

The purpose of this document is to show our concerns regarding certain provisions of the Telecommunications' Single Market's draft Regulation and propose amendments to [Council's first reading text](#). They reflect the minimum changes needed to better ensure the delivery and protection of net neutrality.

For ease of reading, the left column reflects the Council's first reading text, as a result of the trilogue negotiations, and the right column shows our proposals for amendments.

Council's first reading text	Amendment
<p>(7)In order to exercise their rights to access and distribute information and content and to use and provide applications and services of their choice, end-users should be free to agree with providers of internet access services on tariffs for specific data volumes and speeds of the internet access service. Such agreements, as well as any commercial practices of providers of internet access services, should not limit the exercise of those rights and thus circumvent provisions of this Regulation safeguarding open internet access. National regulatory and other competent authorities should be empowered to intervene against agreements or commercial practices which, by reason of their scale, lead to situations where end-users' choice is materially reduced in practice. To this end, the assessment of agreements and commercial practices should inter alia take into account the respective market positions of those providers of internet access services, and of the providers of content, applications and services, that are involved. National regulatory and other competent authorities should be required, as part of their monitoring and enforcement function, to intervene when agreements or commercial practices would result in the undermining of the essence of the end-users' rights.</p>	<p>(7)In order to exercise their rights to access and distribute information and content and to use and provide applications and services of their choice, end-users should be free to agree with providers of internet access services on tariffs for specific data volumes and speeds of the internet access service. Such agreements, as well as any commercial practices of providers of internet access services, should not limit the exercise of those rights and thus circumvent provisions of this Regulation safeguarding open internet access. National regulatory and other competent authorities should be empowered to intervene against agreements or commercial practices which lead to situations where end-users' choice is materially reduced in practice. National regulatory and other competent authorities should be required, as part of their monitoring and enforcement function, to intervene when agreements or commercial practices would result in the undermining of the essence of the end-users' rights.</p>

Justification: Either the freedom to receive and impart information is protected or it is not. Leaving it, in the first instance, to national *telecoms* regulators to determine if this fundamental right has been breached *enough* to warrant an intervention is below the standards European citizens rightly expect.

For the same reason, the following sentence referring to market position should be deleted.

Admissibility: This brings the text back into line with the Parliament's first reading cf. Recitals 47 to 49 and Articles 23(5) and 24.

Council's first reading text	Amendment
<p>(9)The objective of reasonable traffic management is to contribute to an efficient use of network resources and to an optimisation of overall transmission quality responding to the objectively different technical quality of service requirements of specific categories of traffic, and thus of the content, applications and services transmitted. Reasonable traffic management measures applied by providers of internet access services should be transparent, non-discriminatory and proportionate, and should not be based on commercial considerations. The requirement for traffic management measures to be non-discriminatory does not preclude providers of internet access services from implementing, in order to optimise the overall transmission quality, traffic management measures which differentiate between objectively different categories of traffic. Any such differentiation should, in order to optimise overall quality and user experience, be permitted only on the basis of objectively different technical quality of service requirements (for example, in terms of latency, jitter, packet loss, and bandwidth) of the specific categories of traffic, and not on the basis of commercial considerations. Such differentiating measures should be proportionate in relation to the purpose of overall quality optimisation and should treat equivalent traffic equally. Such measures should not be maintained for longer than necessary.</p>	<p>(9)The objective of reasonable traffic management is to contribute to an efficient use of network resources and to an optimisation of overall transmission quality responding to the objective requirements of traffic, and thus of the content, applications and services transmitted. Reasonable traffic management measures applied by providers of internet access services should be transparent, non-discriminatory and proportionate, and should not be based on commercial considerations. The requirement for traffic management measures to be non-discriminatory does not preclude providers of internet access services from implementing, in order to optimise the overall transmission quality, traffic management measures. Any traffic management measures should, in order to optimise overall quality and user experience, be permitted only on the basis of objectively different technical requirements (for example, in terms of latency, jitter, packet loss, and bandwidth), and not on the basis of commercial considerations. Such measures should be proportionate in relation to the specific network management purpose in question. Such measures should not be maintained for longer than necessary.</p>

Justification: The Council first reading text contradicts itself between supporting a permanent differentiation between different “categories” of data on the one hand, and a requirement that such (permanent) measures are only permissible if they are maintained for no longer than “necessary”. If not, encrypted traffic, being a unidentified category, would end up being discriminated against.

Admissibility: This proposed amendment brings the recital in line with Article 3 (3) (c) agreed in trialogue. It reflects the sense of both the Commission's initial proposal for Article 23.5 and the amendment adopted by the Parliament for the same Article..

Council's first reading text	Amendment
<p>(15) Third, measures going beyond such reasonable traffic management measures might also be necessary to prevent impending network congestion, that is, situations where congestion is about to materialise, and to mitigate the effects of network congestion, where such congestion occurs only temporarily or in exceptional circumstances. The principle of proportionality requires that traffic management measures based on that exception treat equivalent categories of traffic equally. Temporary congestion should be understood as referring to specific situations of short duration, where a sudden increase in the number of users in addition to the regular users, or a sudden increase in demand for specific content, applications or services, may overflow the transmission capacity of some elements of the network and make the rest of the network less reactive. Temporary congestion might occur especially in mobile networks, which are subject to more variable conditions, such as physical obstructions, lower indoor coverage, or a variable number of active users with changing location. While it may be predictable that such temporary congestion might occur from time to time at certain points in the network – such that it cannot be regarded as exceptional – it might not recur so often or for such extensive periods that a capacity expansion would be economically justified. Exceptional congestion should be understood as referring to unpredictable and unavoidable situations of congestion, both in mobile and fixed networks.</p>	<p>(15) Third, measures going beyond such reasonable traffic management measures might also be necessary to mitigate the effects of network congestion, where such congestion occurs only temporarily or in exceptional circumstances. The principle of proportionality requires that traffic management measures based on that exception treat equivalent categories of traffic equally. Temporary congestion should be understood as referring to specific situations of short duration, where a sudden increase in the number of users in addition to the regular users, or a sudden increase in demand for specific content, applications or services, may overflow the transmission capacity of some elements of the network and make the rest of the network less reactive. Temporary congestion might occur especially in mobile networks, which are subject to more variable conditions, such as physical obstructions, lower indoor coverage, or a variable number of active users with changing location. While it may be predictable that such temporary congestion might occur from time to time at certain points in the network – such that it cannot be regarded as exceptional – it might not recur so often or for such extensive periods that a capacity expansion would be economically justified. Exceptional congestion should be understood as referring to unpredictable and unavoidable situations of congestion, both in mobile and fixed networks.</p>

Justification: The provision on impending congestion is unnecessary and it will be difficult to interpret. ISPs are only allowed to engage in blocking or discrimination of applications or classes of applications to "mitigate" congestion under Art. 3(3), subparagraph 3 (c) if the congestion is "temporary" or „exceptional.“ These terms have been defined carefully to ensure that these situations remain the exception, rather than the rule. The current version of the recital allows ISPs to use these intrusive measures to "prevent" any kind of congestion, not just temporary or exceptional congestion. This vastly increases the range of cases in which ISPs can engage in blocking/discrimination of applications or classes of applications to manage congestion:

- (1) it allows ISPs to use these measures before congestion has even occurred (all under the guise of preventing impending congestion).
- (2) it allows ISPs to use these measures to prevent any kind of congestion, allowing ISPs to do an endrun around the careful protections that were built into the definitions of "temporary" and "exceptional."

Admissibility: This amendment brings the text into line with Parliament's first reading position (Article 23(5)). It should be noted that neither the Commission's proposal nor the Parliament's first reading text had any reference to "impending congestion".

Council's first reading text	Amendment
<p>(16) There is demand on the part of providers of content, applications and services to be able to provide electronic communication services other than internet access services, for which specific levels of quality, that are not assured by internet access services, are necessary. Such specific levels of quality are, for instance, required by some services responding to a public interest or by some new machine-to-machine communications services. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services should therefore be free to offer services which are not internet access services and which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet the requirements of the content, applications or services for a specific level of quality. National regulatory authorities should verify whether and to what extent such optimisation is objectively necessary to ensure one or more specific and key features of the content, applications or services and to enable a corresponding quality assurance to be given to end-users, rather than simply granting general priority over comparable content, applications or services available via the internet access service and thereby circumventing the provisions regarding traffic management measures applicable to the internet access services.</p>	<p>(16) There is demand on the part of providers of content, applications and services to be able to provide electronic communication services other than internet access services, for which specific levels of quality, that cannot be provided by internet access services, are necessary. Such specific levels of quality are, for instance, essential for some services responding to a public interest or by some new machine-to-machine communications services to function. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services should therefore be free to offer such services which are not internet access services and which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is essential in order to meet the requirements of the content, applications or services for a specific level of quality. National regulatory authorities should verify whether and to what extent such optimisation is objectively necessary to ensure the functioning of the content, applications or services, rather than simply granting priority over comparable content, applications or services available via the internet access service and thereby circumventing the provisions regarding traffic management measures applicable to the internet access services.</p>

Justification: Council's first reading text is contradictory. If “comparable content, applications and services” are available via the internet access service, these specialised services are being offered a competitive advantage - exactly contrary to the stated intention of the draft Regulation. The amendment seeks to resolve this contradiction. The use of the word “essential” seeks to reflect the logic of the requirement for “**enhanced quality from end-to-end**” supported by the Parliament in first reading (cf. Article 2(15)).

Admissibility: This amendment would partly restore Parliament's position on first reading. Cf. Article 23(5) and Article 24(1)).

Council's first reading text	Amendment
<p>(17) In order to avoid the provision of such other services having a negative impact on the availability or general quality of internet access services for end-users, sufficient capacity needs to be ensured. Providers of electronic communications to the public, including providers of internet access services, should, therefore, offer such other services, or conclude corresponding agreements with providers of content, applications or services facilitating such other services, only if the network capacity is sufficient for their provision in addition to any internet access services provided. The provisions of this Regulation on the safeguarding of open internet access should not be circumvented by means of other services usable or offered as a replacement for internet access services. However, the mere fact that corporate services such as virtual private networks might also give access to the internet should not result in them being considered to be a replacement of the internet access services, provided that the provision of such access to the internet by a provider of electronic communications to the public complies with Article 3(1) to (4) of this Regulation, and therefore cannot be considered to be a circumvention of those provisions. The provision of such services other than internet access services should not be to the detriment of the availability and general quality of internet access services for end-users. In mobile networks, traffic volumes in a given radio cell are more difficult to anticipate due to the varying number of active end-users, and for this reason an impact on the quality of internet access services for end-users might occur in unforeseeable circumstances.</p>	<p>(17) In order to avoid the provision of such other services having a negative impact on the availability or general quality of internet access services for end-users, sufficient capacity needs to be ensured. Providers of electronic communications to the public, including providers of internet access services, should, therefore, offer such other services, or conclude corresponding agreements with providers of content, applications or services facilitating such other services, only if the network capacity is sufficient for their provision in addition to any internet access services provided. The provisions of this Regulation on the safeguarding of open internet access should not be circumvented by means of other services usable or offered as a replacement for internet access services or for content, applications or services available over internet access services. However, the mere fact that corporate services such as virtual private networks might also give access to the internet should not result in them being considered to be a replacement of the internet access services, provided that the provision of such access to the internet by a provider of electronic communications to the public complies with Article 3(1) to (4) of this Regulation, and therefore cannot be considered to be a circumvention of those provisions. The provision of such services other than internet access services should not be to the detriment of the availability and general quality of internet access services for end-users. In mobile networks, traffic volumes in a given radio cell are more difficult to anticipate due to the varying number of active end-users, and for this reason an impact on the quality of internet access services for end-users might occur in unforeseeable circumstances.</p>

Justification: This brings this recital into line with the amendments to recital 16.

Admissibility: This amendment would restore Parliament's position on first reading (cf. Article 2(15), Article 23(5) and Article 24(1)).

Council's first reading text	Amendment
<p>3(2) Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1.</p>	<p>3(2) Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1. This provision shall not prevent member states from adopting additional regulations with regard to the practice of exempting certain content, applications, or services or categories thereof from data caps.</p>

Justification: This clarifies the position of the negotiators regarding the ability of Member States to take action to protect against discrimination on the basis of download limits and costs, such as zero rating.

Admissibility: This amendment tries to accommodate the different positions of the three institutions and reflect the intention of the legislators. During trialogues, the three institutions agreed to take zero rating out of the scope of the negotiations. This was confirmed by the European Parliament's rapporteur on this file, Pilar del Castillo, at the press conference following the end of trialogues. However, the European Commission added confusion by issuing a press release pleading for the advantages of zero rating. This amendment clarifies the position agreed within informal trialogues.

Council's first reading text	Amendment
<p>3(3)Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used The first subparagraph shall not prevent providers of internet access services from implementing reasonable traffic management measures. In order to be deemed to be reasonable, such measures shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic. Such measures shall not monitor the specific content and shall not be maintained for longer than necessary.</p>	<p>3(3)Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used The first subparagraph shall not prevent providers of internet access services from implementing reasonable traffic management measures. In order to be deemed to be reasonable, such measures shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations. Such measures shall not monitor the specific content and shall not be maintained for longer than necessary.</p>

Justification: This amendment seeks to resolve two issues:

Firstly, it is inconsistent to state that traffic management “measures should not be maintained as long as necessary” and that they should be “without discrimination”, at the same time as establishing an overarching rule that, by default, different categories can always be treated differently. Moreover, allowing ISPs to discriminate among classes of applications under Article 3(3) subparagraph 2 contradicts Article 3(3) subparagraph 3, which clearly states that "discriminating among categories" of content, applications, or services are "traffic management measures going beyond those measures set out" in Article 3(3), subparagraph 2. That suggests that the drafters wanted to allow discrimination among classes of applications ONLY in the specific cases of exceptions specified in Article 3(3), subparagraph 3, (a)-(c).

Secondly: The categorisation is only possible if the internet provider has the ability to categorise traffic. So, for example, the category into which encrypted data should be put cannot be ascertained. Encryption is crucial for online security and it has been estimated that, by next year, half of internet traffic will be encrypted (see <http://fortune.com/2015/04/30/netflix-internet-traffic-encrypted/>). If this exception is widely used, internet companies and users will have a choice – the slow lane or the unsafe lane. Furthermore, there will be a *de facto* discrimination in favour of large video sources (YouTube or Netflix, for instance), where the service provider's (encrypted) traffic will be assumed to be video given its origin while videos from smaller sites (blogs, political parties, etc) will be downgraded.

Admissibility: This restores the Parliament's first reading position in Article 23(5) and recital 47.

Council's first reading text	Amendment
(c) prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally.	(c) prevent or mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally.

Justification: same as for recital 15 above.

Admissibility: it restores the European Parliament's first reading text. Cf. Article 23(5) (d) and accepts the compromise with Council to move to "exceptional or temporary".

Council's first reading text	Amendment
<p>3.5 Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.</p> <p>Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users.</p>	<p>3.5 Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services that cannot be provided via internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality. Providers of internet access to users shall not discriminate between competing services.</p> <p>Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services or content, applications, or services available over internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users.</p>

Justification: It is crucial for this text to be clear, to minimise uncertainty and to protect against anticompetitive behaviour.

Admissibility: This amendment reflects the European Parliament's first reading reflected in Parliament's Recital 49, Article 2(15) and Article 23(2)

Amendments supported by:

