

Access Amendments to the European Commission proposal for a Regulation on a single market for electronic communications

Access broadly welcomes the Commission proposal for a Regulation on a single market for electronic communications achieving a Connected Continent (2013/0309), particularly the aspects which have the potential to enshrine the guiding principles of the internet – network neutrality -- into law. However, we regret that the proposed text contains several loopholes that, if not properly addressed, could constitute a serious threat to fundamental rights and innovation in Europe.

The following are Access' proposed amendments to the Commission's text that aim to address these loopholes and to ensure that the internet remains an open and dynamic platform for innovation, competition and the flourishing of human rights in Europe. Our amendments therefore focus on the aspects of the Regulation relating to net neutrality (**recitals 46, 47 & 50 – articles 2, 19, 23 & 24**).

Recital 46

Recital 46	
(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 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.
Justification: The relevance of referencing copyright legislation is unclear in the context of this proposal. On the deletion of "lawful", all content is legal until it is deemed to be otherwise. If a judicial decision has been made regarding illegal content, it is clear that this will have to be respected by the providers.	

Recital 47

Recital 47	
(47) In an open internet, providers of electronic communications to the public 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 reasonable traffic management measures. Such measures should be transparent, proportionate and non-discriminatory. Reasonable traffic management encompasses prevention or impediment of serious crimes, including voluntary actions of providers to prevent access to and distribution of child pornography . Minimising the effects of network congestion should be considered reasonable provided that network congestion occurs only temporarily or in exceptional circumstances.	(47) In an open internet, providers of electronic communications to the public 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 reasonable traffic management measures. Such measures should be transparent, proportionate and non-discriminatory. Reasonable traffic management encompasses the implementation of court orders. Minimising the effects of network congestion should be considered reasonable provided that network congestion occurs only temporarily or in exceptional circumstances.
Justification: There is no definition of "serious crime". It is also unclear what "measures to prevent" would	

entail. In short, this text lacks clarity and would therefore lead to legal uncertainty. Moreover, to request such measures of ISPs would lead to private policing activities carried out by internet access providers outside the rule of law.

Recital 50

Recital 50	
<p>(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 to the public is necessary for the provision of specialised services and is expected to play an important role in the development of new services such as machine-to-machine (M2M) communications. At the same time such arrangements should allow providers of electronic communications to the public to better balance traffic and prevent network congestion. Providers of content, applications and services and providers of electronic communications to the public should therefore be free to conclude specialised services agreements on defined levels of quality of service as long as such agreements do not substantially impair the general quality of internet access services.</p>	<p>(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 to the public is necessary for the provision of specialised services and is expected to play an important role in the development of new services such as machine-to-machine (M2M) communications. At the same time such arrangements should allow providers of electronic communications to the public to better balance traffic and prevent network congestion. Providers of content, applications and services and providers of electronic communications to the public should therefore be free to conclude specialised services agreements on defined levels of quality of service as long as such agreements do not impair the quality of internet access services.</p>
<p>Justification: The words “substantially” and “general” are undefined qualifiers, which have no obvious meaning and will generate new barriers and new legal uncertainty.</p>	

Article 2

Article 2 - Paragraph 15	
<p>(15) "specialised service" means an electronic communications service or any other service that provides the capability to access specific content, applications or services, or a combination thereof, and whose technical characteristics are controlled from end-to-end or provides the capability to send or receive data to or from a determined number of parties or endpoints; and that is not marketed or widely used as a substitute for internet access service;</p>	<p>(15) "specialised service" means an electronic communications service or any other service operated within closed electronic communications networks using the Internet Protocol with strict admission control that is not marketed or used as a substitute for internet access service; and that is not functionally identical to services available over the public internet access service;</p>
<p>Justification: The current definition of specialised services is far too broad and could mean, in practice, any online service. We therefore recommend modifying the definition to ensure that specialised services should not be used as substitute for internet access services or degrade its quality. In this regard, our modifications are based on BEREC's definition on specialised services¹.</p>	

¹ http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/1101-berec-guidelines-for-quality-of-service-in-the-scope-of-net-neutrality

Article 19

Article 19	
[...]	<i>deleted</i>
<p>Justification: BEREC has pointed out several times that ASQ is superfluous and indeed could be (mis)used as another way to prioritise traffic for anti-competitive reasons. Imposing such an obligation would unnecessarily burden operators. Moreover, as BEREC has shown, there is a risk that such regulatory measures could hinder innovation and competition, as it would lock ISPs into this now out-dated approach, stifling the development of new technical innovations that could improve the quality of internet access.²</p>	

Article 23

Article 23 - Paragraph 1	
<p>1. End-users shall be free to access and distribute information and content, run applications and use services of their choice via their internet access service.</p> <p>End-users shall be free to enter into agreements on data volumes and speeds with providers of internet access services and, in accordance with any such agreements relative to data volumes, to avail of any offers by providers of internet content, applications and services.</p>	<p>1. End-users have the right to access and distribute information and content, run applications, connect hardware and use services and software of their choice via their internet access service.</p> <p>Providers of internet access services may however offer agreements that differentiate according to data volumes and speeds provided that they do not discriminate based on the content, application or service themselves, or specific classes.</p>
<p>Justification: For sake of clarity and legal certainty, it would be more appropriate to use the word “right.” Indeed, the “freedom” for users to choose their services will actually empower Telecommunication companies to offer them numerous confusing and restricted services instead of giving users the right to seek, receive, and impart information via the open internet. As a matter of fact, it has been estimated that British consumers alone lose approximately 5 billion pounds a year, due to their “freedom” to choose between services.³</p>	

Article 23 - Paragraph 2	
<p>2. End-users shall also be free to agree with either providers of electronic communications to the public or with providers of content, applications and services on the provision of specialised services with an enhanced quality of service.</p> <p>In order to enable the provision of specialised services to end-users, providers of content, applications and services and providers of electronic communications to the public shall be free to enter into agreements with each other to transmit the related data volumes or traffic as specialised services with a defined quality of service or dedicated capacity. The provision of specialised services shall not impair in a recurring or continuous manner the general quality of internet access services.</p>	<p>2. End-users shall also have the right to agree with either providers of electronic communications to the public or with providers of content, applications and services on the provision of specialised services with an enhanced quality of service.</p> <p>In order to enable the provision of specialised services to end-users, providers of content, applications and services and providers of electronic communications to the public may enter into agreements with each other to transmit the related data volumes or traffic as specialised services with a defined quality of service or dedicated capacity. The provision of specialised services shall not impair the quality of internet access services.</p>
<p>Justification: Further safeguards are needed to ensure that specialised services are not confounded with</p>	

² http://berec.europa.eu/eng/news_consultations/whats_new/1673-berec-views-on-the-proposal-for-a-regulation-laying-down-measures-to-complete-the-european-single-market-for-electronic-communications-and-to-achieve-a-connected-continent

³ <http://www.telegraph.co.uk/technology/mobile-phones/8441980/Britons-could-save-195-each-per-year-on-mobile-phone-bills.html>

internet access services. The wording "in a recurring or continuous manner" is very unclear. The degradation of best effort principle has to be avoided.

Article 23 - Paragraph 5

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:

5. Providers of internet access services shall not restrict the **rights** provided for in paragraph 1 by blocking, slowing down, degrading, **altering** or discriminating against specific content, applications or services, or specific classes thereof, except in **certain special** cases where it is necessary to apply reasonable traffic management measures. Reasonable traffic management measures shall be transparent, non-discriminatory, and **strictly** proportionate and necessary to:

Justification: The first phrase of this provision should be deleted as it would allow ISPs to continue discriminatory practices that are persistent throughout Europe, as long as they are transparently included in these contracts that users will be "free" to sign on to. This provision negates the intention of the article, which is to ensure that ISPs do not discriminate connection speeds, or to block applications and services.

Article 23 - Paragraph 5.a

a) implement a legislative provision or a court order, **or prevent or impede serious crimes;**

a) implement a legislative provision or a court order;

Justification: To prevent or impede serious crime without a legal basis or a court order would lead to law enforcement activities by private companies outside the rule of law.

Article 23 - Paragraph 5.b

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

b) preserve the integrity and security of the **European electronic communications provider's** network, services provided via this network, and the end-users' terminals;

Justification: Clarification.

Article 23 - Paragraph 5.c

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 **for direct marketing purposes** to end-users who have given their prior consent to such restrictive measures;

Justification: The term "unsolicited communications" in internet context needs to be clarified in order to avoid broad interpretations, which could lead to arbitrary restrictions.

Article 23 - Paragraph 5.d

d) **minimise** the effects of temporary **or** exceptional network congestion provided that equivalent types of traffic are treated equally.

d) **mitigate** the effects of temporary **and** exceptional network congestion provided that equivalent types of traffic are treated equally.

Justification: Only in cases where application-agnostic measures fail to solve the problem, application-specific measures should be allowed to be taken as long as those measures deal with equivalent types of traffic equally.

Article 23 - Paragraph 5

Reasonable traffic management shall only entail processing of data that is necessary and proportionate to achieve the purposes set out in this

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paragraph.	<i>Processing of the content part of the communication during transmission for these purposes is not permitted.</i>
Justification: To protect the users privacy network management shall never be based on the content part of data transmissions.	

Article 24

Article 24 - Paragraph 1	
1. National regulatory authorities shall closely monitor and ensure the effective 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 non-discriminatory 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.	1. National regulatory authorities shall closely monitor and ensure the effective ability of end- users to benefit from the freedoms provided for in Article 23 (1) and (2), compliance with Article 23 (5) and Article 2 (15) , and the continued availability of non-discriminatory 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, competition and innovation. National regulatory authorities shall report on an annual basis to the Commission and BEREC on their monitoring and findings. Reports should be carried out in a transparent manner, and shall be made freely available to the public.
Justification: Extend the monitoring obligations of the national regulation authority to cover competition issues and ensure that reporting obligations apply not only to European bodies, but also to the public.	

***For more information, see our position paper here, or contact us at our Brussels office:
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About us: Access (AccessNow.org) is an international NGO that defends and extends the digital rights of users at risk around the world. Combining innovative policy, user engagement, and direct technical support, we fight for open and secure communications for all.