

Technical non-paper on open Internet provisions and related end-user rights
(3/6/2015)

This non-paper has been prepared as technical assistance upon the co-legislators' request on 2/6 and shall not be interpreted as representing the position of the Commission or the Commission services.

- (1) This Regulation aims at harmonising rules on access to open internet by ensuring end-users' right to access and distribute information and lawful content, run applications and use services of their choice, as well as by establishing common rules on **the equal treatment of internet traffic and** traffic management which not only protect end-users but simultaneously guarantee the continued functioning of the Internet ecosystem as an engine of innovation. Reforms in the field of roaming should give end-users the confidence to stay connected when they travel in the Union, and should become over time a driver of convergent pricing and other conditions in the Union.
- (2) The measures provided in this Regulation respect the principle of technological neutrality, that is to say they neither impose nor discriminate in favour of the use of a particular type of technology.
- (3) 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 existing regulatory framework aims at promoting the ability of end-users to access and distribute information or run applications and services of their choice. However, a significant number of end-users are affected by traffic management practices which block or slow down specific applications. These tendencies require common rules at the Union level to ensure the open internet and to avoid fragmentation of the single market resulting from individual Member States' measures.
- (4) In the open internet end-users should have the right to access and distribute information and content, and to use and provide applications and services without discrimination, via their internet access service. The exercise of this right is subject to Union law and national law, compliant with Union law, regarding the lawfulness of content, services or applications. However, this Regulation does not seek to regulate the lawfulness of the information, content, application or services, nor the procedures, requirements and safeguards related thereto. These matters remain thus subject to Union legislation or national legislation in compliance with Union law, including measures giving effect to such Union or national legislation (for example, court orders, administrative decisions or other measures implementing, applying or ensuring compliance with such legislation). If those measures prohibit end-users to access unlawful content (such as, for example, child pornography), end-users should abide by those obligations by virtue of and in accordance with that Union or national law.

- (5) End-users should be free to choose between various types of terminal equipment (defined in Directive 2008/63/EC on competition in the markets in telecommunications terminal equipment) to access the internet. Providers of internet access services should not impose restrictions on the use of terminal equipment connecting to the network, in addition to those imposed by terminal equipment's manufacturers or distributors in compliance with Union law.
- (6) Internet access service is a publicly available electronic communications service that provides access to the internet, **and in principle to all its end-points**, irrespective of the network technology and terminal equipment used by **the** end-user. However, for reasons outside the control of internet access service providers, some end points of the internet may not always be accessible, for instance due to measures taken by public authorities. Therefore, a provider is deemed to comply with its obligation related to the offering an internet access service within the meaning of this Regulation when that service provides connectivity to virtually all end points of the internet. Providers of internet access services should therefore not restrict connectivity to any **accessible** end-points of the internet. ~~which are accessible to them.~~
- (7) In order to exercise their rights set out in Article 3(1), end-users should be free to agree with providers of internet access services on tariffs with specific data volumes and speeds of the internet access service. Such agreements, as well as commercial practices conducted by providers of internet access service, should not limit the **effective** exercise of the right set out in Article 3(1) ~~and thus~~ or circumvent provisions of this Regulation on safeguarding internet access. National regulatory authorities should be empowered to intervene against **agreements or** commercial practices which by reason of their scale, lead to situations where end-users' choice is significantly reduced in practice. **To this end, the assessment of agreements and commercial practices should take into account whether they are discriminatory in nature, as well as the respective market positions of the involved providers of internet access services and of content, services and applications.** Since the right to open internet is based on end-users's choice to access **their** preferred content and information, national regulatory authorities should be required, as part of their monitoring and enforcement function, to ~~and~~ intervene when **agreements or** commercial practices would result in undermining the essence of this right.
- (7a) **In an open internet all traffic should be treated equally, without discrimination, restriction or interference, independently of its sender, recipient, content, device, service or application. The principle of equal treatment is a general principle of Union law. According to settled case-law, that principle requires that comparable situations must not be treated**

differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

- (8) ~~End users should have rights to access their preferred content and information, to use and provide preferred services and applications, as well as terminal equipment.~~ Reasonable traffic management contributes to an efficient use of network resources and to an optimisation of overall transmission quality responding to the technical requirements of the content, services and applications transmitted. Moreover, reasonable traffic management measures applied by providers of internet access services should be transparent, proportionate, non-discriminatory and should not **be based on unjustified commercial considerations** ~~constitute anti-competitive behaviour such as preferring or disadvantaging competing content, services or applications.~~ The requirement for traffic management measures to be non-discriminatory does not preclude providers of internet access services to implement, in order to optimise the overall transmission quality, traffic management measures which differentiate between different categories of traffic ~~services or applications.~~ Any such differentiation **in order to optimise overall quality and user experience** should be permitted only on the basis of objective technical quality of service requirements (for example, in terms of latency, jitter, packet loss, and bandwidth) of the different categories of traffic, **which cannot be considered to be** ~~but not on the basis of~~ commercial considerations. Such differentiating traffic management measures should be proportionate in relation to the purpose of overall quality optimisation and should treat equivalent traffic equally.

- 8(a)** ~~Any More intrusive traffic management practices which goes beyond such reasonable measures, including reasonable differentiation,~~ **namely by blocking, slowing down, restricting, interfering with,** altering, degrading or discriminating between specific content, applications or services, **or specific categories of content, applications or services,** should be prohibited, subject to justified and defined exceptions laid down in this Regulation. **These exceptions are subject to strict interpretation and proportionality requirements. Individual Content** ~~content,~~ services and applications should be protected, **as well as categories thereof** because ~~of the~~ negative impact of **unjustified** blocking or other restrictive measures on end-user choice and innovation **would be even greater if applied to entire categories.** Rules against altering content, services or applications refer to a modification of the content of the communication, but do not ban non-discriminatory data compression techniques which reduce the size of a data file without any modification of the content. Such compression enables a more efficient use of scarce resources and serves the end-users' interest in reducing data volumes, increasing speed and enhancing the experience of using the content, services or applications in question.

- (8b) Technical information on specific quality of service requirements of traffic is usually contained in the data packet header. Reasonable traffic management does therefore not require techniques which enable to monitor the content or payload of data packets, such as deep packet inspection. By contrast, legal obligations or the preservation of network security may exceptionally require monitoring of the content of data packets, subject to concrete suspicious facts and strict proportionality. These exceptions do not justify systematic monitoring of the content of data packets.**
- (9) Providers of internet access service may be subject to ~~legal obligations requiring, for example, blocking of specific content, applications or services.~~ Those legal obligations ~~should be laid down in~~ Union or national legislation (for example, Union or national legislation related to the lawfulness of ~~information,~~ content, applications or services, or legislation related to public safety), in compliance with Union law, **including criminal law, requiring, for example, blocking of specific content, applications or services** or ~~they should be established in~~ to measures implementing or applying such legislation, **in compliance with Union law**, such as national measures of general application, court orders, decisions of public authorities vested with relevant powers, or other measures ensuring compliance with such legislation (for example, obligations to comply with court orders or orders by public authorities requiring to block unlawful content). The requirement to comply with Union law relates, among others, to the compliance with the requirements of the Charter of Fundamental rights of the European Union in relation to limitations of fundamental rights and freedoms. Reasonable **Restrictive traffic management measures, including blocking,** ~~should also allow actions~~**should also be considered to be justified when employed** to protect the integrity **and security** of the network, for instance in preventing cyber-attacks through the spread of malicious software or end-users' identity theft through spyware. ~~In the operation of their networks, providers of internet access services should be allowed to implement reasonable traffic management measures to avoid congestion of the network.~~
- (9a) The derogations, subject to strict interpretation, should also include more restrictive traffic management measures affecting certain categories of content, applications or services which may be necessary for the purpose of preventing impending network congestion, i.e. situations where congestion is about to materialise, and in the mitigation of the effects of network congestion, provided that such congestion occurs only temporarily or in exceptional circumstances. The principle of proportionality requires that traffic management measures based on this exception treat equivalent categories of traffic equally and are only applied as long as necessary. Temporary congestion should be understood as referring ~~refers~~ to specific, **situations of short duration, where a sudden increase in the number of users in addition to the regular users, or a sudden increase in demand for a****

particular content or service, may overflow the transmission capacity of some elements of the network and make the rest of the network less reactive. Temporary congestion may occur especially in mobile networks, which are subject to more variable conditions, such as physical obstructions, lower indoor coverage, or a variable number of active users with changing location. It may be predictable that such temporary congestion will occur from time to time at certain points in the network - such that it cannot be regarded as exceptional -, without it recurring often or for such extensive periods that a capacity expansion would be economically justified. Exceptional congestion should be understood as referring to unpredictable and unavoidable situations of congestion, both in mobile and fixed networks. These situations may be caused e.g. by a technical failure such as a service outage due to broken cables or other infrastructure elements, unexpected changes in routing of traffic or large increases in network traffic due to emergency or other situations beyond the control of the internet access service provider. Such congestion problems are likely to be infrequent but may be severe, and are not necessarily of short duration. ~~non-recurring situations during short periods of time. Exceptional circumstances are infrequent situations, especially in mobile access networks, where despite operators' efforts to ensure the most efficient use of the resources available and thus prevent congestion, demand occasionally exceeds the available capacity of the network, for example in large sport events, concerts or festivals and other situations where a much larger number than usual of users is trying to make use of the network at the same time.~~ **The need to apply intrusive traffic management measures to prevent or mitigate the effects of temporary or exceptional network congestion should not give operators the possibility to circumvent the general prohibition of blocking, slowing down, altering, degrading or discriminating between specific content, applications or services, or specific categories of traffic. Recurrent and more long-lasting network congestion which is neither exceptional nor temporary should not benefit from such a derogation and should rather be tackled through expansion of network capacity.**

- (10) For the purposes of this Regulation, prior explicit consent should mean any freely given specific, distinct and informed indication of end-user's wishes by which the end-user signifies his unambiguous agreement to allow the provider of internet access services to prevent the transmission of unsolicited communication or to implement parental control measures. For the purposes of giving effect to the provision requiring a prior explicit consent of the end-user for the implementation of parental control measures by the provider of the internet access services, this Regulation should be applied in accordance with national rules. Therefore, this Regulation does not affect national rules which define, for example, parental rights and obligations. In this respect, and by way of an example, the aim of parental control measures could be to prevent the

access of minors to content, applications and services, such as those involving pornography or gratuitous violence, which might seriously impair minors' physical, mental or moral development. Parental control measures should be applied in a manner that ensures that the end-user decides which categories of content should be filtered, blocked or controlled. They should also include a clear alert to the end-user that such measures have been used to filter, block or control content or categories of content when the end-user attempts to access such content. The measures should also include a clear and transparent mechanism by which the end-user who has consented to the use of these measures may withdraw this consent at any time.

- (11) There is demand on the part of content, applications and services providers **to be able to provide**, as well as on the part of end-users, for the provision of, electronic communication services other than internet access services, based on **which require** specific quality of service levels. ~~Agreements in this respect could also~~ **Such specific quality levels are, for instance, required by some services** play an important role in the provision of services with **responding to** a public interest (e.g. e-health) or as well as in the development **by some** of new services such as machine-to-machine communications **services**. At the same time, such agreements should allow providers of electronic communications to the public to better balance traffic and prevent network congestion. **Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services** End-users should therefore remain **be** free to conclude agreements with providers of electronic communications to the public and providers of content applications and **offer** services **which are not internet access services and which are optimised to meet the specific quality requirements for of specific content, applications or services, or a combination thereof** which require specific levels of quality of service.

- (11a) **In order to avoid a negative impact of the provision of such services on the availability or quality of internet access services for end-users other than those having subscribed to the specific service, sufficient capacity needs to be ensured. Providers of electronic communications to the public, including providers of internet access services, should, therefore, offer such other services, or conclude corresponding agreements with providers of content, services or applications facilitating such services, only if the network capacity is sufficient to provide them in addition to any internet access services provided. The open internet provisions of Article 3 should not be circumvented by other services usable or offered as a replacement for internet access services. However, the mere fact that corporate services such as virtual private networks may also give access to the internet should not be considered as a replacement of the internet access service provided that such access to the internet is compliant with Article 3(1) to (4) of this Regulation and thus**

~~Such services should not be offered as a replacement for internet access services, and t~~**cannot be considered a circumvention of those rules.** ~~Their provision of these services~~ should not impair ~~in a material manner~~ the availability and **general** quality of internet access services for other end-users **other than those having subscribed to the specific service.** National regulatory authorities should ensure that providers of electronic communications to the public comply with this requirement, as set out in Article 4. In this respect, national regulatory authorities should assess ~~whether~~ the ~~negative~~ impact on the availability and **general** quality of internet access services is ~~material~~ by analysing, inter alia, quality parameters ~~such as timing and reliability parameters~~ (latency, jitter, packet loss, **etc.**), levels and effects of congestion in the network, actual versus advertised speeds, performance of internet access services compared with services other than internet access services, and quality as perceived by end-users.

- (12) National regulatory authorities play an essential role in ensuring that end-users are effectively able to exercise the right to avail of open internet access. To this end, national regulatory authorities should have monitoring and reporting obligations, and should ensure compliance of providers of electronic communications to the public, **including providers of internet access services**, with their obligations **pursuant to Article 3, including the obligation** to ensure sufficient network capacity for the provision of non-discriminatory internet access services of high quality which should not be impaired by **the** provision of services with a specific level of quality. ~~Providers of internet access services should ensure maximum transparency in the provision of internet access services according to the additional transparency measures laid down in Article 4. Therefore, national regulatory authorities should enforce compliance with Article 3 and the respective parts of Article 4. They~~ **National regulatory authorities** should also have powers to impose **technical characteristics**, minimum quality of service requirements **and other appropriate measures** on all or individual providers of electronic communications to the public if this is necessary to **ensure compliance with Article 3 or to** prevent degradation of the quality of service of internet access services for other end-users. In doing so, national regulatory authorities should take utmost account of relevant guidance from BEREC.
- (13) **The open internet provisions should be complemented by effective end-user provisions which address issues particularly linked to internet access services and enable end-users to make informed choices. These provisions should apply in addition to the applicable provisions of Directive 2002/22/EC as amended and Member States may maintain or adopt more far-reaching measures. Providers of internet access services should inform end-users in a clear manner about any traffic management practices deployed and about the possible impact of other services to which they subscribe on the quality and availability of their respective internet access services. In view of the**

increasing use of data volume allowances it is essential that end-users be able to be fully aware of any such allowances and to continuously monitor their data consumption. Discrepancies between advertised quality parameters, in particular speeds, and the actually available quality of internet access services, have been evidenced by studies of national regulatory authorities. In order to empower end-users in such scenarios, providers of internet access services should provide precise contractual information on the relevant speeds and on available remedies in accordance with national law in case of non-compliance of performance. National regulatory authorities should enforce compliance with Article 4.

Article 1 - Objective and scope

1. This Regulation establishes common rules to ensure open internet access, safeguarding related end-user's rights and equal treatment of traffic in the provision of internet access services.

Article 2 - Definitions

For the purposes of this Regulation, the definitions set out in Directive 2002/21/EC shall apply.

The following definitions shall also apply:

(1) "provider of electronic communications to the public" means an undertaking providing public electronic communications networks or publicly available electronic communications services;

(2) "internet access service" means a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used.

Article 3 - Safeguarding of open internet access

1. End-users shall have the right to access and distribute information and content, use and provide applications and services and use terminal equipment 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.

This paragraph is without prejudice to Union law or national law, in compliance with Union law, related to the lawfulness of the ~~information~~, content, application or services.

2. **Agreements between P**providers of internet access services and end-users ~~may agree~~ on commercial and technical conditions and characteristics of internet access services such as price, data volumes or speed, ~~Such agreements~~, and any commercial practices conducted by providers of internet access services, shall not limit the **effective** exercise of the right of end-users set out in paragraph 1.

3. Subject to this paragraph, providers of internet access services shall treat all traffic equally when providing internet access services, **without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.**

Providers of internet access services may implement reasonable traffic management measures. In order to be deemed reasonable, such measures shall be transparent, non-discriminatory, proportionate, **and shall not be based on commercial considerations** ~~constitute anti-competitive behaviour and shall be based~~ **but** on objectively different technical quality of service requirements of specific categories of traffic. Such measures **shall not monitor the specific content of data packets and** shall not be maintained longer than necessary.

Providers of internet access services shall not engage in traffic management measures going beyond the reasonable measures set out in subparagraph 2, and **in particular** shall not block, slow down, alter, **restrict, interfere with,** degrade or discriminate between specific content, applications or services, **or specific categories thereof,** except as necessary, and only for as long as necessary, to:

- a) ~~comply with legal obligations to which the internet access service provider is subject, that are laid down in~~ Union legislation or national legislation, in compliance with Union law, **to which the internet access service provider is subject,** or ~~in~~ **with** measures giving effect to such Union or national legislation, **in compliance with Union law,** including ~~with~~ orders by courts or public authorities vested with relevant powers;
- b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminal equipment;
- c) prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally;
- d) prevent transmission of unsolicited communication within the meaning of Article 13 of Directive 2002/58/EC¹ or implement parental control measures **with respect to content, services or applications which might seriously impair the physical, mental or moral development of minors, in particular pornography or gratuitous violence,** subject to a prior explicit consent of the end-user. The end-user shall be given the possibility to withdraw this consent at any time.

4. Any traffic management measures may only entail processing of personal data that is necessary and proportionate to achieve the objectives of paragraph 3. Such processing shall be carried out in accordance with Directive 95/46. Traffic management measures shall also comply with Directive 2002/58.

5. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services other than internet access services which are optimised for specific content, applications or

1 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201 , 31.07.2002, p. 37).

services, or a combination thereof, in order to meet their requirements for a specific level of quality.

Providers of electronic communications to the public, including providers of internet access services, may offer **or facilitate** such services only if the network capacity is sufficient to provide them **in addition to any internet access services provided**. Such services shall not be **usable or** offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for other end-users.

Article 4 -Supervision, enforcement and transparency measures for ensuring open internet access

1. National regulatory authorities shall closely monitor and ensure compliance with Article 3 and with paragraphs 3 **to 6** of this Article, and shall promote the continued availability of open internet access at levels of quality that reflect advances in technology. For those purposes national regulatory authorities may impose technical characteristics ~~and~~ minimum quality of service requirements **and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services.** ~~in accordance with the second subparagraph of Article 22(3) of the Universal Service Directive~~ National regulatory authorities shall publish reports on an annual basis regarding their monitoring and findings, and provide those reports to the Commission and BEREC.

2. Providers of electronic communication services to the public, including providers of internet access services, shall make available, at the request of the national regulatory authority, information relevant to the obligations set out in Article 3 and paragraphs 3 **to 6** of this Article, in particular information about how their network traffic and capacity are managed, as well as justifications for any traffic management measures applied. Those providers shall provide such **the requested** information ~~promptly on request and~~ in accordance with the time limits and the level of detail required by the national regulatory authority.

3. **Providers of internet access services shall offer end-users the facility to monitor their own usage of such services to the extent that these are billed on time or volume consumption. That facility shall include access, free of charge, to timely information on their service consumption.**

4. Providers of internet access services shall ensure that a contract which includes an internet access service ~~shall~~ **specifies** at least the following information:

(a) **information on any procedures put in place by the provider to measure and shape traffic including an explanation of the underlying communication inspection**

methods used for traffic management measures and information on how traffic management measures applied by that provider could impact on internet access service quality, end-users' privacy and the protection of personal data;

(b) a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, in particular the use of content, applications and services;

(c) a clear and comprehensible explanation as to how any **other** services within the meaning of Article 3(5), to which the end-user subscribes, might in practice have an impact on the same end-user's internet access services;-

(d) a clear and comprehensible explanation about respectively the minimum, average, maximum and advertised download and upload speed of internet access services in the case of fixed networks, or the estimated average, maximum and advertised download and upload speed of internet access services in the case of mobile networks, and about how significant deviations from the respective advertised download and upload speeds can impact end-users' rights referred to in Article 3(1);

(e) a clear and comprehensible explanation of how any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated in accordance with sub-paragraphs (a) to (d) may be deemed to constitute non-conformity of performance and which remedies are available to the consumer in accordance with national law;

(f) how end-users can monitor the current level of their consumption, and whether and how any voluntary limits can be set.

Providers of internet access services shall publish the information referred to in the first subparagraph.

5. The information requirements laid down in paragraphs 3 and 4 are in addition to those contained in Directive 2002/22/EC as amended and shall not prevent Member States from maintaining or introducing additional monitoring, information and transparency requirements, including on the content, form and manner of the information to be published. Those requirements shall comply with this Regulation and the relevant provisions of Directive 2002/21/EC and Directive 2002/22/EC.

6. Providers of internet access services shall put in place transparent, simple and efficient procedures to address complaints of end-users relating to rights and obligations under Article 3 and paragraphs 3 and 4 of this Article. Such procedures shall be without prejudice to the end-user's right to refer the matter to out-of court dispute resolution procedures.

7. No later than nine months after this Regulation enters into force, in order to contribute to the consistent application of this Regulation, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, lay down guidelines for the implementation of the obligations of national regulatory authorities under this Article. **BEREC shall in particular issue guidelines for the methods of measuring the speed, the quality of service parameters to be measured such as the average versus advertised speed, and the quality as perceived by users, and the methods for measuring them over time, as well as the content, form and manner of the information to be published, including possible quality certification mechanisms, in order to ensure that end-users, including disabled end-users, have access to comprehensive, comparable, reliable and user-friendly information.**

~~No later than nine months after this Regulation enters into force, in order to contribute to the consistent application of this Regulation, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, lay down guidelines for the implementation of the obligations of national regulatory authorities under this Article.~~

8. This Article is without prejudice to other tasks assigned to the same or other competent authorities by Member States in compliance with EU law.

~~6. For the purposes of this Article, “national regulatory authorities” shall mean the body or bodies within the meaning of point (g) of Article 2 of Directive 2002/21/EC and any other body or bodies charged by a Member State with the tasks assigned in this Article.~~