

Comments by La Quadrature du Net on Draft CA 4 Open internet

The CA covers Art 2(14)-(15), Arts 23-24, Art 30a and recitals 45-51. All relevant AMs, including AMs 322, 340, 345-346, 32, 248, 263, 249-251 and all AMs to Art 2(14)-(15), Arts 23-24 and recitals 45-51, fall.

Recitals

- (45) The internet has developed over the past decades as an open platform for innovation with low access barriers for end-users, content and application providers and internet service providers. *The principle of “net neutrality” means that equivalent traffic should be treated equally, without discrimination, restriction or interference, independent of the sender, receiver, type, content, device, service or application. As stated by the European Parliament resolution of 17 November 2011 on the open internet and net neutrality in Europe 2011/2866, the internet's open character has been a key driver of competitiveness, economic growth, social development and innovation – which has led to spectacular levels of development in online applications, content and services – and thus of growth in the offer of, and demand for, content and services, and has made it a vitally important accelerator in the free circulation of knowledge, ideas and information, including in countries where access to independent media is limited.* The existing regulatory framework aims at promoting the ability of end-users to access and distribute information or run applications and services of their choice. Recently, however, the report of the Body of European Regulators for Electronic Communications (BEREC) on traffic management practices published in May 2012 and a study, commissioned by the Executive Agency for Consumers and Health and published in December 2012, on the functioning of the market of internet access and provision from a consumer perspective, showed that a significant number of end-users are affected by traffic management practices which block or slow down specific applications. These tendencies require clear rules at the Union level to maintain the open internet and to avoid fragmentation of the single market resulting from individual Member States' measures.

Comment: This amendment is unacceptable since it defines Net neutrality as the principle according to which only equivalent traffic are treated equally, but differentiation among traffic class is acceptable. Net neutrality provides instead that *all types of traffic are treated equally*. Indeed, the opinion report of the LIBE committee defines Net neutrality to mean that “all types of traffic are treated equally by providers of electronic communications to the public”.

This is also the case of rigorous Net neutrality definitions. This was stressed in particular in a 2011 French transpartisan parliamentary report:

"The concept of non-discrimination can be interpreted in various ways, including as a homogeneous treatment of flows, as a differentiation in how flows are processed according to the objective needs of the uses they support, or as no discriminatory access to various levels of quality of service. (...) **The concept of**

nondiscrimination is used here in the sense of homogeneous delivery."

See:

http://www.assemblee-nationale.fr/english/dossiers/net_and_network_neutrality.pdf

In its 2010 proposals on Net neutrality, the French NRA Arceps writes the following:

"ARCEP recommends that, as a general rule, **no differentiation be made between the way in which each individual data stream is treated**, whether according to the type of content, the service, application, device or the address of the stream's origin or destination. This applies to all points along the network, including interconnection points."

In the 2013 IGF Dynamic Coalition on Net Neutrality's model law on Net neutrality, the reference to "all traffic" is not explicit, but it is the whole range of Internet traffic which is referred to:

"Network neutrality is the principle according to which **Internet traffic shall be treated equally**, without discrimination, restriction or interference regardless of its sender, recipient, type or content, so that Internet users' freedom of choice is not restricted by favouring or disfavouring the transmission of Internet traffic associated with particular content, services, applications, or devices."

See: <http://networkneutrality.info/sources.html>

In all other legal or soft-law proposals, the same idea is implicit. See: http://www.laquadrature.net/wiki/Model_Law_on_Net_Neutrality

What is for sure is that Net neutrality is *never* defined as meaning non-discrimination between "equivalent types" of traffic, which is why these recitals are unacceptable.

Suggestions: We urge the ITRE committee to erase "equivalent" and replace it with "all" types of traffic.

- (46) The freedom of end-users to access and distribute information and (*deletion*) 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, *Directive 1995/46*, *Directive 2002/58*, Directive 2000/31/EC and *Directive 2011/93/EC*.
- (47) In an open internet, providers of *internet access services* should, within contractually agreed limits on data volumes and speeds for internet access services *and the general characteristics of the service*, not block, slow down, degrade or discriminate against specific content, applications or services or specific classes thereof except for a limited number of (*deletion*) traffic management measures. Such measures should be *technically necessary*, transparent, proportionate and non-discriminatory. *Addressing network congestion should be allowed* provided that network congestion occurs only temporarily or in exceptional circumstances *and if equivalent types of traffic is treated equally*. *National Regulatory Authorities should be able to require that a provider demonstrates that equal treatment of equivalent traffic will be substantially less efficient*.

Comment: We regret the maintain of “within contractually agreed limits on data volumes and speeds for internet access services”, as well as the adding of “**and the general characteristics of the service**”. Those wordings create unclear and dangerous exceptions for ISPs to be able to discriminate contents, applications and services when applying traffic management measures, undermining the principle of net neutrality. We also suggest clarifying sentence on congestion, in coherence with our suggestions for 23.5d.

Suggestion: Second paragraph must read as follows:

In an open internet, providers of *internet access services* should, ~~within contractually agreed limits on data volumes and speeds for internet access services and the general characteristics of the service,~~ not block, slow down, degrade or discriminate against specific content, applications or services or specific classes thereof except for a limited number of (*deletion*) traffic management measures. Such measures should be *technically necessary*, transparent, proportionate and non-discriminatory. *Addressing network congestion should be allowed* provided that network congestion occurs only temporarily **and** in exceptional circumstances *and if equivalent types of traffic is treated equally, in which case National Regulatory Authorities should be able to require that a provider demonstrates that equal treatment of equivalent traffic will be substantially less efficient in mitigating with congestion.*

(48) Volume-based tariffs should be considered compatible with the principle of an open internet as long as they allow end-users to choose the tariff corresponding to their normal data consumption based on *clear*, transparent **and explicit** information about the conditions and implications of such choice. At the same time, such tariffs should enable providers of **internet access services** to better adapt network capacities to expected data volumes. It is essential that end-users are fully informed before agreeing to any data volume or speed limitations and the tariffs applicable, that they can continuously monitor their consumption and easily acquire extensions of the available data volumes if desired.

(49) ***It should be possible to meet end-user*** demand for services and applications requiring an enhanced level of assured service quality (*deletion*). Such services may comprise inter alia broadcasting , 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 **internet access services, providers of** electronic communications to the public or providers of content, applications or services. ***Where such agreements are concluded with the provider of internet access, that provider should ensure that the enhanced quality service does not cause material detriment to the general quality of internet access. Furthermore, traffic management measures should not be applied in such a way as to discriminate between competing services.***

(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 (*deletion*) **may also be** necessary for the provision of **certain** services such as machine-to-machine (M2M)

communications. *(deletion)* Providers of content, applications and services and providers of electronic communications *(deletion)* should therefore *continue to* 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 service.*

- (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 *internet access services, other providers of* electronic communications *and other service providers* and the availability of non-discriminatory internet access services of high quality *which are not impaired by specialised services.* 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 *enhanced quality* services, and quality as perceived by end-users. National regulatory authorities should *establish complaint procedures providing effective, simple and readily available redress mechanisms for end users and* be empowered to impose minimum quality of service requirements on all or individual providers of *internet access services, other providers of* electronic communications *and other service providers* if this is necessary to prevent general impairment/degradation of the quality of service of internet access services.

Articles

Article 2 – Definitions

(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 *of* the internet, irrespective of the network *technologies or terminal equipment* used;

(15) “specialised service” means an electronic communications service *optimized for* specific content, applications or services, or a combination thereof, *provided over logically distinct capacity with a view to ensuring enhanced quality* and that is not marketed or *usable* as a substitute for internet access service;

Comment: The proposed definition of specialized services in 2.15 (and 23.2) is very dangerous.

By refusing to ban the delivery of specialized services for services "functionally identical" to Internet services (a ban recommended by the LIBE report), article 2.15 and 23.2 open the door to the prioritisation of Internet services in a way which would completely bypass the Net neutrality principle and undermine fair competition in the digital economy.

Prioritisation of Internet services or services fonctionnally identical deserves a much more in-depth analysis as it entails serious threats for innovation and fair competition in the digital economy (same reason as the one put forward by the rapporteur to delete article on ASQ). After the adoption of this regulation, which must ban such prioritisation for the time being, a debate should be held to define strong and detailed legal and technical non-discrimination safeguards to ensure that any content provider can benefit from such prioritisation, free of discrimination, at reasonable rates and subject to reasonable terms and conditions. Such safeguard should be much clearer than the vague non-discrimination principle put at the end of 23.2.

In particular, safeguards should include prior authorization by NRAs of classes of specialized services, with strong presumption against specialized services raising anti-competitive risk to Internet services; prior registration, transparency and careful assessment of any specialized services activated by providers of electronic communication; technical framework regarding interconnection and admission control, etc.).

Such a wide public debate should include SMEs, civil society organisations, and National Regulatory Authorities, who were not consulted on this specific issue.

Note that existing specialized services, i.e. for VoIP and TVoIP, are not “functionally identical” to best-effort Internet VoIP (i.a Skype) or streamed TV programmes, and would not be hampered by our proposed version.

Suggestion: We call upon adopting the following version.

"Specialised service' means an electronic communications service operated and provided within closed electronic communications networks that is separated from the open internet. These services provide access for a determined number of parties to specific content, applications or services, or a combination thereof, are not replacing functionally identical services available over internet access service, are relying on strict admission control by deploying traffic management to ensure an appropriate level of network capacity and adequate quality and they are not marketed or used as a substitute for internet access service *or is functionally identical to services available over the public internet access service*".

Article 23 - Freedom to provide and avail of open internet access, and reasonable traffic management

1. End-users shall be free to access and distribute information and content, run ***and provide*** applications and services ***and use terminals*** of their choice, ***irrespective of the end-user's or provider's location or the location, origin or destination of the service, information or content***, via their internet access service.

Comment: We welcome this amendment as it provides all the legal elements, necessary to set out a strong definition of net neutrality, even though we suggest adding an explicit reference to the latter. However, if the provisions on net neutrality are watered down elsewhere in the text (see our comments on Recitals 45 and 47), this article risks to be void. For this reason it is extremely necessary to provide a good definitions in the recitals.

Suggestion: Provided that the Net neutrality definitions are corrected in the recitals, we suggest adding an explicit reference to Net neutrality in the articles of the regulation, as proposed by the LIBE report. The paragraph should read as follows:

End-users shall be free to access and distribute information and content, run ***and provide*** applications and services ***and use terminals*** of their choice, ***irrespective of the end-user's or provider's location or the location, origin or destination of the service, information or content***, via their internet access service. , ***in accordance with the principle of net neutrality***.

[2nd subparagraph deleted]

2. **Providers of internet access, of** electronic communications to the public **and** providers of content, applications and services **shall be free to offer** specialised services **to end-users. Such services shall only be offered if the network capacity is sufficient to provide them in addition to internet access services and they are not to the material detriment of the availability or quality of internet access services. Providers of internet access to end-users shall not discriminate against services from other sources that are competing with their own specialised services.**

Comments: As for the 2.15, this definition would bypass the Net neutrality provisions by allowing for the prioritisation of Internet services without adequate safeguards.

It is unclear why it would be necessary to add a third category (Providers of internet access), supposed to be part of “providers of electronic communications to the public”. This risks to create loophole and legal uncertainty.

Furthermore, the words “material detriment” are unclear and restrain the NRA's capacity to investigate or prosecute infringements on net neutrality, which risks to void the scope of the very welcome article 30a.

Although we understand the intent behind the final sentence, we cannot accept it as an alternative to the definition of specialised services, which - at the moment - does not specify that a specialised service must not be “functionally identical” to another one already available on the Internet (see comment on 2.15).

Suggestion: Replace with the LIBE wording:

“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 within closed electronic communications networks as specialised services with a defined quality of service or dedicated capacity, which are not functionally identical to services available over the public internet access service”.

[2nd subparagraph deleted]

3. This Article is without prejudice to Union or national legislation related to the lawfulness of the information, content, application or services transmitted.

Comment: This article must be deleted, as indicated in most opinion reports on this file. The lawfulness of the content risks to become a ground of traffic management for extra-judicial censorship, and open the door to privacy-invasive techniques (such as so-called “deep packet inspection”) as underlined by the European Data Protection Supervisor.

Suggestion: Delete.

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

(deletion) traffic management measures applied that might affect access to and distribution of information, content, applications and services as specified in paragraphs 1 and 2 of this Article.¹

5. Within the limits of any contractually agreed data volumes or speeds for internet access services, ***and subject to the general quality characteristics of the service***, providers of internet access services shall not restrict the freedoms provided for in paragraph 1 by blocking, slowing down, ***altering or*** degrading specific content, applications or services, or specific classes thereof, except in cases where it is necessary to apply ***(deletion)*** traffic management measures. ***Traffic management measures shall not be applied in such a way as to discriminate for commercial reasons against services competing with those offered by the provider of internet access. Traffic*** management measures shall be transparent, non-discriminatory, proportionate and necessary to:

Comment: As already indicated in our comment on Recital 47, we regret the maintain of “within contractually agreed limits on data volumes and speeds for internet access services”, as well as the adding of “***and the general characteristics of the service***”. Those wordings create unclear and dangerous exceptions for ISPs to be able to discriminate contents, applications and services, which is contrary to the principle of net neutrality.

The addition of “for commercial reason” adds no public benefits and create a new difficulties for NRAs to enforce net neutrality principle and the fruition of an open Internet. Non-commercial discriminations can be equally unreasonable, dangerous in terms of freedom of communication, competition or innovation, by implying that only traffic management measures having this vague objective are regulated.

Suggestion. We propose to follow the compromise amendment voted in the LIBE opinion, as follows:

In accordance with the principle of net neutrality, 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 ***specific*** cases where it is ***strictly*** necessary to apply reasonable traffic management measures. Reasonable traffic management measures shall be transparent, non-discriminatory, proportionate, ***subject to clear, comprehensible and accessible redress mechanisms*** and necessary to:

- a) implement ***(deletion)*** a court order ***(deletion)***;
- b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminals;
- d) ***prevent or mitigate*** the effects of temporary or exceptional network congestion provided that equivalent types of traffic are treated equally.

Comment: In the d), the addition of “prevent” brings no added value and create a potential loophole, allowing for discrimination to “prevent congestion”.

Also, congestion is most often “temporary” so that it is very important that the two conditions be cumulative: traffic management measure to deal with congestion should only

¹IMCO adopted text AM 42 – IMCO exclusive competence. “Reasonable” deleted as not used in 23(5), exclusive ITRE competence, as the word adds nothing.

be allowed when congestion is temporary *and* exceptional. Otherwise, ISPs would escape the incentive of investing in more bandwidth. If this later point is not changed, then our suggestion for imposing application-agnostic as a first resort – coherent with compromise version of recital 47 – becomes of even greater importance to avoid illegitimate discrimination between applications or services.

Suggestion: It is compulsory to delete prevent and “or”. An improved version must be formulated as follows:

“mitigate the effects of temporary **and** exceptional network congestion, **primarily by means of application-agnostic measures or, when these measures do not prove efficient, by mean of application-specific measures**, provided that **all** types of traffic are treated equally.”

*Traffic management measures shall not be maintained longer than necessary.*²

Without prejudice to Directive 95/46, traffic management measures shall only entail such processing of personal data that is necessary and proportionate to achieve the purposes set out in this paragraph, and shall also be subject to Directive 2002/58, in particular with respect to confidentiality of communications.

Providers of internet access services shall put in place appropriate, clear, open and efficient procedures aimed at addressing complaints alleging breaches of this Article. Such procedures shall be without prejudice to the end-users right to refer the matter to the national regulatory authority.

Comment: The last paragraph is very problematic. NRAs will be the only ones responsible of putting in place appropriate, clear, open and efficient procedures aimed at addressing complaints, as set out in article 30.5. This deletion is mandatory in order not to create legal uncertainty and uselessly bureaucratic procedures.

Suggestion: Delete second paragraph.

Article 30a

Supervision and enforcement

- 1. National regulatory authorities shall have the necessary resources to monitor and supervise compliance with this Regulation within their territories.*
- 2. National regulatory authorities shall make up-to-date information on the application of this Regulation publicly available in a manner that enables interested parties to have easy access to it.*
- 3. National regulatory authorities shall have the power to require undertakings subject to obligations under this Regulation to supply all information relevant to the implementation and enforcement of this Regulation. Those undertakings shall provide such information promptly on request and in accordance with time limits and the level of detail required by the national regulatory authority.*
- 4. National regulatory authorities may intervene on their own initiative in order to ensure compliance with this Regulation.*

5. National regulatory authorities shall put in place appropriate, clear, open and efficient procedures aimed at addressing complaints alleging breaches of Article 23. National regulatory authorities shall respond to complaints without undue delay.

6. Where a national regulatory authority finds that a breach of the obligations set out in this Regulation has occurred, it shall require the immediate cessation of such a breach.

Comment: We welcome this amendment, which provides a tool for NRA to enforce the Net neutrality principle. However it should be clarified that complaints procedures are open to end-users.

Suggestion: We suggest clarifying the 30a5 and 30a6 as follows:

5. National regulatory authorities shall put in place appropriate, clear, open and efficient procedures aimed at addressing complaints ***made by end-users or providers of Internet content*** alleging breaches of Article 23. National regulatory authorities shall respond to complaints without undue delay.

6. Where a national regulatory authority finds that a breach of the obligations set out in this Regulation has occurred, it shall require the immediate cessation of such a breach ***and be able to impose dissuasive penalties***.