensure ~~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~~.

Explanation: The characteristics of the service being accessed are key to avoiding discrimination. If the service being accessed (such as telemedicine applications) requires a specific quality of service, then there is no risk of the “fast lane” to that service undermining the open internet, competition or innovation. This definition still allows for all possible forms of innovation on “other services” for which best effort internet access is not a technically sufficient access service.

“In a material manner” should be deleted as it adds no meaning. Regulators will clearly not intervene in cases where there is no material impairment.

4. Subject to this paragraph, providers of internet access services shall treat 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~~ **between** 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 ~~pending~~ **imminent** 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/EC4 or **in order** 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.~~

Explanation:

Paragraph c: Imminent is more precise, as explained in relation to recital 9, above.

Final paragraph: Any measure implementing national or Union legislation must be foreseen, directly or indirectly by that legislation. As a result, the deleted wording adds no further meaning.

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.

~~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.~~

Explanation: There is nothing in the Regulation which could possibly give the impression that Union or national law on lawfulness of content would be changed in any way. The clarification is therefore confusing and unnecessary. Therefore, it should be deleted.

* EDRi is particularly thankful to the contributions of its members [Access](#), [Bits of Freedom](#), [IT-Political Association of Denmark](#) (IT-Pol) and [Initiative für Netzfreiheit](#) (IfNf) in the preparation of this analysis.

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