



Proposed Amendments to the Open Internet Chapter of the EU Telecommunications Single Market Regulation

The [Center for Democracy & Technology \(CDT\)](#) offers the following proposed revisions to the open Internet chapter of the proposed European Telecommunications Single Market Regulation.

We have from the outset supported enshrining the principle of non-discrimination of traffic in legislation, both in Europe and in the US. In May 2013, we set out our [recommendations for European net neutrality policy](#), and we have since [commented](#) at [various stages](#) of the TSM Regulation process.

We make the following suggestions in the hope that they will help the negotiating parties find solutions that will provide meaningful open Internet protections. They do not reflect CDT's view of an "ideal" open Internet regulation, nor do they represent a comprehensive proposal on all differences between the Commission, Parliament, and Council texts. Instead, they address three important issues that have come up repeatedly in conversations with representatives of the European institutions. These are: 1) the relationship between Internet access service and *managed* or *enterprise* services, 2) the relationship between 'Internet access service' and 'specialised services', and 3) the relationship between non-discriminatory treatment of Internet traffic and reasonable network management.

1. The definition of Internet Access Service

CDT proposes a modified definition of Internet access services to clarify that such services do not include business-to-business or machine-to-machine services that rely on access to the same infrastructure as Internet access service. Accordingly, CDT proposes incorporating the "mass-market, retail" definition that appears in the Federal Communications Commission's recently adopted open Internet regulation.¹

CDT also proposes to remove the definition of "net neutrality" from the definition of Internet access service. This is not due to a substantive disagreement with the Parliament's definition of the term. Indeed, CDT believes the term accurately and concisely defines the concept. However, incorporating that term into the definition of Internet access service leads to ambiguity with respect to the consequences that flow from departure from open Internet obligations that apply to Internet access service. One could argue that the provider of an electronic communications service to the public that provides access to the Internet but fails to adhere to basic non-discrimination requirements is not in fact providing an "Internet access service" and therefore need not comply with the regulation's open Internet obligations placed on that service. Removing

¹ See [Protecting and Promoting an Open Internet, Appendix A, Section 8.2\(a\)](#) (2015).

“net neutrality” from the definition of “Internet access service” avoids this potential loophole. Accordingly, CDT proposes the following definition:

“Internet access service” means a publicly available **mass-market, retail** electronic communications service that provides access to the Internet, and thereby connectivity to substantially all end points of the Internet, irrespective of the network technology and terminal equipment used;

2. Specialised Services

CDT has long advocated for a definition of specialised services to ensure that such services cannot be used to offer the equivalent of an Internet access service while evading the requirements that an open Internet regulation would place on that service. CDT recognises the difficulty in crafting a definition that gives sufficient clarity and flexibility to all actors in the Internet ecosystem to offer new, innovative services that rely on the same infrastructure as Internet access service but perform a specific, limited function that is distinct from Internet access.

We understand Council’s reluctance to include a definition, but we believe that a workable definition of specialised services is possible and that the Parliament text provides a good basis for such a definition. Some parties have expressed concerns that certain qualifications in that definition may prove unworkable in practice. Thus, CDT proposes the following modified definition:

“Specialised service” means an electronic communications service optimised and used to send or receive data to and from a limited number of parties or endpoints specific content, applications or services, or a combination thereof, which requires enhanced quality of service from end to end and that is not intended, marketed, or used, either individually or together with other specialized services, as a substitute for Internet access service.

Regardless of whether the regulation defines specialised services, it must clarify that services other than Internet access service that rely on the same infrastructure are not offered in a way that harms Internet access service. The proposed texts seek to accomplish this goal by ensuring that sufficient capacity is reserved for Internet access service and, in the case of the Parliament text, by banning discrimination between functionally equivalent services. While CDT agrees with Parliament that a meaningful open Internet regulation should not permit discrimination between functionally equivalent services, this issue is more properly addressed in the provision related to equal treatment of traffic than in the provision on specialised services.

CDT is concerned that the Council text’s inclusion of “providers of content, applications, and services” among end-users to whom the provider of an electronic communications may offer specialized services creates uncertainty with respect to an Internet access

service “customers”. Particularly if Internet access service is defined as a mass-market, consumer-facing service, this ambiguity is unnecessary and possibly harmful because it could make all providers of content, applications, or services unwilling customers of a provider of electronic communication services with whom they otherwise have no business relationship. To avoid the problems inherent in such an approach, CDT proposes the following compromise between the Parliament and Council texts:

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. In providing those services, providers of electronic communications to the public, including providers of Internet access services, shall ensure that sufficient network capacity is available so that the availability and quality of Internet access services for other end-users are not impaired.

If the term “specialised services” is not defined in the regulation, the article establishing reasonable limits on the provision of ‘services other than Internet access services’ should clarify the distinctions between those services and Internet access service. CDT proposes the following provision, which captures those distinctions. In either case, CDT recommends deleting “in a material manner” from the prohibition on impairment of Internet access service, as this creates unnecessary uncertainty on the permissible impact a specialised service may have on Internet access service:

Providers of Internet access, of electronic communications to the public and providers of content, applications and services shall be free to offer to end users a service other than Internet access services, which requires a specific level of quality and is not intended, offered, or widely used as a substitute for Internet access service. In providing those services, providers of electronic communications to the public, including providers of Internet access services, shall ensure that sufficient network capacity is available so that the availability and quality of Internet access services for other end-users are not impaired.

3. Equal treatment of traffic and traffic management measures

CDT strongly prefers the Parliament’s formulation of the prohibition on unreasonably discriminatory treatment of traffic by Internet access service providers in Article 23(5). Application agnosticism is a core component of a meaningful open Internet regulation and merely requiring equal treatment of equal “types” of traffic is insufficient to achieve that goal. The Council has expressed its view that discrimination between different types of traffic is necessary to account for certain sensitivities of different types of traffic to effects of congestion such as latency or packet loss. CDT believes that it is possible to address these concerns without sacrificing the principle of application agnosticism through an expansion of the legitimate traffic management measures under Article 23(5). CDT also believes that it is essential to clarify that traffic management measures that deviate from a principle of non-discrimination should be technical in nature and not

intended to achieve an unrelated business purposes. Thus, CDT proposes the following modification:

Subject to this paragraph, providers of Internet access services shall treat all traffic equally when providing Internet access services.

Providers of Internet access services may implement technical traffic management measures. Such measures shall be transparent, non-discriminatory, proportionate and shall not constitute anti-competitive behaviour. When implementing these measures, providers of Internet access services shall not block, slow down, alter, degrade or discriminate against specific content, applications or services except as necessary, and only for as long as necessary, to:

...

(c) prevent pending network congestion, mitigate the effects of exceptional or temporary network congestion, or achieve a similar legitimate network management purpose,² provided that equivalent types of traffic are treated equally;

² This alteration draws from the definition of “reasonable network management” in the Federal Communications Commission’s open internet regulation. See [Protecting and Promoting an Open Internet](#), Appendix A (pp. 283-290), Section 8.2(f) (2015).