



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

Last September 2013, the Commissioner responsible for the Digital Agenda, Neelie Kroes, tabled a **Regulation aimed at completing a European single market for electronic communications and to achieve a Connected Continent**¹ (also known as the Telecoms proposal), in which she proposed to include provisions on “network neutrality.”

While we welcome any proposal that would enshrine the guiding principles of the open internet into European law, 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 analysis, divided by themes, will focus on the provisions contained in the proposed Regulation that relate to net neutrality (**Articles 2, 19, 23, 24, 25 & 26**).

Introduction: The Internet’s Guiding Principles

The internet’s continued success is based on three foundational principles. First, the ***end-to-end principle***, which ensures that all points in the network should be able to connect to all other points in the network. Second, the ***best effort principle*** which guarantees that all providers of the internet should make their best effort to deliver traffic from point to point as expeditiously as possible. Last but not least, the ***innovation without permission*** principle, which states that everyone should be able to innovate without permission from anyone or any entity. These principles can be collectively defined as network neutrality, which is fundamental to ensure growth and innovation in the ICT sector and safeguard the internet’s core value for democracy and freedom of communication.

Net neutrality means that all traffic on the internet is treated on an equal basis, no matter its origin, recipient, sender, type of content or the means (e.g. equipment or protocols) used to transmit packets. Any deviation from this principle (for instance for congestion purposes) must be necessary, proportionate, temporary, targeted, transparent, and in accordance with relevant laws.

1- “FREEDOM” vs. RIGHTS

Throughout the proposed Regulation, the EU Commission refers to end-users “freedom.” 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.²

Access therefore suggests replacing the word “freedom” with “rights” throughout the text, particularly in Articles 21, 23, & 24.

1 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0627:FIN:EN:PDF>

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

2 - NON DISCRIMINATION PRINCIPLE

Article 23 introduces a much-needed provision banning practices such as the blocking or the slowing down of content. This is a welcome provision, particularly in light of BEREC's findings on the frequency of these discriminatory practices throughout Europe.³

However, this provision alone is not enough to protect the open and neutral internet in Europe. Explicit blocking and throttling of services and applications is only *one* of the many ways that discrimination occurs on the network (see for e.g. Section 3 on specialised services). In line with the opinion of the European Data Protection Supervisor, while the inclusion of the net neutrality principle is welcome, this provision *"is devoid of substance because of the almost unlimited right of providers to manage internet traffic"*.⁴

Moreover, **Article 23.5** includes a provision prohibiting discrimination of users' right to access content *"within the limits of any contractually agreed data volumes or speeds."* This wording is problematic, as it would allow ISPs to continue discriminatory practices that are persistent throughout Europe⁵, as long as they are transparently included in contracts that users will be "free" to sign on to. This provision negates the apparent intention of the article, which is to ensure that ISPs do not discriminate connection speeds or block applications and services.

In order to ensure the provision does in fact guarantee non-discrimination, Access suggests deleting the wording "within the limits of any contractually agreed data volumes or speeds for internet access services" in Article 23.5.

3 - SPECIALISED SERVICES

Article 23 allows content and application providers to conclude agreements with ISPs to transmit their traffic as *"specialised services with an enhanced quality of service or dedicated capacity"*. The proposal would allow for an exceptionally broad interpretation of "specialised services" which could, in practice, mean that access to any online service could form the basis of a "specialised" service. If this became the rule, ISPs would effectively create a two-tiered internet, where ISPs could determine which content would be delivered first and faster than the rest. This would undermine the best effort principle, stifling innovation and competition and the enjoyment of human rights on the internet.

Specialised services would be completely legitimate if they were not developed at the expense of internet access services. If **Article 2.15** remains unchanged, it would mean that Internet access providers could essentially sell access to its own customers to online services – to the detriment of innovation, competition and freedom of communication.

³ http://bereg.europa.eu/doc/2012/TMI_press_release.pdf

⁴ http://europa.eu/rapid/press-release_EDPS-13-10_en.htm

⁵ https://ec.europa.eu/digitalagenda/sites/digitalagenda/files/Traffic%20Management%20Investigation%20BEREC_2.pdf

Indeed, as a recently published report presented to the European Parliament has warned, this approach risks undermining the innovation without permission principle.⁶ These practices of prioritisation are already occurring around Europe, whereby ISPs offer internet connection contracts that only give access to some services such as Facebook or Google.⁷ A proposal promoting this broad definition of specialised services would create an environment where only the highest bidders would be able to reach end-users. This would result in greater market access for those who can afford it, such as US giants in the ICT sector, thereby crippling European innovation.

What's more, the proposed text on specialised services appears to be very similar to the "End to End quality of service delivery" proposal made by ETNO at the WCIT Conference in December 2012,⁸ which, at the time, was swiftly rejected by the EU Commission due to concerns that this approach "risked threatening the future of the open internet and internet freedoms, as well as having the potential to undermine future economic growth."⁹ Despite this rejection, the Commission now appears to be prepared to take such risks.

Article 24.1 makes National Regulatory Authorities (NRAs) responsible for monitoring "*the effects of specialised services on cultural diversity and innovation.*" Such provision demonstrates that the European Commission is aware of possible negative impacts of specialised services and shows the need for legal clarity.

Access strongly recommends modifying the definition of specialised services to ensure that they are separate services not provided on the public internet, and that they cannot be used as substitutes for internet access services or degrade its quality. In this regard, BEREC's definition¹⁰ on specialised services would be a good starting point as it specifies that these services not provided on the open internet.

4 - "REASONABLE" TRAFFIC MANAGEMENT

Article 23.5 lays down the framework for "reasonable" traffic management. Although any legislation regulating net neutrality should include a clear definition of what constitutes "reasonable" traffic management in order to provide ISPs with guidance on when these practices are acceptable, Article 23.5 contains several loopholes.

Indeed, one of the most problematic issues is the exception for management to "*prevent or impede serious crime.*" This provision raises serious concerns due to the lack of a definition of "serious crime" and will lead to private policing activities being carried out by ISPs outside the rule of law, which is in direct violation of

6 <http://www.openforumacademy.org/research/Prospective%20Analysis%20of%20Net%20Neutrality%20Policy%20Scenarios%20-%20OpenForum%20Academy%20-%20final.pdf>

7 An example of these practices which are already in place is "Facebook Zero"; read more about it and the implications for the open internet here: <http://xercestech.com/facebook-network-neutrality-problem.geek>

8 <http://files.wcitleaks.org/public/ETNO%20C109.pdf>

9 http://europa.eu/rapid/press-release_MEMO-12-991_en.htm

10 BEREC defines "specialised services" as, "electronic communications services that are provided and operated within closed electronic communications networks using the Internet Protocol. These networks rely on strict admission control and they are often optimised for specific applications based on extensive use of traffic management in order to ensure adequate service characteristics."

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 52 of the Charter of Fundamental Rights of the EU.¹¹ Any “reasonable” traffic management measure should be necessary, targeted, proportional and temporary.¹²

Article 23.5 lists others exceptions for “reasonable” traffic management, which would need to be clarified in order to ensure proportionality, efficiency, non-discrimination and transparency. (See our list of proposed amendments).

Traffic management is not “reasonable” when it aims to “prevent or impede serious crime” via measures that fall outside the rule of law. Access strongly recommends the deletion of this provision. In addition, the list of exceptions allowing reasonable traffic management must be clarified (see attached amendments for details).

5 - ASSURED SERVICE QUALITY (ASQ) CONNECTIVITY PRODUCTS

Under **Article 19**, ISPs are obliged to provide a “European Assured Service Quality connectivity products”. Traditionally, ASQ is intended to enable high-quality end-to-end connectivity services with “guaranteed” quality of service across networks. Access is unsure as to why obliging providers to implement ASQ has been incorporated in the text, particularly as BEREC has shown that ASQ requirements are not necessary¹³ as “technical innovations have improved quality of experience of the Internet.”¹⁴

BEREC has also shown that reciprocal obligations to provide ASQ are an unjustified regulatory burden on operators without significant market power and there is a risk that such regulatory measure could hinder innovation and competition. Enshrining this -- now out-dated -- approach to enhance quality of service would stifle the development of new technical innovations that could improve the quality of internet access.

Finally, the implicit encouragement of ASQ could result in yet another way to increase the proliferation of specialised services and thus to impair the open and neutral internet.¹⁵ BEREC’s comments on the proposed Regulation have acknowledged that the inclusion of ASQ “simply raises its profile, in favour of terminating operators who have long sought to charge for terminating traffic at guaranteed QoS.”¹⁶

Making ASQ offers mandatory for all ISPs proliferates the “sending party networks pays” principle (as proposed by ETNO on WCIT in December 2012¹⁷). ASQ enables discriminatory business models because it would establish Access Tiering throughout the European Internet,¹⁸ propagating a double market.

11 http://www.europarl.europa.eu/charter/pdf/text_en.pdf

12 https://s3.amazonaws.com/access.3cdn.net/653b3b0adb37e88f4b_u7m6vw480.pdf

13 [http://berec.europa.eu/files/document_register_store/2012/11/BoR_\(12\)_120_BEREC_on_ITR.pdf](http://berec.europa.eu/files/document_register_store/2012/11/BoR_(12)_120_BEREC_on_ITR.pdf)

14 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

15 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

16 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

17 <http://files.wcitleaks.org/public/ETNO%20C109.pdf>

18 https://www.ict-etics.eu/fileadmin/events/2011-06-01_2ndETICS_WS/SPNP_Versailles_V10_Versailles.pdf

Any regulatory measures on ASQ will create a burden on operators and threaten the open internet. Article 19 in its entirety should therefore be deleted. However, if it was to remain, Access calls for the deletion of Article 19.2 to remove this obligation for ISPs.

6 - NATIONAL REGULATORY AUTHORITIES (NRAs)

Article 24 empowers NRAs to ensure the ability of end-users to exercise their right “to access and distribute content or information or to run applications and services of their choice” and that they “shall have the power to impose minimum quality of service requirements.” Oddly, it seems that the European Commission aims to achieve a European single market for electronic communications by letting 28 different NRAs monitor users rights and establish minimum quality of service requirements. These provisions are not in line with the intention to harmonise regulation in Europe and would, on the contrary, lead to fragmentation and inequality between users in the EU.

Moreover, as BEREC underlines, the proposed Regulation does not explicitly provide an obligation for NRAs to set up measurement systems to identify degradation and to intervene in cases where this is detected with the most appropriate tool, including minimum quality requirements but also other regulatory remedies (such as penalties, end-to-end interoperability, dispute resolution, etc.).¹⁹

Furthermore, there is a need for NRAs to report in a transparent manner on its activities to ensure that this Regulation is properly enforced. A recent case in Chile demonstrates that in the face of alleged ISP net neutrality violations, NRAs sometimes fail to protect users’ right to access.²⁰

Access recommends to set strong minimum standards to be respected by the NRAs to ensure harmonisation and protection of users’ rights as well as an efficient and transparent reporting system on NRA activities. Furthermore, NRAs should have appropriate monitoring systems to ensure effective enforcement.

7 - TRANSPARENCY

Access welcomes the transparency obligations laid out in **Article 25 and 26** as this could significantly improve users understanding of their contractual rights. We welcome **Article 26.2(e)** in particular -- which obliges ISPs to provide users information on how the simultaneous use of specialised services may practically impact the quality of their connection -- as even legitimate specialised services (see Section 3) can degrade the best effort internet when they are delivered via the same pipe and/or do not have reserved bandwidth. For instance, the use of IPTV may degrade the quality of other content, applications, and services online.

Access welcomes the provisions on transparency included in this proposal, however, transparency alone is insufficient to safeguard network neutrality.

CLOSING COMMENT

19 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

20 <https://ongcivico.org/neutralidad-en-la-red/consejo-para-la-transparencia-determina-que-subtel-ha-denegado-acceso-a-informacion-publica/>

The internet is a platform for economic growth, for innovation, and for the flourishing of human rights. This Regulation is an opportunity to protect the foundational principles of the internet and users' rights. Sir Tim Berners-Lee, inventor of the World Wide Web, strongly believes that net neutrality needs to be enshrined in law since "keeping the Web open for innovation is critical to Europe's future competitive advantage."²¹

Europe has an opportunity to create a harmonised digital single market, where human rights, innovation and competition can flourish; however, if the issues highlighted in this analysis are not amended, the damage to the open internet would be irreparable.

Please find our amendments to improve this proposal and ensure an open and free internet here (<https://www.accessnow.org/page/-/docs/ams-to-connected-continent.pdf>), which will benefit users, innovation, and growth in Europe.

***For more information, see our policy paper on Network Neutrality²², or contact 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.*

²¹ See Sir Tim Berners-Lee's preface in Access' Policy Paper, "Network Neutrality: Ending Network Discrimination in Europe, https://s3.amazonaws.com/access.3cdn.net/653b3b0adb37e88f4b_u7m6vw480.pdf

²² https://s3.amazonaws.com/access.3cdn.net/653b3b0adb37e88f4b_u7m6vw480.pdf