Open internet – compromise proposals

The CA covers Art 2(14)-(15), Arts 23-24, Art 30a and recitals 45-51.

Below are some texts being discussed as possible compromise texts in the European Parliament.

European Digital Rights, Access Now, BEUC, La Quadrature du Net (FR), Digitale Gesellschaft (DE) and Initiative für Netzfreiheit (AT) are prepared to accept these suggestions in order to help the Parliament reach an agreement on this text. However, we would prefer much clearer, shorter text with a more logical structure..

Key to changes:

Non highlighted text: Commission proposal.
Bold text: Text added by Industry Committee
(Deletion): Deletion by the Industry Committee
~~Blue strikethrough text:~~ Proposed deletions as part of this package of amendments
Dark blue underlined text: Proposed added as part of this package of amendments

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. The **principle of "net neutrality"** ~~**in the open internet**~~ **means that traffic should be treated equally, without discrimination, restriction or interference, independent of the sender, receiver, type, content, device, service or application. 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. 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.

Why this is acceptable: This text is the same as that adopted by the Industry Committee. The one change is the deletion of “in an open Internet” from the Industry Committee text, as this wording is clearly superfluous.

(46) The freedom of end-users to access and distribute information and **(deletion)** 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.

Why this is acceptable: This is the same as the Industry Committee text.

(47) In an open internet, providers of **internet access services** should, within contractually agreed limits on data volumes and speeds for internet access services, 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 **technically necessary**, transparent, proportionate and non-discriminatory. **Addressing network congestion should be allowed** provided that network congestion occurs only temporarily or in exceptional circumstances. **National Regulatory Authorities should be able to require that a provider demonstrates that equal treatment**

of traffic will be substantially less efficient.

Why this is acceptable: This is the same as the Industry Committee text.

(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 **clear**, transparent **and explicit** 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.

Why this is acceptable: This is the same as the Industry Committee text.

(49) **It should be possible to meet** end-user demand for services and applications requiring an enhanced ~~level of~~ or assured service quality **(deletion)**. Such services may comprise inter alia broadcasting, 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 cause** ~~material~~ **detriment to the** ~~general~~ **quality of internet access. Furthermore, traffic management measures should not** ~~be applied in such way as to~~ **discriminate between competing services and applications.**

Why this is acceptable: This is the same as the Industry Committee text, with the exception of the deletion of “level of”, “material”, “general” and “not be applied in such as a way as to”. All deleted wording is superfluous.

(50) In addition, there is demand 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. 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** 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 as long as such agreements do not impair the ~~general~~ quality of internet access **service**.

Why this is acceptable: This is the same as the Industry Committee text, with the exception of the deletion of the word “general”, which is superfluous and unclear.

(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** and the availability of non-discriminatory internet access services of high quality which are not impaired by specialised services. 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 i**nternet access services, other providers of** electronic communications **and other service providers** if this is necessary to prevent ~~general~~ impairment/degradation of the quality of service of internet access services.

Why this is acceptable: This is the same as the Industry Committee text, with the exception of the deletion of the word “general”, which is superfluous and unclear.

Articles

Article 2 – Definitions

(14) “internet access service” means a publicly available electronic communications service that provides connectivity to the internet in accordance with the principle of net neutrality, and thereby connectivity between virtually all end points **of** the internet, irrespective of the network **technologies or terminal equipment** used;

Why this is acceptable: This clarifies the applicability of the net neutrality principle.

(15) “specialised service” means an electronic communications service **optimised for** specific content, applications or services, or a combination thereof, **provided over logically distinct capacity** ~~and~~**, relying on strict admission control** ~~with the view of ensuring~~**, offering functionality requiring enhanced quality from end to end** and that is not marketed or **usable** as a substitute for internet access service;

Why this is acceptable: This amendment draws a clear distinction between “specialised services” and online services in general. Without such a clear distinction, this text will generate discrimination, rather than helping to avoid it.

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

1. End-users shall have the right ~~freebe~~ to access and distribute information and content, run **and provide** 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.

   [2nd subpar deleted]

Why this is acceptable: Chapter 4 of the Regulation is “user right to open internet access”. The Charter of Fundamental Rights refers to the right of freedom of expression. It is incongruous to refer to a vague concept of being “free” in this context.

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. Such services shall only be offered if the network capacity is sufficient to provide them in addition to internet access** services **and they are not to the ~~material~~ detriment of the availability or** quality of **internet access services. Providers of internet access to end-users shall not discriminate between ~~such services~~ functionally equivalent services and applications.**

[2nd subpar deleted]

Why this is acceptable: This is the same as the Industry Committee with two exceptions. “Material” has been deleted from “material detriment” as this is superfluous. “Such services” at the end of the amendment has been replaced with “functionally equivalent services and applications”. The original text restricts the prohibition on discrimination to discrimination between specialised services, which is far too narrow to be useful. The prohibition on discrimination should also cover potential discrimination between specialised services and equivalent online services.

~~3. This article is without prejudice to Union or national legislation related to the lawfulness of the information, content, application or services transmitted.~~

Why this is acceptable: There is nothing in this Regulation which would either make legal activities illegal or vice versa. This text is therefore entirely misleading, confusing and redundant.

4. End-users shall be provided with complete information in accordance with Article 20(2), Article 21(3) and Article 21a of Directive 2002/22/EC, including information on any (deletion) traffic

management measures applied that might affect access to and distribution of information, content, applications and services as specified in paragraphs 1 and 2 of this Article.[1]

Why this is acceptable: This is the same as the Industry Committee text

5. Providers of internet access services and end-users may ~~Within the limits of any contractually~~ agree~~d~~ to set limits on data volumes or speeds for internet access services.~~, p~~ Providers of internet access services shall not restrict the rights ~~freedoms~~ provided for in paragraph 1 by blocking, slowing down, **altering,** discriminating **or degrading** 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 be transparent, non-discriminatory, proportionate and necessary to:

Why this is acceptable: This clarification makes it clear that download limits and reduced speeds may be agreed between providers and customers. It then explains that discrimination may not happen, irrespective of such limits. The general prohibition of discrimination should cover all internet traffic, whether it is part of a contractually-agreed data limit or not.

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

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

c. **prevent or mitigate** the effects of temporary ~~or~~ and exceptional network congestion provided that equivalent types of traffic are treated equally.

Why this is acceptable: This change fixes a linguistic inconconsistency. Clearly, it is not possible for congestion to be temporary but not exceptional or vice versa.

Traffic management measures shall not be maintained longer than necessary.[2]

1 IMCO adopted text AM 42 – IMCO exclusive competence. "Reasonable" deleted as not used in 23(5), exclusive ITRE competence, as the word adds nothing.

2 IMCO 43 (part)

Without prejudice to Directive 95/46, traffic management **measures shall** only entail **such** processing of **personal** data that is necessary and proportionate to achieve the purposes set out in this paragraph**, and shall also be subject to Directive 2002/58, in particular with respect to confidentiality of communications.**

Providers of internet access services shall put in place appropriate, clear, open and efficient procedures aimed at addressing complaints alleging breaches of this Article. Such procedures shall be without prejudice to the end-users right to refer the matter to the national regulatory authority.

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 compliance with Article 23(5)** and 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** on an annual basis **regarding their monitoring and findings, and provide those reports to the Commission and BEREC.**
2. In order to prevent the ~~general~~ impairment of quality of service for internet access services or to safeguard the ability of end-users to access and distribute content or information or to run applications, services **and software** of their choice, national regulatory authorities shall have the power to impose minimum quality of service requirements**, and where appropriate, other quality of service parameters, as defined by the national regulatory authorities,** on providers of electronic communications to the public.

Why this is acceptable: As with the previous instances of “general”, we propose deleting the word as it adds no further meaning to the text.

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. 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.[3]

3. **Within six months of adoption of this regulation, BEREC shall, after consulting stakeholders and in close cooperation with** the Commission, **lay down general guidelines** defining uniform conditions for the implementation of the obligations of national competent authorities under this Article**, including with respect to the application of traffic management measures and for monitoring of compliance.**

Article 24a – Review

The Commission shall, in close cooperation with BEREC, review the functioning of the provisions on specialised services and, after a public consultation, shall report and submit any appropriate proposals to the European Parliament and the Council by [insert date three years after the date of applicability of this regulation].

Article 30a - Supervision and enforcement

1. **National regulatory authorities shall have the necessary resources to 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.**

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3 IMCO adopted text AM 45 – IMCO exclusive competence. IMCO text on complaint procedures addressed substantively identically in Art 30a. IMCO text on BEREC guidelines in Art 24(3), maintained by ITRE.

5. **National regulatory authorities shall put in place appropriate, clear, open and efficient procedures to address complaints alleging breaches of Article 23. National regulatory authorities shall respond to complaints without undue delay.**

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