



Written Opinion on the Telecoms Single Market Regulation

[Introductory statement](#)

[The Importance of Protecting Net Neutrality](#)

[The Telecoms Single Market Regulation](#)

[Regulatory Tools to Combat Net Discrimination](#)

[Discriminatory price differentiation and “Zero Rating”](#)

[In Closing](#)

Introductory statement

Dear Members of the Environment and Communications Committee of Althingi,

I would like to thank you very much for the opportunity given to Access Now to share with you our analysis of the European Union Regulation 2015/2120 laying down measures concerning open internet access, also known as the Telecoms Single Market Regulation.¹ We further supplement this analysis with information on emerging national regulatory standards and international norms on the issue of net neutrality and combating network discrimination.

Access Now is an international organisation which works to defend and extend the digital rights of users at risk globally.² Through representation in 10 countries around the world – including our presence in the European Union – Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet’s continued openness and the protection of fundamental rights. This objective is reaffirmed in Access Now’s leading role in promoting Net Neutrality globally and pioneering stance against price discrimination.

¹ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2120&from=EN>

² Access Now - About us <https://www.accessnow.org/about-us/>

Access Now has been working on the Telecoms Single Market Regulation, since its introduction in 2013, providing analysis to lawmakers in the European Commission, Parliament, and the Council of the EU. To provide the Committee with a comprehensive overview of this Regulation, we have provided information on:

- the principle of Net Neutrality;
- the legislative negotiations in the European Union;
- the rules on network discrimination practices; and
- standards and regulatory models on “zero rating” schemes, which are defined below.

Access Now also filed comments to the United States Federal Communications Commission’s (FCC) rulemaking process which resulted in the 2015 Open Internet Order, and has provided inputs on the issue of “zero rating” practices and discriminatory price differentiation to regulatory consultations on the implementation of Brazil’s Marco Civil law and to the Telecom Regulatory Authority of India.^{3 4}

We look forward to future discussions addressing all issues pertinent to the future of the internet and remain at your disposal for any questions or comments.

Thank you very much,

Estelle Massé
Access Now EU Policy Analyst

The Importance of Protecting Net Neutrality

In 2011, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted a report to the UN Human Rights Council on trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet.⁵ The report explained that:

“Given that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, ensuring universal

³ Access Now’s comments to the FCC Notice of Proposed Rulemaking on Protecting and Promoting the Open Internet https://s3.amazonaws.com/access.3cdn.net/af949ec97d0da13532_d6m6bpg10.pdf

⁴ Access Now’s submission on zero rating and the Marco Civil da Internet https://s3.amazonaws.com/access.3cdn.net/7f755440a612008202_evm6b93it.pdf

⁵ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 2011 http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

access to the Internet should be a priority for all States. Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population.”

Net Neutrality lies at the very core of the internet’s potential for development and the exercise of rights. Internationally, it has become increasingly accepted that “Net neutrality requires that the internet be maintained as an open platform, on which network providers treat all content, applications and services equally, without discrimination”.⁶ These developments are reflected in the 2015 Outcome Document of the WSIS+10 which acknowledged “the important regulatory and legislative processes in some Member States on the open Internet in the context of the Information Society and the underlying drivers for it, and call for further information sharing at the international level on the opportunities and challenges.”⁷

Net Neutrality means that all traffic on the internet is treated on an equal basis, no matter where you are, the type of content you are trying to access or deliver, or the equipment you are using. Any deviation from this principle amounts to network discrimination unless it is proven to be necessary, proportionate, temporary, targeted, transparent, and in accordance with relevant laws.

Protecting the openness of the internet by guaranteeing Net Neutrality amounts to protecting and promoting free expression and freedom of opinion, which are integral in any democratic country. The Inter-Parliamentary Union – in its unanimous resolution on ‘Democracy in the Digital Era and the Threat to Privacy and Individual Freedoms’ – buttressed this point when it said that it:

*“... Calls on parliaments to review their national frameworks and State practices with a view to promoting and increasing public participation and involvement in the digital era, free exchange of information, knowledge and ideas and equal access to the Internet and, with a view to enhancing democracy in the 21st century, **encourages parliaments to remove all legal limitations on freedom of expression and the flow of information and to uphold the principle of Net neutrality;**”⁸ [emphasis added]*

Finally, Net Neutrality creates an impetus for the development and upgrade of telecommunications networks – which is of particular importance for the development of rural areas.

⁶ Global Net Neutrality Coalition, www.thisisnetneutrality.org

⁷ Outcome Document of the High-Level Meeting of the General Assembly on the Overall Review of the Implementation of World Summit on the Information Society (WSIS) Outcomes
<http://workspace.unpan.org/sites/Internet/Documents/UNPAN95707.pdf>

⁸ Democracy in the Digital Era and the Threat to Privacy and Individual Freedoms, Resolution adopted unanimously by the 133rd IPU Assembly <http://www.ipu.org/conf-e/133/res-1.htm>

The Telecoms Single Market Regulation

The European Parliament adopted the Telecoms Single Market Regulation on 27 October 2015. Passage of the TSM concluded a two-year negotiation period between the EU Commission, the Council of the EU, and the EU Parliament. At every step of the way, civil society groups and consumer organisations have pushed back against creating rules that would undermine Net Neutrality, harm users' rights and hinder innovation.

Until recently, only two EU countries – the Netherlands and Slovenia – had comprehensive national Net Neutrality laws while other member states were taking action to prevent the rise of gatekeepers across the internet. To preserve non-discriminatory access to the internet, in a harmonised manner, action at the EU level was needed. In September 2013, when the Commission introduced the TSM, the text was deeply flawed.⁹ It would have enabled paid prioritisation and created slow lanes over the internet, severely damaging users' freedom to receive and impart information. Citizens and NGO groups, including Access Now, fought back under the auspices of the SaveTheInternet.eu coalition.¹⁰ Six months later, the European Parliament adopted a series of amendments intended to remove all the loopholes from the text, codifying Net Neutrality in EU legislation for the very first time.¹¹

Unfortunately, one year later representatives of EU member states gathered at the Council and reached an agreement which reintroduced those same loopholes, and even worse, inserted new discriminatory practices such as mandatory, default filtering of the internet.¹² After that, the opaque and undemocratic process known as the trialogue negotiations began. Through this process, the Parliament negotiated with the European Commission and the Council to agree on a compromise text.

The trialogue negotiations lasted from March to June 2015. During that time, the SaveTheInternet.eu coalition repeatedly urged the Parliament to stay strong and defend the text they had originally adopted, which protected Net Neutrality. On 30 June, the institutions finally agreed on a text, but it was a mixed-bag – weaker than the original Parliament text though much stronger than the Council text.¹³ The Parliament, under pressure from the Commission and the Council, did their utmost to retain what they could of their amended version.

⁹ Access Now's Opinion on the European Commission proposal for a Regulation on a single market for electronic communications

<https://www.accessnow.org/cms/assets/uploads/archive/docs/opinion-connected-continent.pdf>

¹⁰ SaveTheInternet.eu - Home <https://savetheinternet.eu/>

¹¹ Access Now, The European Parliament takes important step to enshrine net neutrality into law

<https://www.accessnow.org/the-european-parliament-takes-important-step-to-enshrine-net-neutrality-int/>

¹² Access Now, Latest Net Neutrality proposal in the EU: a wolf in sheep's clothing?

<https://www.accessnow.org/latest-net-neutrality-proposal-in-the-eu-a-wolf-in-sheeps-clothing/>

¹³ Access Now, The EU Parliament adopts ambiguous Net Neutrality legislation

<https://www.accessnow.org/the-eu-parliament-adopts-ambiguous-net-neutrality-legislation/>

The result: the adopted text provides baseline Net Neutrality protections for the EU, but vagueness remains in the text and can lead to misinterpretation. The Parliament chose to adopt enough to create rules for protecting the access to the unfettered internet, however, it is left to regulators and courts to sort out the details of the application and details of these rules. The Body of EU Telecoms Regulators (BEREC) have been tasked with developing detailed guidelines which will give concrete meaning to the adopted rules and address the remaining ambiguities.¹⁴

Since 2013, the road to Net Neutrality in the EU seemed long and winding, and while the discussion is not over, the intention of the legislators with this Regulation has always been clear. From the Commission to the Council, representatives have repeatedly expressed their willingness to protect and guarantee the openness of the internet encompassed in the Net Neutrality principles. This is reflected at the very beginning of the Regulation, in the article laying down the objective of this law as well as in Article 3 which establishes that “Providers of internet access services shall treat all traffic equally”. This clear objective must guide the regulators as they the details of the adopted rules.

Access Now, together with a small group of representatives from civil liberties and consumer groups, was invited to meet with BEREC and contribute to this Net Neutrality regulatory process.¹⁵ Following our meeting, BEREC met with content providers and ISPs to hear their views on the TSM. BEREC guidelines must be finished by 29 August 2016, as provided by the TSM.

Regulatory Tools to Combat Net Discrimination

When the Telecoms Single Market Regulation was first introduced, the majority of stakeholders agreed on the need to outlaw blocking and throttling practices, which directly interfere with user’ right to access and deliver information over the internet. The Body of European Regulators for Electronic Communications had demonstrated in a 2012 study that blocking, throttling of VoIP and P2P traffic, and other discriminatory practices are pervasive throughout Europe.¹⁶ While these practices are clearly outlawed in the final text of the TSM, the debate on Net Neutrality has been less developed till now insofar as when it has focused on price discrimination.

The Regulation allows for the development and delivery of innovative specialised services such as IPTV or e-health services, that cannot run over the internet given their specific technical needs. The provisions allowing these services cannot be abused to offer a “specialised” access to

¹⁴ Body of European Regulators of Electronic Communications - About us
http://berec.europa.eu/eng/about_berec/what_is_berec/

¹⁵ Access Now’s written submission for the BEREC stakeholder dialogue on Net Neutrality
https://www.accessnow.org/cms/assets/uploads/2015/12/BERECsubmission_NN_2015.pdf

¹⁶ A view of traffic management and other practices resulting in restrictions to the open Internet in Europe - Findings from BEREC’s and the European Commission’s joint investigation
https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Traffic%20Management%20Investigation%20BEREC_2.pdf

existing online services like Twitter or Spotify. Abuse of this provision amounts to a violation of the Net Neutrality principle requiring all internet traffic to be treated equally.

During the TSM negotiations, we acknowledged that several telecoms operators in the EU increasingly entered into commercial deals with services, to offer unlimited access mobile networks to online services such YouTube, Facebook or online streaming music services for example, separate from overall general internet usage. These offers are only accessible to dominant and deep-pocketed companies that have the resources to conclude financial agreements or other arrangements to get their services into a fast or priority lane. They are inherently anti-competitive and are in violation of the objective of the TSM.

Strict control over these practices is necessary to prevent telecoms operators from becoming internet gatekeepers, being able to pick and choose winners and losers among content and application services. Failure to prevent these developments would result in the creation of a new monopoly for the telecoms operators: access to their customers. This would have a damaging impact on competition, choice, and innovation, in addition to affecting the right to free expression and access to information.

Regarding practices defined under “reasonable traffic management”, as observed by BEREC in the 2012 guidelines on Net Neutrality, any deviation from these rules is to be defined as “restricted access to the internet”.¹⁷ While telecoms operators need to manage internet traffic to ensure proper functionality of the network, this must be done in accordance to the specific criteria defined by the Regulation.

Similarly, the Regulation provides for strict rules on traffic monitoring practices put in place by operators. They must be in line with EU data protection law and the Regulation further establishes that the use of privacy-intrusive tools, which are used to monitor traffic, is not required.

Finally, the Regulation provides a clear set of enforcement rules as well as a provision covering transparency to the benefit of users. Under this provision, information regarding traffic management practices, speed and delays must be made available to the public. We have requested BEREC to insist that this information is required to be clear, verifiable and simple in order to ensure it is understandable by a large audience.

Discriminatory price differentiation and “Zero Rating”

The issue of zero rating was at the core of the Net Neutrality debate during the negotiations of the Telecoms Single Market. “Zero rating” schemes limit user access to services and applications

¹⁷ BEREC, Guidelines for Quality of Service in the scope of Net Neutrality
http://berec.europa.eu/files/news/bor_12_32_guidelines.pdf

chosen by dominant tech and telecom companies.¹⁸ This prioritisation results in network discrimination, in which users are delivered access to some, but not all, of the internet, resulting in unequal access — the very opposite of Net Neutrality. Free expression and access to information depend on access to the full, unfettered internet; anything less harms users' rights.

Beyond free expression concerns, “zero rating” programmes could also facilitate the surveillance of users. By limiting the number of platforms and websites through which users communicate and access information, “zero rated” programmes give operators incentives to scrutinise our data traffic in order to discover which content, apps, and services are the most popular to strike deals with. This in turn makes surveillance and censorship much easier, as the data only flows through a limited number of easily identifiable channels.¹⁹

Many of those offers have been initiated in the Global South region by internet giants and successful online platforms, in partnership with a handful of telecommunications operators and often with the stated goal of reducing the global digital divide and connecting more people to the internet. Far from achieving this goal, these services raise serious human rights concerns and are increasingly being rejected by users in this region.

In Paraguay where a programme led by Facebook initially called “Internet.org” (now rebranded to FreeBasics, a programme of Internet.org) launched in 2015, users reacted by creating a “tunnel” establishing a link to the unrestricted internet, circumventing the lock-in.²⁰ This reaction shows the importance of being able to access the whole internet for users which is confirmed in BEREC's report on how consumers value the net. This report found that internet users consider it ‘mission-critical’ to have access to the internet and focus their demand on “high-speed broadband performance, continuous availability, value for money and rich online user interactivity and experience.”²¹

More recently, in January 2016, the Telecom Regulatory Authority of India (TRAI) outlawed discriminatory practices such as “zero rating” offered by telecoms service providers, and banned discriminatory pricing of data in favour of Net Neutrality. The ruling follows more than a year of concerted activism by Indian civil society groups led by the SavetheInternet.in coalition, and many other organisations, including Access Now.²² These regulations prohibit telecom service providers from offering discriminatory data tariffs or from entering into arrangements with others

¹⁸ Access Now's position on zero rating schemes

https://s3.amazonaws.com/access.3cdn.net/d812d59f706c3e8a75_w0m6iipn5.pdf

¹⁹ Facebook's Internet.org unveils free, limited web access — such opportunity, but at what cost?

<https://gigaom.com/2014/07/31/facebooks-internet-org-unveils-free-limited-web-access-such-opportunity-but-at-what-cost/>

²⁰ This App Lets You Piggyback Facebook's Free Internet to Access Any Site

<http://motherboard.vice.com/read/this-app-lets-you-piggyback-facebooks-free-internet-to-access-any-site>

²¹ BEREC, How consumers value the Net

berec.europa.eu/eng/document_register/subject_matter/berec/download/1/5024-berec-report-on-how-consumers-value-net-1.pdf

²² SavetheInternet.in <https://www.savetheinternet.in/>

to provide such programmes; content-based differential data pricing is not allowed. The regulations provide for an exemption for emergency services or for grave public emergencies, but subject to such reporting to TRAI and possibility of subsequent adjudication by it. TRAI can issue orders to licensed telcos in order to enforce compliance and the regulations provide for financial penalties on service providers for violations.²³

In the EU, a 2016 study from Rewheel, an independent Finnish consultancy on network economics, established compelling systematic evidences that “zero rating” causes consumer and competitive harm. The study has found that European Union mobile operators, that “zero rated” video services, charge on average twice more for mobile internet access plans. These operators affordable mobile data plan also have very restrictive gigabyte caps - twice less - than operators that do not “zero rate” content.²⁴

From a regulatory perspective, we have provided evidence to BEREC that sub-internet offers and “zero rating” practices as a category, are clearly prohibited under the TSM. These offers blatantly limit users’ rights to receive and impart information over the whole internet, as safeguarded in the Regulation. Allowing offers that would provide access to some but not all the services, content, and applications available online contradicts the objective of the Telecoms Single Market Regulation and would severely harm users’ freedom of choice and access to information, and right to receive and impart information. Nothing in this Regulation can be interpreted in a way that would allow online services to be offered as specialised services or allow offers of “bits of internet”.

In Closing:

The revolutionary nature of the internet rests in its breadth and diversity. Net Neutrality requires an active commitment from public agencies and private telecom actors to protect this principle in practice, including preventing the rise of price discrimination schemes that would undermine the future of the internet and limit users’ rights.

²³ Access Now, Indian regulator stands up for Net Neutrality, rules against zero-rated services
<https://www.accessnow.org/indian-regulator-stands-up-for-net-neutrality-rules-against-zero-rated-services/>

²⁴ Rewheel - Digital Fuel Monitor, Tight oligopoly mobile markets in EU28 in 2015
http://dfmonitor.eu/insights/2016_jan_premium_tightoligopoly_eu28/