

Comments on LIBE draft opinion for TSM Regulation

EDRi generally welcomes LIBE draft opinion, but would like to make some comments on selected proposed amendments below. The left column repeats the Commission proposal; the right column contains the amendments proposed by the rapporteur, Salvador Sedó i Alabart. EDRi's comments can be found below. For ease of reading, the headings are highlighted and marked with arrows:

- green for amendments which we welcome (++);
- yellow for amendments which pursue good aims, but could benefit from further suggested improvements (+);
- red for amendments which in our view should be reconsidered (-).

In each case, a short justification is given.

Amendment 4

Recital 46	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
(46) The freedom of end-users to access and distribute information and lawful content, run applications and use services of their choice is subject to the respect of Union and compatible national law. This Regulation defines the limits for any restrictions to this freedom by providers of electronic communications to the public but is without prejudice to other Union legislation, including copyright rules and Directive 2000/31/EC.	(46) The freedom of end-users to access and distribute information and lawful content, run applications and use services of their choice is subject to the respect of Union and compatible national law. This Regulation defines the limits for any restrictions to this freedom by providers of electronic communications to the public but is without prejudice to other Union legislation, including copyright rules and Directive 2000/31/EC <i>on electronic commerce and Article 13 of Directive 95/46/EC and Article 15 of 2002/58/EC, which define the limits to traffic management measures from the data protection and privacy perspective.</i>
Comments : The original Commission text displays a lack of understanding of the legal framework. The freedoms in question are rights – as defined by the European Convention on Human Rights and European Charter of Fundamental Rights. Traffic management is about managing a network and not managing content. Consequently, the Commission's reference to the E-Commerce Directive is entirely misplaced. This amendment reinforces and extends the Commission's initial misreading of the existing legal framework, rather than fixing it.	

Amendment 9

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<i>Text proposed by the Commission</i>	<i>Amendment</i>
(e) ensuring that the rules on protection of privacy, personal data, security and integrity of networks and transparency in accordance with Union law are respected.	(e) ensuring that the rules on protection of privacy, personal data, security and integrity of networks and transparency in accordance with Union relevant law are respected <i>in a way to entail respect for the confidentiality, integrity and security of the data processed within the course of transmitting communications over the network.</i>
Comments : Article 19 on Assured Service Quality (ASQ) should be entirely deleted. BEREC pointed out several time that ASQ are superfluous and that by imposing obligation to ISP to use ASQ, this article would hinder innovation and competition.	

Amendment 10

Article 19 – paragraph 5 ++	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
<i>5. The Commission shall be empowered to adopt delegated acts in accordance with Article 32 in order to adapt Annex II in light of market and technological developments, so as to continue to meet the substantive requirements listed in paragraph 4.</i>	<i>deleted</i>
Comments : We welcome this deletion. However, Article 19 as a whole should be deleted as it could hinder innovation and competition. See comments on AM 9.	

Amendment 11

Article 23 – paragraph 3 ++	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
<i>3. This Article is without prejudice to Union or national legislation related to the lawfulness of the information, content, application or services transmitted.</i>	<i>deleted</i>
Comments : The Commission's text is entirely meaningless, as there is absolutely nothing in the Regulation which could conceivably render legalised content or activities which are currently	

illegal.

Amendment 12

Article 23 – paragraph – 5 point a

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<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>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. Reasonable traffic management measures shall be transparent, non-discriminatory, proportionate and necessary to:</p> <p>(a) implement a legislative provision or a court order, <i>or prevent or impede serious crimes</i>;</p>	<p>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. Reasonable traffic management measures shall be transparent, non-discriminatory, proportionate and necessary to:</p> <p>(a) implement a legislative provision or a court order, <i>or for the prevention, investigation, detection and prosecution of criminal offences as laid down in article 15 of Directive 2002/58/EC</i>;</p>
<p>Comments : The first sentence leaves the possibility for ISPs to discriminate on connection speeds, quality of service, or block applications and services and should be removed. Moreover, even if the rapporteur addressed the problem with « prevent or impede serious crime », that needs to be deleted, the addition he made on the Directive on privacy and electronic communications (2002/58) is legally incoherent, as it covers national security issues which are outside the scope of EU competence.</p>	

Amendement 13

Article 23 – paragraph 5 – point aa (new)

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<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<p><i>(aa) provide clear and specific information on communication inspection techniques that are allowed</i>;</p>
<p>Comments : Traffic management measures can only be permissible if they are necessary, proportionate, temporary, targeted, transparent, and in accordance with the law. It is important to</p>	

implement key legal safeguards rather than technical details about the technologies in question.

Amendment 14

Article 23 – paragraph 5 – point c +	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
(c) prevent the transmission of unsolicited communications to end-users who have given their prior consent to such restrictive measures;	(c) prevent the transmission of unsolicited communications to end-users who have given their prior consent to such restrictive measures. <i>Such consent should be informed, specific and unambiguous, as well as freely given;</i>
Comments : Even if the rapporteur's addition brings clarification, the Commission's proposal is redundant. Insofar as personal data are processed in such circumstances, prior consent would be required under relevant data protection laws.	

Amendment 15

Article 23 – paragraph 5 – subparagraph 2 +	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
Reasonable traffic management shall only entail processing of data that is necessary and proportionate to achieve the purposes set out in this paragraph.	Reasonable traffic management shall only entail processing of data that is necessary and proportionate to achieve the purposes set out in this paragraph. <i>In no case, sensitive data as defined in Article 8 paragraph 1 of Directive 95/46/EC shall be processed.</i>
Comments : This amendment goes in the right direction, however, further improvement could be made. We recommend to add another sentence: “Processing of the content part of the communication during transmission for these purposes is not permitted”. To protect the user privacy, traffic management shall never be based on the content part of data transmission.	

Amendment 16

Article 24 – paragraph 1 +	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. National regulatory authorities shall closely monitor and ensure the effective	1. National regulatory authorities shall closely monitor and ensure the effective

<p>ability of end-users to benefit from the freedoms provided for in Article 23 (1) and (2), compliance with Article 23 (5), and the continued availability of nondiscriminatory internet access services at levels of quality that reflect advances in technology and that are not impaired by specialised services. They shall, in cooperation with other competent national authorities, also monitor the effects of specialised services on cultural diversity and innovation. National regulatory authorities shall report on an annual basis to the Commission and BEREC on their monitoring and findings.</p>	<p>ability of end-users to benefit from the freedoms provided for in Article 23 (1) and (2), compliance with Article 23 (5), and the continued availability of nondiscriminatory internet access services at levels of quality that reflect advances in technology and that are not impaired by specialised services. They shall, in cooperation with other competent national authorities and data protection authorities, also monitor the effects of specialised services on cultural diversity and innovation. National regulatory authorities shall report on an annual basis to the Commission and BEREC on their monitoring and findings. <i>This monitoring shall comply with the principle of confidentiality of communications and shall not imply processing of personal data.</i></p>
<p>Comments : This amendment could be further improved by changing "freedoms" to "rights" and to make the NRAs reports available to the public.</p>	

Amendment 17

Article 25 – paragraph 1 ++	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>1. Providers of electronic communications to the public shall, save for offers which are individually negotiated, publish transparent, comparable, adequate and upto-date information on:</p>	<p>1. Providers of electronic communications to the public shall, save for offers which are individually negotiated, publish transparent, comparable, adequate and upto-date information <i>in a clear, comprehensive and easily accessible manner</i> on:</p>
<p>Comments : This amendment brings clarity.</p>	

Amendment 18

Article 25 – paragraph 1 – point iv a (new) ++	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<p><i>(v) clear and adequate information on traffic management measures applied for</i></p>

	<i>the purposes listed in Article 23(5) of the proposal.</i>
Comments : This amendment brings clarity.	

Amendment 19

Article 26 – paragraph 1 – point g ++	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
(g) where an obligation exists in accordance with Article 25 of Directive 2002/22/EC, the end-users' options as to whether or not to include their personal data in a directory, and the data concerned;	(g) where an obligation exists in accordance with Article 25 of Directive 2002/22/EC, the end-users' options as to whether or not to include their personal data in a directory, and the data concerned; <i>the processing of personal data included in such a directory shall comply with provisions of Article 12 of the Directive 2002/58/EC.</i>
Comments : This amendment clarifies existing end-users' rights. <u>However, the final LIBE Opinion must be clear that the entire Regulation is without prejudice to existing data protection instruments.</u>	

Amendment 20

Article 26 – paragraph 2 – point fa (new) ++	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<i>(fa) Information on actions referred to in Article 26 (1)(j), and their potential effect on end-users' privacy and data protection rights.</i>
Comments : This amendment brings clarity.	