



ETNO Position Paper for the trilogue negotiations on the Telecoms Single Market Package

INTRODUCTION

In the context of the ongoing trilogue discussions on the Telecoms Single Market Package (TSM), different approaches have been proposed by the European Parliament and the Council of the EU on the two remaining chapters of the draft Regulation (Open Internet and Roaming).

In this paper, ETNO, the Association representing Europe's leading telecom operators, would like to assess the different approaches proposed by the co-legislators, and outline some remarks in the direction of a balanced and forward-looking conclusion of the negotiations.

More generally, ETNO would like to recall that the draft TSM Regulation falls short of the ambition to stimulate investment and innovation in high-speed broadband across Europe. In fact, the measures currently being discussed do not contribute to the achievement of this key policy goal.

We therefore encourage the European Commission, the European Parliament, and the Council of the EU to envisage with urgency a comprehensive and thorough reform of the current regulatory framework for electronic communications, with concrete measures aimed at incentivizing investment in next-generation network infrastructures, to the benefit of a stronger Digital Union¹.

OPEN INTERNET

ETNO is eager to support an Open Internet framework which incentivizes innovation, consumer choice and investment in new network infrastructures; which safeguards the right of consumers to access and distribute information and content, use and provide applications and services of their choice; which recognizes the consumer benefits flowing from traffic management and provides appropriate flexibility and commercial freedom for the development and delivery of innovative services alongside general Internet access; which provides for harmonized principles at the EU level.

Below, we set out the main principles that, in ETNO's view, should inform a future-proof Open Internet framework. Moreover, we discuss the main issues to be addressed in order to achieve a forward-looking and balanced outcome of the negotiations.

¹ For further reference on this point, see ETNO's contribution to the forthcoming Digital Single Market Strategy of the European Commission. The ETNO position paper is available at this [link](#).

1. The key principles for a forward-looking Open Internet framework

To guarantee a forward-looking Open Internet framework, we encourage the co-legislators to adhere to the following key principles:

The need for harmonised EU rules

A patchwork of national rules on net neutrality will simply not work. Europe needs to find a single, high-level approach to net neutrality, and ensure users across the Continent are confronted with a stable and harmonised set of rules. The creation of a successful and globally competitive single market will also depend on our ability to avoid national extremes and create a homogeneous regulatory environment. EU harmonisation is key in a global environment, as companies will benefit from consistency of rules across markets.

The need for a consumer-centric approach

In an Open Internet, the user must be free to access any type of legal application, service or content provided.

The need for quality

As the usage of the Internet goes mobile and becomes ubiquitous, European users need reliable, stable and top quality connectivity. Today's Internet, its reliability and its quality depend upon traffic management and the technologies embedded in the Internet's infrastructure. We need this to remain possible if we are to empower a satisfactory experience for all users.

The need for choice

Not all users are the same and they value different offers, tailored to their needs. Telecom operators need to be able to respond to the diverse requirements of their customers, big or small. This diversified demand is only met if operators are able to provide users with a wide variety of Internet access products and services.

The freedom to innovate

Digitalisation of formerly analogue industries – from transport and health to manufacturing – is contributing to create new growth opportunities for enterprises. In this field innovation is essential, whether related to new products or new business models. The development in areas such as connected cars or entertainment, for example, depends on the possibility of providing specialised services at guaranteed levels of quality.

2. Main issues to be addressed in the negotiations

In order to respect the principles recalled above, we encourage the co-legislators to take into account the following remarks.

2.1 - A principle-based approach to the Open Internet is more future-proof than an overly prescriptive one

As recognized by the Council, safeguarding the Open Internet would be best served by a light-touch approach, consisting of high-level principles. Otherwise, the risk of putting in place overly prescriptive and counterproductive provisions for an environment which is constantly innovating is just too high.

A recent report commissioned by the European Parliament for the IMCO Committee is in line with this consideration, stressing that:

“(...) it is important to ensure that any approach that is taken is sufficiently future proof. There is considerable uncertainty as to the future evolution of the Internet value chain. An overly rigid regulatory response might easily lock Europe in prematurely”.²

This approach offers more room to establish the right balance between two desirable aims: protect the openness of the Internet and at the same time support innovation across the ecosystem. On this point, the Council proposal mainly differs from the European Parliament on the following main aspects:

- As opposed to the Parliament, the Council position does not attempt to lay down prescriptive, complex and arguably unnecessary definitions such as “net neutrality” and “specialised services”.
- Also, as opposed to the Parliament, the Council does not attempt to regulate services other than the Internet Access Service while the Parliament’s proposal extends the scope of text from Internet Access Services to other broadband services defined as “specialised services”.
- While the Parliament regulates on the basis that “all bits have to be treated equally” the Council adopts a more reasonable stance by requiring equal treatment to “equivalent types of traffic”. While imposing a strict non-discrimination requirement, the Council approach better recognizes the necessity for Internet Access Providers to manage traffic to ensure a smooth functioning of the network and the services that run on top of it.

In all these areas, we believe that the Council’s position better reflects the market and technological reality of the Open Internet, in the direction of a balanced and future-proof approach.

2.2 - Open Internet rules in the TSM Regulation should focus only on “Internet Access Services”

The text of the TSM should not address commercial, competitive, or technical characteristics of services other than Internet services (i.e. specialised services) and should only address the potential impairment of Internet Access Services. The Open Internet regulation has to give room to agreements between end users and content providers based on different levels of quality, recognizing the freedom to provide services “other than Internet access services”.

To protect both innovation in networks and services and the Open Internet it is sufficient to clearly state that operators can provide other services than the Internet Access service to end-users or content, service and applications providers, and to rely on NRAs’ supervision. The Council’s proposal goes in this direction.

Consequently, specialised services need not be defined, and should in any case not be defined in an overly technical manner. Furthermore, defining specialized services is extremely difficult since the definition has to be flexible enough to cover both existing and future services; therefore, there is a

² “Network Neutrality Revisited: Challenges and Responses in the EU and in the US”, Study for the IMCO Committee, December 2014 (available at this [link](#)).

high risk of technical inaccuracy, which could then hinder innovation.

In addition to commending the Council's approach on this issue, we suggest to take into account the initial Commission's proposal, according to which broadband specialised services should not impair "in a recurring or continuous manner" the "general" quality of Internet Access Services. The co-legislators should take utmost caution in wording the so-called "impairment clause" in order not to limit the scope for specialised services in networks based on shared capacity such as mobile networks.

2.3 - Not all Internet bits are equal

The European Parliament's first-reading text mandates that operators "treat all traffic equally".

In this respect, we invite the co-legislators to consider the following evidence. The Internet is not "neutral" today. Internet content providers, search engines and social networks all use optimization and prioritization techniques and this is an accepted form of service provisioning, from which consumers benefit. Some services are particularly time-sensitive (like emergency notifications, live video-streaming or online gaming), while others (like emails) are not. These latter services work just as well in face of minor delays due to congestion or packet-loss, whereas the former suffer from significant drop-offs in quality of experience.

Routers, which every second route billions of Internet packets in the most efficient way, dispatch each individual packet in the right direction, taking into account the information they have on the packet and on the real-time utilization of the network. As a consequence, two different packets will never be treated in exactly the same way. Hence, strictly speaking, two different packets are always treated differently and therefore not "equally".

To which extent such normal Internet traffic routing will be considered compliant to "an equal treatment", as proposed, remains uncertain. Such compliance will be very difficult to evaluate for network operators. All traffic management practices would be put into question, based on uncertain criteria. This is why it is essential to insist that regulation should concentrate on outcomes (not blocking or discriminating access to specific content), and not by means (how network operators manage their networks to achieve these results).

A principle that all types of Internet traffic have to be treated equally will therefore be at odds with the way in which the Internet works today, as different types of traffic have different requirements to deliver an adequate consumer experience.

The Parliament's proposal would therefore cause major uncertainty around the use of traffic management which is currently implemented to ensure an adequate quality of service as well as an economically efficient and technically effective operation of network resources for the benefit of all end users. Ensuring quality and efficient allocation of resources are beneficial for providers and customers alike and should be supported, not restricted, by regulation.

The Council position gives a positive signal to the use of traffic management in recitals and in article 3.4 where Internet Access Service providers are entitled to equally treat equivalent types of traffic. This is an important and meaningful difference of approach between the Council and the Parliament, although we believe that, in light of the technological reality, the most accurate and future-proof solution would be the deletion of this provision altogether.

2.4 – Rules on traffic management should allow sufficient flexibility

Both the Parliament's and the Council's texts provide for a closed list of scenarios where traffic management would be allowed. However, traffic management is a basic pre-requisite to operating a network and, for the reasons outlined in para. 2.3 above, should not be limited to specific cases or instances.

Moreover, it should be possible to "alter" (i.e. to tailor) traffic flows if required in specific circumstances. It is for example a mobile network reality that traffic management measures are employed to optimize content, for example for the delivery to the small mobile screen. Mobile operators should be able to keep using data compression technology. Otherwise, not only would they have to deliver video content as offered on the web sites, which would result in increased network loads as well as higher costs to end-users, but they would also leave these useful options open only to other players of the value chain such as providers of browsers' proxies or device makers. Moreover, this would also decrease spectrum efficiency.

The European Parliament's proposal confine traffic management to a reactive and restrictive scope, in particular when it comes to congestion management, allowing for a limited number of situations in which traffic management would be legally accepted. This lack of flexibility in the use of traffic management may in the future impede operators to deliver the best Internet access products in an economically efficient way with the adequate quality.

We also ask that the co-legislators recognize that networks differ, and require different types of traffic management techniques in order to assure that all users are able to access the Internet. Mobile networks, for example, due to their dynamic nature (i.e. multiple users can walk into an area served by a single site – a situation that does not occur in fixed networks), and due to the limited availability of the key resource (spectrum), require very active traffic management.

In the light of these considerations, we encourage the co-legislators to open up the list of instances where traffic management is allowed (currently limited to four situations) by specifying that the listed exceptions do not constitute a closed list (e.g. by introducing the words "inter alia").

Also, when it comes to the treatment of network congestion, the text should not preclude common practices, such as the use of proactive and continuous traffic management to ensure an economically efficient and technically effective use of network resources that anticipates network congestion situations and benefits all users.

In this respect, limiting network network management to "*imminent or exceptional network congestion*" does not fit with the technical reality. Operators work to prevent and mitigate the effects of congestion is a continuous effort.

Moreover, it would be advisable to adopt a more flexible approach by recognising the situations where network congestion is pending and by considering that congestion is not temporary or exceptional, adopting a text in line with the Council proposal.

Finally, requiring prior user's explicit consent for preventing unsolicited traffic will harmfully limit the possibility for operators to effectively fight against spam and similar kinds of unsolicited traffic, affecting Internet experience for all users. Effective spam filtering needs to be done within the network and cannot be restricted to customers who have actively consented to this filtering. End users risk being unsatisfied if a significant part of their mobile data allowance is consumed by unsolicited spam.

2.5 - Internet Access Service market and competition issues

The Council approach to commercial practices and internet access services is problematic. The Council addresses this issue in article 3 stating that “...commercial practices conducted by providers of internet access services, shall not limit the exercise of the right of end-users set out in paragraph 1” and recital 6 “Commercial practices should not, given their scale, lead to situations where end-users’ choice is significantly reduced in practice. Since the right to open internet is based on end-user’s choice to access preferred content and information, such practices would therefore result in undermining the essence of this right”.

We support ensuring the availability of Open Internet access, but this does not warrant proposed far reaching regulation on competitive retail markets. We urge the European Parliament to consider the existing regulation and oversight before introducing an open-ended and vague sectorial rule to govern commercial practices of Internet access providers. With this regard, we highlight that:

- Competition Authorities are already empowered to address case by case potential undue commercial behaviours of retail markets;
- Constraining the ability of operators to differentiate and innovate on their retail charging policies in a competitive market undermines consumer choice.

ROAMING

As regards the Roaming chapter of the draft Regulation, we encourage the co-legislators to adopt measures which avoid undue distortions of competitive markets, hampering both consumers and operators alike.

From a general point of view, ETNO considers that the Council, with its Roam-Like-At-Home Plus (RLAH+) proposal, has envisaged several safeguards to avoid unintended negative consequences for consumers and operators, and is therefore the most balanced proposal on the table. However, it contains several elements of concern, which could be substantially improved (e.g. regarding the removal of decoupling obligations, as explained below).

On the other hand, the proposal of the Parliament does not provide enough safeguards to guarantee regulatory certainty and avoid hampering consumers and operators in specific contexts.

1. A plea for regulatory certainty

Before detailing our views on the proposals on the table, it is worth recalling that the Roaming III Regulation entered into force less than three years ago, with new price decreases and wholesale obligations. The requirement to decouple roaming services entered into force only last July. It is therefore clear that more time would be needed to assess how the existing rules are working. ETNO also notes that the market is evolving rapidly in terms of tariff innovation, especially on data roaming offers.

The need to change again the rules has not been proven, and the way to ensure full regulatory certainty would therefore be for the Roaming III Regulation to be implemented and then reviewed in 2016.

Mobile network operators have invested to implement the technically complex and resource-intensive provisions on the separate sale of roaming services, which entered into force less than one year ago (July 2014). These market driven solutions should be given the opportunity to prove their effectiveness and not be undermined by the currently discussed new provisions.

2. Avoid distortion of competition, harming consumers and operators – the merits of the RLAH+ approach

That being said, the Commission and the co-legislators have called for a further intervention on the Roaming regulation through the TSM legislative process, providing different solutions.

In our view, any action towards achieving the political goal of removing roaming surcharges should ensure the avoidance of any undue distortions of competition, as well as unintended consequences for consumers and operators alike.

This sensible approach has not been advocated by the industry only. Most notably, it has informed the opinion of BEREC, the body reuniting European regulators.

In its “Analysis of the Impacts of Roam Like At Home (RLAH)”³, BEREC has stated:

*“BEREC’s analysis of the risks and impacts of the European Parliament’s RLAH proposals demonstrates that **the removal of retail roaming surcharges across Europe is not currently sustainable or feasible in practice**, given the significant variations in a number of important parameters across Member States, including (but not limited to) the levels of retail tariffs, costs, and travelling and consumption patterns. The situation is made more complex by differences between operators and between travel patterns of consumers within individual Member States. We consider below the extent to which fair use policies and/or adjustments to the relevant roaming wholesale caps might mitigate some of the distortions caused by the introduction of these RLAH proposals, and the analysis below illustrates that **in all scenarios there are substantial trade-offs between the policy objectives of promoting greater use of roaming services, protecting competition, protecting investment and, importantly, protecting European consumers**. In other words, there is no RLAH “sweet spot”.”*

When considering any further regulatory intervention on Roaming markets, BEREC has also argued:

“Any proposed regulatory intervention should be assessed against the broader regulatory objectives of the regulatory framework. The same applies to any proposed intervention in the international roaming market. These objectives can be briefly described as follows:

1. **Protection of competition and investment incentives in visited markets** – by allowing all visited networks to recover efficiently incurred costs (...);
2. **Protection of competition and investment incentives in home markets** – by allowing mobile operators the opportunity to recover efficiently incurred costs of providing services (...).
3. **Protection of domestic consumers in visited markets against distributional effects** such as an increase in domestic prices available to non-roaming customers (...).
4. **Protection of domestic consumers in home markets against distributional effects** such as an increase in prices available to non-roaming customers.”

We agree with the opinion of BEREC that these key underlying principles should be fully respected in any revision of the Roaming rules.

ETNO believes that the Council of the European Union has taken positive steps in the direction indicated by BEREC. The proposed RLAH+ approach in fact envisages a path leading to a further substantial reduction in Roaming surcharges, on the other hand providing a safeguard, by means of a limited surcharge, against unintended negative consequences for consumers and operators.

On the other hand, a sudden abolition of retail roaming surcharges, as proposed by the Parliament, without the necessary safeguards at wholesale and retail level, would strongly undermine legal certainty. It would allow operators very little time to adapt to the new rules and, more importantly, create the conditions for permanent Roaming situations, lack of cost-recovery in specific contexts, and risk of distortions of competitive markets negatively affecting consumers and operators.

3. Specific issues to be addressed to avoid negative side-effects and ensure legal certainty

a) Allow enough time for implementing the new rules

Adaptation to the new scenario and implementation of the safeguards foreseen (e.g. the basic roaming allowance proposed by the Council) require major changes in IT and billing systems

³ BoR (14)209, 17 December 2014, available at this [link](#).

as well as in contracts, which cannot be done swiftly due to the need for a sufficient migration period.

In this respect, the European Parliament's proposal to abolish roaming charges by December 2015 is unrealistic. The introduction of the new rules at retail level should allow operators enough time in advance to prepare and adapt for the new scenario. A minimum period between the entry into force of the amended Roaming regulation and the introduction of the new obligations is therefore a necessary requirement given the complexity of the implementation.

The Council's proposal is more realistic, as it foresees a more reasonable deadline for adapting retail offers (30 June 2016 for new offers and 1 January 2017 for legacy offers). However, the industry estimates that this timeline would still pose substantial strains on the operators to adapt to the new scenario.

b) Ensure that the roaming allowance remains basic

If the concept of basic allowance - granting roaming services at domestic prices for a certain amount of volume and timing - is to remain in the text, it has to be limited, remain basic and cover all roaming services including incoming calls.

Defining an excessively wide allowance would indeed mean reintroducing the concept of RLAH with fair use, whose drawbacks have been clearly highlighted by BEREC in its aforementioned report. When deciding on its level, policy makers should notably have in mind the figures delivered by BEREC regarding EU average, especially when considering the number of days while roaming.

Finally, the text should remain proportionate and flexible in terms of implementation, and further consideration will have to be given to the concept of domestic price, notably to avoid negative side effects on domestic bundled offers, to take into account national and international call rates and the needs of different type of customers.

c) Allow operators to offer attractive and innovative commercial offers to their customers

Operators should be allowed to offer national offers without "roaming" services for non-roamers, or alternative commercial offers that improve commercial conditions already set by the Roaming III Regulation (some existing offers already go beyond the draft Regulation notably for data services).

The new Regulation should also encompass some rules allowing consumers to keep their specific roaming offers in case they consider them more interesting than switching automatically to the new RLAH+ offer; similar provisions are foreseen for instance within the Roaming III Regulation.

d) Remove decoupling obligations once new rules are in place

The obligation to offer the separate sale of roaming services imposed by Roaming III becomes irrelevant once RLAH+ is provided by mobile network operators. In fact, as the purpose and

aim of the introduction of the separate sale of roaming services was to increase competition and by doing so bring roaming retail prices closer to domestic levels, there is no need to maintain these structural measures once the aim is reached. This is not adequately reflected in both the Parliament's and the Council's proposals.

Maintaining the separate sale of roaming services would bring no benefits from the roaming customers' point of view, and would result in an inefficient allocation of resources. This applies to the two decoupling obligations: single IMSI but also LBO.

e) Carefully consider the wholesale aspect of Roaming regulation

In the new setting, careful consideration should be given by legislators and regulators to the wholesale market in order to avoid hampering competition in domestic markets.

In particular, we believe that the following aspects should be taken into account:

- On the wholesale market operators should be able to recover their investments and costs;
- Any intervention on the wholesale market should ensure that innovation incentives remain in place and avoid any risk of distortion of competitive markets;
- As indicated by BEREC, the differences in costs between countries due to differences in e.g. labour costs, taxes, or spectrum costs as well as geography and population density should also be duly taken into account in a review of wholesale roaming rates;

Furthermore, given the complexities enumerated in BEREC's analysis, any review should take place only after thorough consultation with all stakeholders, and with the time needed to assess the implementation of the new rules at the retail level.

f) Carefully consider the technical details

Some of the provisions included in the regulation imply a technical complexity which will make the measures overly burdensome and not proportionate.

Operators should be left some flexibility in the implementation of the basic roaming allowance, according to the IT systems they have in place. For instance, the definition of the number of days of the allowance on a yearly basis is not compatible with the billing cycles the majority of operators have, resulting in the need of additional investments which bring no real value to the customer.



About ETNO

ETNO (the European Telecommunications Network Operators' Association - www.etno.eu, @ETNOAssociation) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses. ETNO members account for 60% of the total investments in European networks.