



Position on the Draft Opinion
of the Committee on the Internal Market and Consumer Protection
on the proposal for a regulation of the European Parliament and of the Council
laying down measures concerning the European single market for electronic
communications

EDRi welcomes the draft opinion, but would like to make some comments on selected proposed amendments below. The left column repeats the Commission proposal; the right column contains the amendments proposed by the rapporteur, Malcolm Harbour. EDRi's comments can be found below. For ease of reading, the headings are highlighted:

- green (++) for amendments which we welcome;
- yellow (+) for amendments which pursue good aims, but could benefit from further suggested improvements;
- red (-) for amendments which in our view should be reconsidered.

In each case, a short justification is given.

Amendment 1

Article 2 – paragraph 2 - point 14		+
(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 connected to the internet, irrespective of the network technology used;	(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 connected to the internet; it enables end-users to run any application utilising the electronic communication function of the internet without any form of restriction on the content exchanged, except for the purposes of reasonable traffic management measures or to implement a court order , irrespective of the network technology used;	
<ul style="list-style-type: none">• EDRi's comments: This amendment goes into the right direction since it tries to clarify that there should not be any form of restriction or discrimination. However, it is not clear what the rapporteur means by "the electronic communication function of the internet". It may be that he is trying to explain that an internet access service refers to the functions of the Internet which fall under the definition of "electronic communications network" in the Framework Directive. This is unnecessary in our view. More importantly, the draft opinion does not seek to fully define "reasonable traffic management". Finally, reference to the exception for court orders is unnecessary here. In any event, it would be easier to define such activities as outside the scope of the Regulation, rather trying to mis-define them as "traffic management" and then excluding them.		

Amendment 2

Article 2 – paragraph 2 - point (15) ++	
(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;	(15) "specialised service" means an electronic communications service that is provided and operated within a closed electronic communication network using the Internet Protocol, relying on strict admission control and optimised for specific content, applications or services, or a combination thereof, and the technical characteristics of which are optimised for specific applications based on extensive use of traffic management in order to ensure adequate service characteristics , and that is not used as a substitute for internet access service
<ul style="list-style-type: none">EDRi's comments: The Commission proposal would allow for a broad interpretation of "specialised services" and could mean any online service. Therefore, we fully support the proposed clarification which is based on BEREC's definition - it clearly states that specialised services have to be separate from the public best effort internet and shall be only provided within the provider's network.	

Amendment 3

Chapter IV - Title ++	
Harmonised rights of end-users	Users' rights to open internet access
<ul style="list-style-type: none">EDRi's comments: This is a good amendment since it moves the focus to achieving the goal that the internet must be kept open, and that users have a right to this.	

Amendment 4

Article 21 - Elimination of restrictions and discrimination		-
<p>1. The freedom of end-users to use public electronic communications networks or publicly available electronic communications services provided by an undertaking established in another Member State shall not be restricted by public authorities.</p> <p>2. Providers of electronic communications to the public shall not apply any discriminatory requirements or conditions of access or use to end-users based on the end-user's nationality or place of residence unless such differences are objectively justified.</p> <p>3. Providers of electronic communications to the public shall not apply tariffs for intra-Union communications terminating in another Member State which are higher, unless objectively justified:</p> <p>a) as regards fixed communications, than tariffs for domestic long-distance communications; b) as regards mobile communications, than the euro-tariffs for regulated voice and SMS roaming communications, respectively, established in Regulation (EC) No 531/2012.</p>		
		deleted
<ul style="list-style-type: none">• EDRI's comments: The Commission's proposal, while needing improvement, does establish important principles regarding non-discrimination. It is therefore regrettable that the rapporteur chose to delete rather than improve the text.		

Amendment 5

Article 22 - Cross-border dispute resolution		
<p>1. The out-of-court procedures set up in accordance with Article 34 (1) of Directive 2002/22/EC shall also apply to disputes related to contracts between consumers, and other end-users to the extent that such out-of-court procedures are available also for them, and providers of electronic communications to the public which are established in another Member State. For disputes within the scope of Directive 2013/11/EU¹, the provisions of that Directive shall apply.</p> <p>Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165 of 18 June 2013, p.63.</p>		
		deleted
<ul style="list-style-type: none">• EDRI's comments: This article/amendment is not within our scope.		

Amendment 6

Article 23 – paragraph 1

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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.

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.

1. End-users shall be free to access and distribute information and content, run applications and use services **and devices** of their choice, **irrespective of their origin or destination**, via their internet access service.

deleted

- EDRI's comments: This is a good amendment since it further clarifies that users should also have the right to connect the devices of their choice and adds that there should be no discrimination on the basis of the origin or the destination. However, one small improvement could be made in this amendment by replacing "shall be free" with "shall have the right".
- We fully support deletion of the second sentence of this paragraph. It has been estimated that British consumers alone pay approximately [1]5 billion pounds a year too much, due to their "freedom" to enter into agreements and to choose between numerous confusing service options. Deleting this sentence would avoid that users are given the "freedom" to choose discriminatory services, which will ultimately be negative for them and negative for the broader online innovative environment

Amendment 7

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. National regulatory authorities shall ensure that end-users are free to enjoy specialised services delivered by providers of electronic communications services or providers of content, applications and services.</p> <p>Providers of electronic communication services or providers of content, applications and services shall be allowed to offer specialised services in addition to internet access services, provided that such offers are not to the detriment of internet access services, or their performance, affordability, or quality.</p>
<ul style="list-style-type: none">• EDRI's comments: As announced in the title of this Chapter, end-users rights need to be ensured. We propose to replace "also be free" by "also have the right" (see previous comment above). Introducing an amendment which states that NRAs should have the responsibility to ensure the freedoms would be insufficient. However, it is positive that the rapporteur suggests to delete "recurring or continuous manner the general" which would lead to legal uncertainty.	

Amendment 8

Article 23 – paragraph 4 ++	
<p>4. The exercise of the freedoms 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).</p>	<p>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 reasonable traffic management measures applied that might affect access to and distribution of information, content, applications and services as specified in paragraphs 1 and 2.</p>
<ul style="list-style-type: none">• EDRI's comments: This amendment would improve the provision of information to the end-user. It would also provide the end-user with information on specialised services that are separate from the public internet. However, "reasonable traffic management measures" should be defined in the exceptions of Article 23.5 and not left to the BEREC and the Commission as proposed by the rapporteur in AM 11.	

Amendment 9

Article 23 – paragraph 5

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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:****

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

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 communications to end-users who have given their prior consent to such restrictive measures;

d) minimise the effects of temporary or exceptional network congestion provided that equivalent types of traffic are treated equally. Reasonable traffic management shall only entail processing of data that is necessary and proportionate to achieve the purposes set out in this **paragraph.**

5. Providers of internet access services shall not restrict the freedoms provided for in paragraph 1 by **discriminating against, restricting, or otherwise interfering with the transmission of internet traffic except in cases where it is necessary to apply reasonable traffic management measures **or to implement a court order.****

Such measures shall be set by transparent procedures, not be maintained longer than strictly necessary and provide adequate safeguards; in particular to ensure that any restrictions are limited to what is necessary, non-discriminatory and proportionate. Those safeguards shall be subject to periodic review and include the possibility of judicial redress.

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

- EDRI's comments: We agree with the deletion of the first part of this paragraph since it would open a loophole for discrimination of certain services and prioritisation of others once the end-user's contractually agreed speed/data/etc limits has been exhausted.
- The rapporteur suggests to limit the exceptions to court orders or where traffic management measures are temporary and proportionate. It is however unclear what the "adequate safeguards" would be, since they are not defined by the rapporteur. It should be made clearer this refers only to traffic management measures which are necessary and exceptional in order to deal with temporary congestion.
- The introduction of judicial redress and review is welcome if the text proposed by the rapporteur is understood as only referring to temporary and necessary technical traffic management measures.
- Furthermore, we fully support the deletion of the exception to prevent or impede serious crime without a legal basis or a court order since this would lead to law enforcement activities by private companies outside the rule of law. This amendment brings the proposal in line with Article 52 of the European Charter on Fundamental Rights.

Amendment 10

Article 24 – paragraph 1

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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), **and the application of reasonable traffic management measures in compliance with Article 23 (5), taking the utmost account of the BEREC guidelines specified in paragraph 2 of this Article and in paragraph 3a of Article 21(3a) of the Directive 2002/22/EC. Reasonable traffic management measures shall be subject to periodic review to reflect advances in technology.** National regulatory authorities shall report on an annual basis to the Commission and BEREC on their monitoring and findings.

- EDRI's comments: It is a clear improvement to add BEREC's guidelines and to introduce periodic reviews. We also welcome the suggested deletion of the undefined "impact of specialised services on cultural diversity and innovation".

Amendment 11

Article 24 – paragraph 2 – subparagraph 2 /	
<p>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.</p>	<p>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.</p> <p>By (DATE OF APPLICATION DEADLINE) BEREC, after consulting stakeholders and in close cooperation with the Commission, shall lay down general guidelines for the application of reasonable traffic management measures. BEREC shall develop such guidelines on the basis of Articles 23 and this Article.</p>
<ul style="list-style-type: none">• EDRI's comments: The definition of acceptable or reasonable traffic management measures should not be left to BEREC and to the Commission after the adoption of this Regulation, but should be clearly defined in this proposal.• As traffic management measures have major significance for fundamental rights to communication and privacy, it is important that the appropriate Commission services have significant input, as these issues fall outside the scope of BEREC's expertise and responsibilities.	

Amendment 12

Article 24 – paragraph 3 /	
3. The Commission may adopt implementing acts defining uniform conditions for the implementation of the obligations of national competent authorities under this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 33 (2).	deleted
<ul style="list-style-type: none">• EDRI's comments: not within our scope	

Amendment 13

Article 25 - Transparency and publication of information -	
[...]	deleted
<ul style="list-style-type: none">• EDRI's comments: Even though the Commission text was not perfect, we think that it was a very good start in order to improve transparency of the operators. We do not support the deletion of this Article.	