



Net Neutrality – Analysis and background of triologue compromise

CHAPTER 1 – HISTORY

Introduction

In September 2013, the European Commission launched its “Telecommunications Single Market” Regulation. This was a heavily political proposal, which needlessly squeezed fully and partially unrelated issues such as roaming, spectrum, net neutrality and users' rights into the same instrument. After ignoring three Parliament resolutions calling for net neutrality proposals in the previous four years, the Commission finally issued its (deeply flawed) proposal, with just nine months to go before the May 2014 European Parliament elections.

Initial Commission proposal (September 2013)

While claiming to support net neutrality and written in a way which sought to give this impression, the Commission's proposal was peppered with loopholes that would have profoundly undermined the neutral, innovative internet in Europe.

A perfect example of this misleading drafting was Article 23.5 of the initial proposal. While appearing to ban blocking and other forms of discrimination, this was limited to situations where (potentially very low) agreed data volumes and speeds were implemented. Outside of any such agreed data volumes and speeds, the rules would not have applied.

23.5. *Within the limits of any contractually agreed data volumes or speeds* for internet access services, providers of internet access services shall not restrict the freedoms provided for in paragraph 1 by blocking, slowing down, degrading or discriminating against specific content, applications or services, or specific classes thereof, except in cases where it is necessary to apply reasonable traffic management measures. (emphasis added)

This is the very essence of bad regulation. Laws should be designed to clearly achieve their policy goal and not to mislead and legislate via loopholes.

Parliament first reading (April 2014)

Racing against time, with the elections coming in May 2014, the European Parliament worked hard to close the many obvious and not-so-obvious loopholes in the Commission's chaotic, contradictory net neutrality provisions, at the same time as assessing and



amending the chaotic proposals in this four-regulations-in-one-text proposal.

The Parliament did a solid job in fixing the loopholes. For example, the above text was amended to say:

23.5. Providers of internet access services and end-users may agree to set limits on data volumes or speeds for internet access services. Providers of internet access services ***shall not restrict*** the freedoms provided for in paragraph 1 ***by blocking, slowing down, altering, degrading or discriminating against specific content, applications or services***, or specific classes thereof, except in cases where it is necessary to apply traffic management measures. (emphasis added)

Similarly, the Parliament changed the definition of “specialised services” to make it clear that these could not be “functionally equivalent” to online services.

Council agreement (March 2015)

The Member States of the EU, in the Council, pulled the European Commission's proposal to pieces. It deleted the sections on radio spectrum management and end-user rights, severely watered down the provisions on roaming and produced an entirely destructive, loophole-ridden text on the “open internet”. Indeed, the Council refused to mention, either in debates or in written documents, the words “net neutrality”.

As proposed by the Council, the Regulation would have been vastly worse than useless, with all of the relevant provisions totally annihilated by gaping loopholes. Recital 7 is just one of many egregious examples:

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 require*** specific levels of quality of service. (emphasis added)

In short, the “safeguard” suggested by the Council to ensure that anti-competitive fast-lanes are not created on the internet was that there needed to be an agreement between either the online service or the “end-user” and the access provider! Again, this is the very essence of bad regulation – the text added confusion, sent a needless political message and permitted exactly what it claimed to prevent.



Informal triilogue negotiations (March – June 2015)

After the adoption of the Council political agreement in March 2015, the informal “trialogue” negotiations started. For pretty much the entire four months of the negotiations, these consisted of the Council telling the Parliament to compromise. At each step, the Parliament compromised and the response of the Council was to say “we welcome your compromise, now please give in on everything” and to make public statements complaining about the Parliament’s unwillingness to compromise. Given the abusive, undemocratic posture of the Council for the entire period of the negotiations, it always seemed that the best outcome available would be a very bad agreement or no agreement at all.

CHAPTER II – NEED FOR IMPROVEMENT

At the beginning of July 2015, a [compromise](#) was reached. In the final stage of the negotiations, the Parliament persuaded the Council to move a little from its initial position. We congratulate the Parliament for this achievement. However, there are five points for which the text needs important clarifications on private law enforcement, congestion, traffic management, price discrimination and “specialised services”.

Private law enforcement and other censorship

The Charter of Fundamental Rights is applicable to issues regulated by the EU legal framework.

Article 2.2 of the compromise, clearly states that connections should be available to all technically available end points. The recital dealing with illegal content (recital 9) makes it clear that the obligations of the Charter of Fundamental apply to any restrictions, such as blocking, that may be applied by internet providers:

[...] 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. [...]

One of the requirements of the Charter is that restrictions must be provided for by law. However, in Article 3.3.a the Regulation states that blocking of content is possible by “measures giving effect to such Union or national legislation, in compliance with Union law, **including** with orders by courts or **public authorities vested with relevant powers**”. Here, the Regulation appears to contradict itself, as it is not possible to comply with the requirements of the Charter in relation to limitations of fundamental rights and freedoms and, implicitly, permit blocking (by measures other than court orders or orders of legally empowered authorities) that is not provided for by a (specific, predictable) law.

There is likely to be a huge amount of argument about the Regulation “banning” the voluntary blocking of *alleged* child abuse websites. However, the inclusion of blocking in the 2011 Child Exploitation Directive (2011/92/EC) meant that blocking was already part of the EU legal framework and, therefore, the provisions of the Charter with regard to restrictions needing to be provided for by law already apply, regardless of the recital which claims the contrary.

“Parental controls” are a service that can be added to an internet access service that allow a parent to block or filter certain content based on various criteria that they choose, such as

pornography or violence or the length of time the child is allowed to be online. In at least one EU country, internet providers have such controls turned on by default. Sometimes these are difficult to turn off and sometimes services are “dumb”, offering no “control” to parents to adjust the filters to suit the educational needs and development of children.

Under the compromise text, it will, of course, continue to be possible for both internet providers and software providers to offer such services. However, it will not be possible for internet companies to arbitrarily block content by default and without request, under the name of “parental controls”. The compromise gives the control back to parents.

Summary: The provisions on illegal content are deliberately written in an unclear way in order to try to permit breaches of the Charter of Fundamental Rights and are contradictory. The recital is also exceptionally badly drafted.

The removal of proposals on “parental controls” is a clear improvement compared with the Council text agreed in March.

Congestion

The European Commission initially foresaw open-ended rights for internet companies to “manage” their traffic for reasons of “congestion”, with very few restrictions on how this provision could be (ab)used. The final text is weak in that it includes a provision on preventing “impending” network congestion, with few safeguards on how this can be interpreted.

However, the text does require the congestion to be either “temporary” or “exceptional” and, at the request of the Parliament, this is now explained in a much more comprehensive way. While it remains difficult to interpret “impending” congestion, the exception appears tight enough to ensure that it cannot easily be used indefinitely as a strategy for hiding anti-competitive behaviour.

Summary: Thanks to the provisions of the recital on the “temporary” or “exceptional” nature of the implementation of this exception, the compromise text is probably workable, although the provision on “impending” congestion is unnecessary and adds a degree of doubt.

“Traffic management” without congestion

The basis for network neutrality is the “best effort” principle. Network management should be limited to times of congestion and be as application agnostic¹ as possible, in order to

¹ As opposed to application-specific. See Barbara Van Schwick, “Network Neutrality: What a non-

preserve the neutral character and innovative capacity of the network. Deviations from this principle have to be limited and justified. Rather than emphasising the “best effort” principle and recognising its contribution to the success of the internet, Article 3.3 and Recital 8 allow for deviations which are not limited to the exceptions provided for in Article 3. Consequently, the potential justifications for such traffic management are not clear. The “right” to manage traffic in this way is clearly not meant to be open-ended, as it can only be maintained for as long as “necessary”, with no clarification at all as regards what this might mean.

That relevant recital states that network management outside of congestion is possible if it is based on “objectively different technical quality of service requirements of specific categories of traffic”. These categories cannot be based on commercial considerations, but are nonetheless established by the Internet Service Provider (ISP) and allow for discrimination against a whole category of applications (video streaming, file uploads, etc). It also could imply a degree of surveillance of data traffic to assess the kinds of content they contain (but not the specific content), to the potential detriment of protocols such as FTP, P2P, protocols not recognised by the network, and even to the detriment of encrypted data, whose requirements cannot be read and risk being assumed to have lower priority. This can lead to traffic management which appear to be neutral as defined by Recital 8, but is nonetheless arbitrary from the point of view of end-users and content/application providers, and ultimately to the detriment of end-user choice. The disadvantages of this type of traffic management are likely to outweigh the advantages in many cases, particularly for users relying on de-prioritised categories of data, such as businesses that exchange large files using protocols such as FTP or peer-to-peer or data which is encrypted and whose priority may, therefore, not be known to the internet access provider.

The first and last lines of Recital 8 on “traffic management” appear to convey opposite messages. The first sentence suggests that the “traffic management” being referred to is a standard practice for maintaining an efficient network. The final sentence says, however, that it should only be “maintained for as long as is necessary”, suggesting that it is an exceptional activity. It should be clarified that traffic management under Recital 8 is not meant to be a permanent activity, as appears to be the intention behind the final sentence of the recital.

Summary: These provisions have to be amended to limit “traffic management” to times of congestion and give priority to application agnostic resolution strategies, which are the strategies that the internet has successfully used until now..

discrimination rule should look like”, Stanford Public Law Working Paper No. 1684677
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684677

Price discrimination (zero-rating)

In price discrimination, internet users pay for a certain volume of download capacity, but get unlimited access to some websites but not all the internet, resulting in unequal rights to send and receive information – the very opposite of net neutrality. Price discrimination achieves the same goal (from the side of the telecoms operator) as any other form of net neutrality violation, as it allows the operator to demand payment from online companies for privileged access to their customers. It is also as destructive as other forms of net neutrality violations, as it splits the online population between those who can pay for additional downloads, those who cannot pay for such downloads and between those who can pay for the privilege of an unlimited freedom to communicate their message and those who cannot.

This is the point where the Regulation is the most unclear. The Commission and Council tried very hard to add wording to the legislation that would clearly allow price discrimination. The Parliament's first reading text did not permit price discrimination, but did not make this point explicitly. In the end, negotiators agreed not to legislate on this point.

However, the agreed text could be argued to permit price discrimination, as it allows agreements on data volumes and commercial practices that do not completely remove the right of end-users to use and provide content, services and applications of their choice. It could also be read as prohibiting price discrimination, on the basis that this would amount to a discrimination on the basis of the services being used and that it would limit the right to distribute information. Parliament negotiators were assured that the issue was NOT covered by the Regulation. At the press conference involving the Parliament's Rapporteur (Ms Del Castillo) and Commissioner Oettinger, Ms Del Castillo made it clear that she believed that zero rating was not covered and was not contradicted by the Commissioner. Now, however, the European Commission has produced a grossly inaccurate analysis of what zero-rating is, how it works and, implicitly, that it is regulated by the agreed text.²

Summary: If zero-rating is considered by courts as being allowed by the Regulation, then national bans on zero rating (such as in the Netherlands) would not be permitted. The easiest way to resolve this problem is for the Parliament at least to add an amendment to confirm that zero rating is not regulated in the legislation. At best, the Parliament should add an amendment definitively banning a price discrimination, a practice that is an affront to competition and freedom of communication.

² http://europa.eu/rapid/press-release_MEMO-15-5275_en.htm

“Specialised services”

In the Commission's initial proposal, such “fast lane” services were (badly) defined by the Regulation. The Parliament suggested a narrower, clearer definition. The final agreement sets a number of criteria, but these are very subjective. These are:

- optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality;
- that the quality of service levels cannot be “assured” (the meaning of which is very unclear) by an internet access service;
- optimisation is objectively necessary to ensure one or more specific and key features of the content, application or service and to enable a corresponding quality assurance to be given to end-users; and
- that the optimisation is not simply granting general priority over comparable content, applications or services available via the internet access service and thereby circumventing the provisions regarding traffic management applicable to the internet access service.

Summary: The text would be good enough for a good regulator to implement efficiently, without fear of being successfully sued. However, it is weak enough for politically and economically weak national regulators to be able to easily avoid implementing it correctly. But because the Body Of European Regulators for Electronic Communications (BEREC) Guidelines will severely limit the interpretation and application scope of these provisions the outcome can not be foreseen.



CHAPTER III – PARLIAMENT'S SECOND READING

In the autumn, the Parliament will need to approve, amend or reject the net neutrality text which, due to the chaotic initial Commission proposal, is still attached to the “roaming surcharge ban” (that does not, incidentally, ban roaming surcharges).

As the compromise currently stands, the EU institutions have avoided making a choice. It has left it up to courts and unelected regulators to seek to give meaning to some of the key elements of the Regulation.

The Parliament has a choice, therefore. It either has to table amendments to give meaning to the provisions, or it, can decide not to decide.

We urge the Rapporteur and Shadow Rapporteurs to urgently consider the preparation and adoption of amendments to the compromise text in order to:

- remove unverifiable “impending” congestion exception for traffic management or at least narrow the contexts in which it can be used in a way that would make this meaningful;
- confirm that “traffic management” does not go beyond the basic, best-effort principle that is the essence of the internet's success;
- either clearly prohibit “price discrimination” or make it clear that Member States who wish to protect competition by banning such discrimination remain free to do so;
- revert to a clearer definition of “specialised service”, to give regulators the tools to do their job more effectively.

Alternatively, European citizens and online businesses can wait for a year or two to find out what the decision-makers in the courts and national regulatory authorities decide.



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European Digital Rights is an association of [33 privacy and civil rights organisations](#).

Comments have been jointly prepared and endorsed by the following EDRi members and digital rights organisations:

