



Comments on ITRE Draft Report

EDRi welcomes the [draft report](#), 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, Pilar del Castillo Vera. 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 33

Recital 47	
Commission Proposal	Amendment
<p>(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.</p> <p><i>Reasonable traffic management encompasses prevention or impediment of serious crimes, including voluntary actions of providers to prevent access to and distribution of child pornography.</i> Minimising the effects of network congestion should be considered reasonable provided that network congestion occurs only temporarily or in exceptional circumstances.</p>	<p>(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 <i>and the general characteristics of the service</i>, 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. Minimising the effects of network congestion should be considered reasonable provided that network congestion occurs only temporarily or in exceptional circumstances.</p>
<p>Comments: First, we welcome the deletion of the dangerous exception for arbitrary interferences in communications traffic flows of reasonable traffic management, as this provision is in obvious violation of Article 52 of the Charter of Fundamental Rights. However, we regret that the rapporteur has not deleted an obvious loophole (“within contractually...internet access services”) that would allow ISPs to offer</p>	

discriminatory contracts to end-users. This is made worse with the addition of “and the general characteristics of the service”, which voids the recital of most of its meaning. We strongly advise removing this provision in its entirety to ensure an end to arbitrary discrimination by ISPs, which BEREC’s findings have shown are a persistent problem throughout Europe.

Amendment 34

Recital 49	
Commission Proposal	Amendment
<p>(49) There is also end-user demand for services and applications requiring an enhanced level of assured service quality offered by providers of electronic communications to the public or by content, applications or service providers. Such services may comprise inter alia broadcasting via Internet Protocol (IP-TV), 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 electronic communications to the public or providers of content, applications or services.</p>	<p>(49) There is also end-user demand for services and applications requiring an enhanced level of assured service quality offered by providers of electronic communications to the public or by content, applications or service providers. Such services may comprise inter alia broadcasting via Internet Protocol (IP-TV), 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 electronic communications to the public or providers of content, applications or services. <i>Where such agreements are concluded with the provider of internet access, that provider should ensure that the enhanced quality service does not impair the general quality of internet access, except as may be necessary, considering the state of the art and technology deployed, to ensure the delivery of the enhanced quality service. Furthermore, traffic management measures should not be applied in such a way as to discriminate against services competing with those offered by the provider of internet access.</i></p>
<p>Comments: The addition from the rapporteur is unclear and seems to add unnecessary legal complexity. Specifically, it is unclear what would fulfil the “necessary” criterion for degrading the quality of internet access. Similarly, we are at a loss to understand what is meant by “state of the art and technology deployed”. Traffic management practices area also addressed elsewhere in the text and not needed here. We regret that the rapporteur has proposed unnecessary and ambiguous additions instead of clarifying the Commission text. We suggest deleting this amendment.</p>	

Amendment 35

Recital 50 +	
Commission Proposal	Amendment
<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 <i>is</i> necessary for the provision of <i>specialised services and is expected to play an important role in the development of new</i> 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 <i>substantially</i> 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. <i>There is nothing in current Union law preventing agreements for the provision of such transmission services.</i> The possibility for content, applications and service providers to negotiate such flexible quality of service levels with providers of electronic communications to the public <i>may be</i> necessary for the provision of <i>certain</i> 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 <i>continue to</i> 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 services.</p>
<p>Comments: The deletion of “substantially” by the rapporteur improves the Commission text but this recital still allows agreements on the basis of an extremely expansive understanding of “specialised services” as defined in Article 2.15, which undermine the openness of internet (See comment on Amendment 69).</p>	

Amendment 36

Recital 51	
Commission Proposal	Amendment
<p>(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 electronic communications to the public and the availability of non-discriminatory internet access services of high quality <i>which are not impaired by specialised services</i>. 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 <i>specialised</i> services, and quality as perceived by end-users. National regulatory authorities should be empowered to impose minimum quality of service requirements on all or individual providers of electronic communications to the public if this is necessary to prevent general impairment/degradation of the quality of service of internet access services.</p>	<p>(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 electronic communications to the public and the availability of non-discriminatory internet access services of high quality. 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 <i>enhanced quality</i> services, and quality as perceived by end-users. National regulatory authorities should be empowered to impose minimum quality of service requirements on all or individual providers of electronic communications to the public if this is necessary to prevent general impairment/degradation of the quality of service of internet access services.</p>
<p>Comments: The addition of a new and undefined term, “enhanced service”, reduces clarity, particularly as no definition of it exists in the text. Furthermore, it might actually be good to ensure that specialised services do not impair the availability of non-discriminatory internet access services of high quality. The deletion of this provision brings uncertainty.</p>	

Amendments 60 - 68

Article 2 – paragraph 2 – point 1 to
Article 2 – paragraph 2 – point 13

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Commission Proposal

Amendment

[...]

deleted

Comments: It is regrettable that the Rapporteur has decided to delete key definitions in the proposed text instead of proposing language to ameliorate the Commission's definitions. Any good regulation will require tightly worded definitions.

Amendment 69

Article 2 – paragraph 2 – point 15

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Commission Proposal

Amendment

(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 or any other service that provides the capability to access specific content, applications or services, or a combination thereof **at a guaranteed capacity**, 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;

Comments: It is unclear to us why the rapporteur has decided to cut all definitions except 'specialised service'. The Commission proposal would allow for an exceptionally broad interpretation of "specialised services" which could, in practice, mean any online service. This would have the effect of creating a two-tiered internet, which would obstruct innovation, competition and the enjoyment of human rights on the internet. We regret that the Rapporteur did not propose a clarification based on BEREC's definition – which clarifies that specialised services have to be separate from the public best effort internet and shall only be provided within the provider's network.

Amendment 100

Chapter III – Section 2 Articles 17, 18 and 19 ++	
Commission Proposal	Amendment
[...]	<i>deleted</i>
Comments: We welcome this deletion, particularly of Article 19 on “assured quality of service”, which, as BEREC has pointed out several times, is superfluous and indeed could be (mis)used as another way to prioritise traffic for anti-competitive reasons.	

Amendment 102

Article 23- paragraph 1 - subparagraph 2 -	
Commission Proposal	Amendment
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.	End-users shall be free to enter into agreements on data volumes and speeds, and the general characteristics of the service , with providers of internet access.
Comments: The Commission’s use of the term “free” is problematic, as this would empower ISPs to offer the same kinds of confusing and restricted services that are already commonplace in the mobile environment, instead of giving users to right to access and impart information via the open internet. For sake of clarity and legal certainty, it would be more appropriate to use the word “ right ”. The rapporteur’s addition would only further empower ISPs to offer discriminatory contracts. This amendment negates the intention of the article, which is to ensure that ISPs do not discriminate connection speeds, or block applications and services.	

Amendment 103

Article 23- paragraph 2 - subparagraph 1 -	
Commission Proposal	Amendment
End-users shall also be free to agree with either providers of electronic communications to the public or with providers of content, applications	End-users shall also be free to agree with either providers of electronic communications to the public or with providers of content, applications

<p>and services on the provision of specialised services with an enhanced quality of service.</p>	<p>and services on the provision of specialised services with an enhanced quality of service. <i>Where such agreements are concluded with the provider of internet access, that provider shall ensure that the enhanced quality service does not impair the general quality of internet access, except as may be necessary taking into account the state of the art and technology deployed, in order to ensure the delivery of the enhanced quality service.</i></p>
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Comments: The original proposal of the Commission is already problematic, as it would allow specialised services that might lead to the creation of a two-tiered internet. However, the apparently deliberate effort by the Rapporteur to render the proposal unclear serves only to broaden this loophole. (See Comment on AM 102 above)

Amendment 104

Article 23 – paragraph 2 – subparagraph 2

Commission Proposal	Amendment
<p><i>In order to enable the provision of specialised services to end-users</i>, 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 in order to enable the provision of specialised services. The provision of specialised services shall not impair in a recurring or continuous manner the general quality of internet <i>access</i> services.</p>	<p>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 in order to enable the provision of specialised services. The provision of specialised services shall not impair in a recurring or continuous manner the general quality of internet services. <i>Furthermore, traffic management measures shall not be applied in such a way as to discriminate against services competing with those offered by the provider of internet access.</i></p>

Comments: The addition made by the rapporteur clearly states that specialised services will compete with services offered in the open internet and, even if a provision to prohibit traffic management measures to the detriment of other services is welcome, it does not fix the problem that specialised services must be different from the ones offered in the open internet and thus cannot be in competition (See comments on Amendment 69). If this amendment were adopted, 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.

Amendment 105

Article 23 – paragraph 5 – subparagraph 1- point a ++	
Commission Proposal	Amendment
a) implement a legislative provision or a court order, or prevent or impede serious crimes ;	a) implement a legislative provision or a court order;
Comments: This amendment brings the text into line with the Charter of Fundamental Rights.	

Amendment 106

Article 24 – paragraph 1 +	
Commission Proposal	Amendment
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. In exercising their powers under Article 30a with respect to Article 23, national regulatory authorities shall closely monitor 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.
Comments: The modifications made by the rapporteur improve the Commission text since it obliges NRAs to publish reports on their activities. However, these reports should be transparent and made public (not only for BEREC and the Commission).	

Amendment 107

Article 24 – paragraph 3 +	
Commission Proposal	Amendment
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).	3. BEREC shall, after consulting stakeholders and in cooperation with the Commission, lay down guidelines defining uniform conditions for the implementation of the obligations of national competent authorities under this Article.
Comments: The changes introduced by the rapporteur improve the Commission text. However, to achieve a harmonisation, or a truly “connected continent”, minimum standards should be set in order to ensure a uniform implementation of NRAs' obligations.	