EDRI's Comments to ITRE Compromise amendments

EDRi welcomes the compromise amendments to the ITRE draft report tabled by the Rapporteur, Pilar del Castillo , but would like to make some comments on selected proposed amendments below.

For ease of reading, the welcome part of the compromise amendments have been highlighted in green and the part which in our view should be reconsidered are highlighted in red.

Draft CA 4
Open internet

The CA covers Art 2(14)-(15), Arts 23-24, Art 30a and recitals 45-51. All relevant AMs, including 322, 340, 345-346, fall.

Recitals

(45) 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. ***Indeed, as stated by the European Parliament resolution of 17 November 2011 on the open internet and net neutrality in Europe 2011/2866, the internet's open character has been a key driver of competitiveness, economic growth, social development and innovation – which has led to spectacular levels of development in online applications, content and services – and thus of growth in the offer of, and demand for, content and services, and has made it a vitally important accelerator in the free circulation of knowledge, ideas and information, including in countries where access to independent media is limited.*** 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. ***A way of ensuring this ability is to treat all types of traffic equally[1].*** Recently, 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 rules at the Union level to maintain the open internet and to avoid fragmentation of the single market resulting from individual Member States' measures.

[1] According to the Resolution in question, treating all traffic equally is not "a way" of ensuring innovation and the ability to distribute information and run applications and service, it is essential: "*net neutrality as a significant prerequisite for enabling an innovative internet ecosystem and for securing a level playing field at the service of European citizens and entrepreneurs*".

It should be made clear here that "end-users" are *users* at either *end* of the chain of distribution of content. "End-users" are not simply passive recipients, as in the context

of broadcasting.

(46) The freedom of end-users to access and distribute information and ***(deletion)*** [2] 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[3]**,** ***Directive 1995/46, Directive 2002/58,***[4] Directive 2000/31/EC ***and Directive 2011/93/EC, in particular Article 25 thereof*** **[5],** ***which allows Member State measures to block access to web pages containing or disseminating child pornography, subject to safeguards***.

[2] This is a helpful amendment, as it avoids the Commission's confusion about court orders.

[3] There is absolutely nothing in this Regulation could conceivably be misunderstood as having any impact whatsoever on the interpretation of "copyright rules" – the compromise on Article 23 is clear that courts will still be free to impose injunctions. However, the inclusion of this wording will create doubt in interpretation of this instrument as regards what the co-legislators might have meant.

[4] Some of the Commission's text is written in an ambiguous way meaning that, while it should have been possible not to mention privacy legislation, it is, unfortunately, useful to add this clarification.

[5] Same comments as for [3] above.

(47a) The Charter of Fundamental Rights **[6]** ***of the European Union requires that limitations to the respect for private life, right of confidentiality of communications, right to data protection or freedom to receive or impart information must be provided for by law and respect the essence of those rights and freedoms. In the context of traffic management measures, the CJEU in Case C-70/10, SABAM v. Tiscali (Scarlet), with respect to general monitoring of electronic communications, states that an imposition of an obligation on an Internet service provider of electronic communications or services to indiscriminately monitor communications would constitutes not only a serious infringement on the freedom of the provider to conduct its business, but may also infringe the fundamental rights of the customers of the provider. Any scheme involving general monitoring of communications by providers of electronic communications or services should therefore be specifically provided for by Union law, or national law adopted in conformity with Union law.***

[6] If the Charter is to be mentioned, the description of the safeguards need to be far more precise. The Charter does not require that "limitations to the respect...", it requires that "*any* limitation...". It also requires that such limitations are *necessary* and *genuinely* meet objectives of general interest.

(46b) ***An internet access service should be a publicly*** **[7]** ***available electronic communications service enabling connectivity through any terminal to virtually all end points connected to the internet. A specialised service using the internet protocol should provide the end user with the capability of accessing and using specific content, applications or services at an enhanced level of assured quality compared to an internet access service.*** **[8]** ***In order for an enhanced level of service quality to be assured, the provision of specialised services may require implementation of traffic management measures such as [9] limitations on the number of users [10] or end-to-end control [12] of service characteristics [13], or it may require [14] dedicated capacity. A specialised service may be provided by an internet access provider, by another provider of electronic communications services or, by means of an agreement with the internet access provider or another provider of electronic communications services, by the provider of the specific content, application or service.***

[7] It is not clear why this text is conditional ("should be").

[8] It is not clear why the definition of specialised service should rely on it simply being better, to an undefined extent, than an internet access service

[9] "May require" means that it may not require. Optional criteria of this nature do not improve clarity. If this is not necessary as a criterion, it should not be included.

[10] This is an optional criterion of an optional criterion.

[11] It is exceptionally unusual for any communications service not to have a limited number of users. Deutsche Telekom services is limited to the number of people who subscribe to Deutsche Telekom. This – optional – criterion, has no obvious meaning.

[12] This is a useful criterion, but is part of a list of optional criteria, so its practical meaning is unclear.

[13] It is unclear what this is meant to mean.

[14] This is a further optional criterion.

(47) In an open internet, providers of ***internet access services*** should, within contractually agreed limits on data volumes and speeds for internet access services ***and the general characteristics of the service***,[15] not block, slow down, degrade or discriminate against specific content, applications or services or specific classes thereof except for a limited number of ***(deletion)*** traffic management measures. Such measures should be ***necessary,*** transparent, proportionate and non-discriminatory. ***Addressing network congestion*** **[16]** ***should be allowed*** provided that network congestion occurs only temporarily or in exceptional circumstances ***and if equivalent types of traffic are treated equally.***

[15] This text has no obvious meaning.

[16] "Addressing" appears to mean "mitigating" – if this is what it is meant to mean, this is what it should say.

(48) Volume-based tariffs should be considered compatible with the principle of an open internet as long as they allow end-users to choose the tariff corresponding to their normal data consumption based on transparent information about the conditions and implications of such choice. At the same time, such tariffs should enable providers of ***internet access services*** to better adapt network capacities to expected data volumes. It is essential that end-users are fully informed before agreeing to any data volume or speed limitations and the tariffs applicable, that they can continuously monitor their consumption and easily acquire extensions of the available data volumes if desired. [17]

[17] It is crucial that the amendment from CULT (or similar) be added to this recital. The alternative is to establish de facto online monopolies of existing dominant market players who can pay to be included in data bundles, while competitors are left outside, trying to compete with "free".

(49) ***It should be possible to meet end***-user [18]demand for services and applications requiring an enhanced level of assured service quality ***(deletion)***. Such services may comprise inter alia broadcasting via Internet Protocol (IP-TV), video-conferencing and certain health applications. End-users should therefore also be free to conclude agreements on the provision of specialised services with an enhanced quality of service with either providers of ***internet access services, providers of*** electronic communications to the public or providers of content, applications or services. ***Where such agreements are concluded with the provider of internet access, that provider should ensure that the enhanced quality service does not impair the general quality of internet access, except as may be necessary, considering the state of the art and technology deployed, to ensure the delivery of the enhanced quality service. Furthermore, traffic management measures should not be applied in such a way as to discriminate against services competing with those offered by the provider of internet access.[19]***

[18] It seems strange to legislate on the theoretical possibilities to meet theoretical demand

[19] This is a useful clarification. However, it relies on a clear definition of "net neutrality" being included in the Regulation. Also, it needs to be clear that discriminating in favour of any given service means, logically, that other services are discriminated "against" (even if the other services remain at a pre-existing service quality. The final sentence appears to acknowledge the legal possibility of discriminating against services not directly offered by the internet access provider – this would clearly be inappropriate.

(50) In addition, there is demand [20] on the part of content, applications and services providers, for the provision of transmission services based on flexible quality parameters, including lower levels of priority for traffic which is not time-sensitive. ***Such agreements are allowed and may be necessary [21]in order to meet end-user demand for services and applications requiring an enhanced level of assured service quality[22].*** The possibility for content, applications and service providers to negotiate such flexible quality of service levels with providers of electronic communications ***(deletion)*** ***may also be*** [23] necessary for the provision of ***certain*** services such as machine-to-machine (M2M) communications. ***(deletion)*** Providers of content, applications and services and providers of electronic communications ***(deletion)*** should therefore ***continue to*** be free to conclude specialised services agreements on defined levels of quality of service ***(deletion).***

[20] Again, it appears strange to legislate on the existence, or otherwise, of market conditions.

[21] The addition of this text adds no obvious meaning

[22] The only reason for permitting lower levels of service for particular content in order to permit "assured service quality" would be if the legislator was providing opportunities for network providers to invest less in their networks.

[23] Peppering this text with conditional clauses is generating a text that will be nearly impossible for regulators to interpret. It will then be up to national courts to provide national rulings on what the legislator might have meant.

This entire paragraph is very close to meaningless ("may be necessary", "may also be necessary", "certain services"...)

(51) National regulatory authorities play an essential role in ensuring that end-users are effectively able to exercise this freedom to avail of open internet access. To this end national regulatory authorities should have monitoring and reporting obligations, and ensure compliance of providers of ***internet access services, other providers of*** electronic communications ***and other service providers*** **[24]** and the availability of non-discriminatory internet access services of high quality. In their assessment of a possible general impairment of internet access services, 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 ***enhanced quality*** services, and quality as perceived by end-users. National regulatory authorities should ***establish complaint procedures providing effective, simple and readily available redress mechanisms for end users and*** be empowered to impose minimum quality of service requirements on all or individual providers of ***internet access services, other providers of*** electronic communications ***and other service providers*** **[25]** if this is necessary to prevent general impairment/degradation of the quality of service of internet access services.

[24] Compliance with what by whom? Who are the "other service providers" and what are they meant to be complying with?

[25] It is unclear what obligations NRAs could be imposing on these undefined

“other” services that are not internet access services.

Articles

Article 2 – Definitions

(14) "internet access service" means a publicly available electronic communications service that provides connectivity to the internet, and thereby connectivity between virtually all end points ***of*** the internet, irrespective of the network ***technologies or terminals*** used;

(15) 'specialised service' means an electronic communications service ***using the IP protocol*** that provides ***access by a determined number of parties[26] to*** specific content, applications or services, or a combination thereof, ***by deploying traffic management [27]to ensure an appropiate level of network capacity[28] and enhanced quality relying on admission control*** [29]and that is not marketed or widely used as a substitute for internet access service;

[26] Each provider of access services has a customer base which consists of a determined number of parties. This text therefore has no obvious meaning.

[27] Each access provider manages the traffic on their network to some extent. Without further clarification, this text has no obvious meaning.

[28] It appears reasonable to assume that every provider or network services should always aim to have "an appropriate" level of network capacity Without further clarification, this text has no obvious meaning.

[29] Every network service has some form of admission control. This text therefore has no obvious meaning.

It is hard to find any meaning in this definition of specialised services.

Article 23 - Freedom to provide and avail of open internet access, and reasonable traffic management

1. End-users shall be free to access and distribute information and content, run ***and provide*** [30]applications and services ***and use terminals*** 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.

[30] This helps clarify that "end-users" are not passive recipients of content/services

[2nd subpar deleted] [31]

[31] This removes one of the most egregious loopholes included by the Commission with a view to permitting discriminatory, anti-competitive behaviour.

2. ***Providers*** of ***internet access, of*** electronic communications to the public ***and*** providers of content, applications and services ***shall be free to offer*** specialised services ***to end-users***. ***Where such agreements are concluded with the provider of internet access, that provider shall take measures to ensure that the enhanced quality service does not impair the general quality*** **[31]*****of internet access, except as may be necessary*** ***[32]taking into account*** ***[33]the state of the art and technology deployed*** ***[34], in order to ensure the delivery of the enhanced quality service*** ***[35].***

[31] The concept of "general" quality is very unclear and gives regulators an almost impossible task.

[32] This adds a new layer of uncertainty, making it even more difficult for regulators to establish what the legislator might have meant.

[33] This is not clear.

[34] This is not clear.

[35] This appears to establish a principle that the "enhanced" service needs to be prioritised over open, competitive access services.

[2nd subpar deleted][36]

[36] This removes one of the most egregious loopholes included by the Commission with a view to permitting discriminatory, anti-competitive behaviour.

3. This Article is without prejudice to Union or national legislation related to the lawfulness of the information, content, application or services transmitted.[37]

[37] This text is entirely unnecessary as there is absolutely nothing in either the Commission's text nor the suggested compromises which suggests otherwise.

4. The exercise of the freedoms [38]provided for in paragraphs 1 and 2 shall be facilitated by the provision of complete information in accordance with Article 25(1), Article 26 (2), and Article 27 (1) and (2).

[38] The word "freedoms" here has no obvious legal meaning.

5. Within the limits of any contractually agreed data volumes or speeds for internet access services, ***and subject to the general quality*** **[39]** ***characteristics of the service,*** providers of

internet access services shall not restrict the freedoms provided for in paragraph 1 by blocking, slowing down, ***altering or*** degrading [40]specific content, applications or services, or specific classes thereof, except in cases where it is necessary to apply ***(deletion)*** traffic management measures. ***Traffic management measures shall not be applied in such a way as to discriminate against services competing with those offered by the provider of internet access. Traffic*** management measures shall be transparent, non-discriminatory, proportionate and necessary ***in particular*** to:

[39] This text is not clear.

[40] It is odd that the Commission did not use the "discrimination" wording that is used elsewhere in the proposal. This is significant because the text refers to active measures to deteriorate content, applications and services. However, providing access to certain content, applications and services at a higher quality will also undermine competition, innovation and, de facto, access to services that are being discriminated against.

a) implement ***(deletion)*** a court order ***(deletion)***;

[38] This brings the proposal back into line with the Charter of Fundamental Rights. However, it is important to ensure that the relevant recitals are also fully in line.

b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminals;

c) prevent the transmission of unsolicited ***commercial*** communications to end-users ***(deletion)***;

d) ***prevent network congestion[39] or mitigate*** the effects of temporary or exceptional network congestion provided that equivalent types of traffic are treated equally.

[39] This is inconsistent with the proposed compromise on recital 47, which indicates that this can only be temporary or exceptional.

National Regulatory Authorities shall monitor if the practices in their market respect these criteria, including whether traffic management ***measures*** only entail processing of data that is necessary and proportionate to achieve the purposes set out in this paragraph.

Within six months of the adoption of this regulation, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, lay down general guidelines for the application of traffic management measures, on the basis of this Article, and for monitoring of compliance.

Article 24 - Safeguards for quality of service

1. ***In exercising their powers under Article 30a with respect to*** Article 23***, national regulatory authorities shall closely monitor*** the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. They shall, in cooperation with other competent national authorities, also monitor the effects on cultural diversity and innovation. National regulatory authorities shall ***publish reports*** [40]on an annual basis ***regarding their monitoring and findings, and provide those reports to the Commission and BEREC***.

[40] It is helpful for transparency for the reports to be published.

2. In order to prevent the general impairment of quality of service for internet access services [41] or to safeguard the ability of end-users to access and distribute content or information or to run applications and services of their choice, national regulatory authorities shall have the power to impose minimum quality of service requirements on providers of electronic communications to the public.

National regulatory authorities shall, in good time before imposing any such requirements, provide the Commission with a summary of the grounds for action, the envisaged requirements and the proposed course of action. This information shall also be made available to BEREC. The Commission may, having examined such information, make comments or recommendations thereupon, in particular to ensure that the envisaged requirements do not adversely affect the functioning of the internal market. The envisaged requirements shall not be adopted during a period of two months from the receipt of complete information by the Commission unless otherwise agreed between the Commission and the national regulatory authority, or the Commission has informed the national regulatory authority of a shortened examination period, or the Commission has made comments or recommendations. National regulatory authorities shall take the utmost account of the Commission's comments or recommendations and shall communicate the adopted requirements to the Commission and BEREC.

[41] This implies that some form of undefined non-general impairment of quality of service would not be covered by this paragraph.

3. ***BEREC shall, after consulting stakeholders and in cooperation with*** the Commission***, lay down guidelines*** defining uniform conditions for the implementation of the obligations of national competent authorities under this Article.

Article 30a

Supervision and enforcement [41]

1. National regulatory authorities shall monitor and supervise compliance with this Regulation within their territories.

2. National regulatory authorities shall make up-to-date information on the application of this Regulation publicly available in a manner that enables interested parties to have easy access to it.

3. National regulatory authorities shall have the power to require undertakings subject to obligations under this Regulation to supply all information relevant to the implementation and enforcement of this Regulation. Those undertakings shall provide such information promptly on request and in accordance with time limits and the level of detail required by the national regulatory authority.

4. National regulatory authorities may intervene on their own initiative in order to ensure compliance with this Regulation.

5. National regulatory authorities shall put in place appropriate, clear, open and efficient procedures aimed at addressing complaints alleging breaches of Article 23. To this end, all users of internet access services shall be entitled to make use of such complaint procedures in front of the relevant authority. National regulatory authorities shall respond to complaints within a reasonable time.

6. Where a national regulatory authority finds that a breach of the obligations set out in this Regulation has occurred, it may require the immediate cessation of such a breach.

[41] This text is broadly positive and welcome. However, it is important that NRAs have an obligation to ensure that any breach that has been demonstrated by a complainant be brought to an end as soon as possible. It is unclear what paragraph 6 is intended to mean. It is to be hoped and assumed that it does not mean that NRAs have the choice not to require immediate cessation of breaches of the Regulation, where this is a proportionate response to the breach in question.