LA QUADRATURE DU NET

31 March 2014

Telecom Regulation:
Defend freedom of communication and innovation

Dear Member of the European Parliament,

On the 3rd of April you will have the opportunity to enshrine Net Neutrality in EU law. Before the end of your mandate, you can thus assist at the protection of freedom and democracy. Positive amendments have been tabled by the Social-Democrats (S&D), the Greens (Greens/EFA), the United Left (GUE/NGL) and the Liberals (ALDE)[1]. Adopting these amendments is the only way to effectively enact Net Neutrality and thus guarantee freedom of expression and information online, as well as fair competition in the digital economy. While telecom companies (in particular those represented by the European Telecommunications Network Operators' Association (ETNO)) have been circulating misleading information about these amendments, they will in fact safeguard the ability of telecom operators to launch innovative "specialised services", guarantee that innovative small and medium enterprises (SMEs) can benefit from a level playing-field and guarantee users' freedom to choose the services they prefer.

Please, find below the reasons why La Quadrature du Net strongly urges you to support this cross-party proposal.

Defining Net Neutrality through normative provisions

Since the adoption of the original proposal on the 11th of September 2013, the principle of Net Neutrality has remained in the public eye, debated by journalists, citizens, civil society organisations, and even the European Commission itself. However, the regulation initially made no explicit reference to Net Neutrality.

The principle of Net Neutrality was introduced only during the legislative process by the Greens. It eventually gained a mention in a recital (45) but until today, is still not mentioned in an article.

Although EU commissioner Neelie Kroes and rapporteur Pilar del Castillo Vera are trying to argue that this represents a solid safeguard for Net Neutrality, recitals are not, by definition, normative provisions; it does not suffice to state a principle to enforce it. That *"traffic should be **treated equally** without discrimination, restriction or interference, independent of the sender, receiver, type content, device, service or applications"* – currently contained in recital 45 – needs to be legally enacted in order to allow its application. For these reasons, amendments 234/241,

[1] The amendments tabled by ALDE are identical on the key points to the amendments tabled by other groups. See: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0190+234-236+DOC+PDF+V0//EN

which introduce a clear definition of "Net Neutrality", and amendments 235/242, which clarify its applicability, should be adopted.

Amendments 234/241
Article 2 – paragraph 2

ITRE report	Amendements
	(12 a) (new) "net neutrality" means the principle that all internet traffic is treated equally, without discrimination, restriction or interference, independent of its sender, receiver, type, content, device, service or application.

Amendments 235/242
Article 2 – paragraph 2

ITRE report	Amendements
(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;	*(14) "internet access service" means a publicly available electronic communications service that provides connectivity to the internet* ***in accordance with the principle of net neutrality****, and thereby connectivity between virtually all end points of the internet, irrespective of the network technologies or terminal equipment used;*

Creating a strong framework for specialised services

To truly protect the neutrality of the network for Internet access and guarantee fair competition in the telecom market, it is absolutely necessary to provide a strong framework for "specialised services". "Specialised services" are networks that provide "Quality of Service" optimised for a specific type of application (VOIP, video, e-health, etc.) (hence providing a form of positive discrimination, or prioritisation) through bandwidth management techniques. The proposed amendments to articles 2.15 and 23.2 respond to that logic.

The definitions of "specialised services" provided by either the Commission or the EP rapporteur do not include sufficient safeguards. They allow telecom operators to bypass Net Neutrality by giving priority to some online service providers on "specialised services" at the expense of similar, "functionally equivalent" services or applications available on the Internet, and which would also benefit from optimised quality of service.

To address this serious problems, amendments 235/242 and 236/243 propose two significant improvements. First, they clarify that "specialised services" should only be allowed for applications for which it can be argued that they actually require enhanced QoS. In other words, such applications do not function properly when

delivered through "best-effort" (non-prioritised) Internet access. This wording allows telecom operators to develop new and innovative traffic delivery models while preserving the best-effort, neutral delivery as the default model.

Second, the amendments introduce a strong "non-discrimination principle" to prevent network operators from discriminating between service providers that require quality of service for their applications. Let us consider the following scenario: Vodafone makes a deal with Google to deliver through a "specialised service" an "enhanced" version of YouTube requiring optimised quality of service to work properly. However, with the current wording of article 2.15 and article 23.2, all other video platforms providing a functionally equivalent application – it could be a company such as Vimeo – would have great difficulties to compete on fair terms with YouTube or gain a foothold in this new market. The proposed amendments aim to prevent such a scenario. They ensure that end-users subscribing to "specialised services" with enhanced quality of service for a given application – say a specific type of video service – are able to obtain that quality of service for any application provider, be it YouTube, smaller actors or new entrants.

This is arguably the most important problem with the regulation as it stands. It aims to transpose the non-discrimination between application providers that Net Neutrality guarantees to "specialised services". Failing this, the regulation will allow exclusive deals on "specialised services" between telecom operators and (mostly US-based) Internet giants. Such a power-grab in the digital economy would clearly weaken competition, innovation and users' freedom of choice.

Amendments 235/242
Article 2 – paragraph 2

ITRE report	Amendements
(15) 'specialised service' means an electronic communications service optimised for specific content, applications or services, or a combination thereof, provided over logically distinct capacity ***and*** *relying on strict admission control* ***with a view to ensuring*** *enhanced quality from end to end and that is not marketed or usable as a substitute for internet access service;*	*(15)* ***"****specialised service****"*** *means an electronic communications service optimised for specific content, applications or services, or a combination thereof, provided over logically distinct capacity****,*** *relying on strict admission control****, offering functionality requiring*** *enhanced quality from end to end and that is not marketed or usable as a substitute for internet access service;*

Amendments 236/243
Article 23 – paragraph 2

ITRE report	Amendements
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 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 users shall not discriminate between* ***such*** *services.*	*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 detriment of the availability or quality of internet access services. Providers of internet access to* ***end-****users shall not discriminate between* ***functionally equivalent*** *services* ***or applications****.*

Banning contractual restrictions to Net Neutrality

Besides the vague "specialised services" definition, the other major loophole remaining in the text relates to contractual exceptions to Net Neutrality provided in article 23.5.

If adopted unchanged this article would encourage telecom operators to propose deals that bypass Net Neutrality by favouring either their own services and content or that of their commercial partners when contractual limits on data volumes (so-called "data caps") have been reached.

Such dangerous trends are already widespread, as telecom operators increasingly engage in price discrimination. For instance, Orange has recently launched its own cloud service in France which their subscribers can access without the connection counting towards their quota. This clearly favours their own cloud services over competing services such as Dropbox or SkyDrive, as access to these services will count towards the subscriber's quota. Similarly, SFR has a mobile offer with a low data-cap but which allows unlimited access to YouTube, thus discriminating against other video streaming websites. In Germany, Deutsche Telekom sparked public outcry last year when it announced[2] that it would introduce a service with a data-cap on fixed-line DSL (later overturned by a Court[3]), offering unlimited access to its own entertainment services. All these business-models which are rapidly spreading across Europe introduce a form of pricing discrimination that severely undermines the fair competition that Net Neutrality aims to guarantee.

The rewording of article 23.5 proposed by amendment 236/243 is very welcome in order to avoid such discrimination, which distorts competition in the marketplace and reinforces the positions of already dominant players.

[2] Deutsche Telekom's own entertainment services won't count towards those caps. See: http://www.zdnet.com/deutsche-telekom-tweaks-plan-to-bring-in-broadband-data-caps-throttling-in-2016-7000016889/

[3] Reuters, 30.10.2013, *Court blocks Deutsche Telekom plans to cap Internet speed*: http://www.reuters.com/article/2013/10/30/us-deutschetelekom-ruling-idUSBRE99T0NI20131030

Amendments 236/243
Article 23 – paragraph 5

ITRE report	Amendements
*5. **Within the limits of any contractually agreed data volumes or speeds for internet access services, p**roviders 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 traffic management measures. Traffic management measures shall be transparent, non-discriminatory, proportionate and necessary to:*	*5. **Providers of internet access services and end-users may agree to set limits on data volumes or speeds for internet access services. P**roviders of internet access services shall not restrict the freedoms provided for in paragraph 1 by blocking, slowing down, altering**,** discriminating **or degrading** specific content, applications or services, or specific classes thereof, except in cases where it is necessary to apply traffic management measures. Traffic management measures shall be transparent, non-discriminatory, proportionate and necessary to:*

Preventing abuse in traffic management measures during congestion

The application of traffic management measures is essential to ensure the smooth functioning of the network. However, it should not be used as a pretext to unreasonably discriminate against some applications and services.

Article 23.5 provides a well-defined framework in which internet access providers can apply these management measures. However its point d) raises several concerns.

The spirit of this provision is to allow telecom operators to apply traffic management measures to deal with network congestion without undermining the open nature of the Internet. To ensure this, the European Commission originally restricted the use of such measures to *"temporary **or** exceptional"* congestions. Unfortunately, this wording does not prevent the systematic recourse to discriminatory traffic management practices. In other words, specific services, applications or protocols could be recurringly degraded during daily episodes of congestion whenever congestion becomes commonplace. For this reason it is absolutely necessary that these traffic management measures be only allowed in cases of *"temporary"* **and** *"exceptional"* congestions. This would also have the effect of incentivising network operators to invest in more bandwidth and faster networks. For this reason, amendment 236/243 should be adopted.

Amendments 236/243
Article 23 – paragraph 5

ITRE report	Amendements
*d) prevent or mitigate the effects of temporary **or** exceptional network congestion provided that equivalent types of traffic are treated equally.*	*d) prevent or mitigate the effects of temporary **and** exceptional network congestion provided that equivalent types of traffic are treated equally*

Bringing clear safeguards to the quality of Internet access

The proposal of the ITRE committee states that when providers of Internet access enter into agreement with end-users for the provision of specialised services, they must guarantee that those services *"do not cause material detriment to the general quality of internet"*. The concepts of "general quality" and "material detriment", is referred to in the proposal more than once[4], are vague and might compromise the legal certainty of the text. Since these notions are not specified, these provisions do little more than create a vague framework which could hamper their effectiveness and enforcement by national regulatory authorities. For this reason, the amendments proposed by the Social-Democrats (S&D), the Greens (Greens/EFA) and the United Left (GUE/NGL) to fix this important loophole are very welcome.

We count on you to protect freedom of communication, innovation, and fair competition in the online environment by supporting these amendments. By doing so, you will protect the public interest and help preserve and protect the benefits brought about by the Internet while pushing back against the harmful practices of a few dominant economic actors.

We remain at your disposal for any information you may need.

Yours faithfully,

La Quadrature du Net

[4] Recital 49: *"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"*;

Recital 50: *"Providers (...) should (...) be free to conclude specialised services agreements (...) as long as such agreements do not impair the* general *quality of internet access service"*;

Recital 51: *"National regulatory authorities should (...) be empowered to impose minimum quality of service requirements (...) if this is necessary to prevent* general *impairment/degradation of the quality of service of internet access services"*;

Article 24.2 2: *"In order to prevent the* general *impairment of quality of service (...) national regulatory authorities shall have the power to impose minimum quality of service requirements"*.