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NOTE

from: Presidency
to: Delegations

No. Cion prop.: 13555/13 TELECOM 232 COMPET 646 MI 753 CONSOM 161 CODEC 2000

Subject: Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012

- Examination of the Presidency compromise text on net neutrality

In the Working Party meeting of 27 January, the Presidency intends to engage in an article by article discussion of the text in the Annex.

The text is based on Italian Presidency's note of 14 November 2014 (15541/14 ADD 1, Annex III), and also takes into account Member States' written contributions from November and December 2014. Thus, the text follows a principle-based approach. However, certain issues have been further specified in order to, among other things, ensure legal certainty and enable a consistent application across the European Union. The following is a brief summary of the main amendments compared to the Italian Presidency text:

- A definition of internet access services has been included. Since this regulation lays down rules to safeguard open internet access, it is essential to define what internet access services are, and also to distinguish them from other services (services which require a specific level of quality).
- The structure of draft Article [23] has been changed. The Article starts with end-users' right to open internet and the freedom of electronic communication providers to offer services other than those of internet access (services which require a specific level of quality), provided that there is no demonstrable negative impact on the availability and general quality of internet access services.
- With respect to the provision of internet access services, the draft stipulates equal treatment of all traffic. However, reasonable traffic management measures are allowed, and the draft sets out the characteristics of such measures. The list of exceptional situations where internet access service providers can implement measures which block or discriminate has been limited to four.

Moreover, following the discussion on the text, the Presidency plans to address the two issues described below.

Firstly, a proposal to include a ban on positive price discrimination across the European Union was put forward, gaining support of several Member States. At the same time, other Member States objected, leading the Presidency to conclude that an explicit proposal to ban positive price discrimination cannot gain the necessary support.

The Presidency would like to seek guidance from the Member States on whether and how this issue needs to be resolved in the draft legislative text. The issue of positive price discrimination could be left outside the scope of this instrument, and accordingly, an article on subject matter and scope which would specify so could be included. This would allow each Member State to decide whether to ban positive price discrimination at national level, or leave the assessment of such practices to general competition law. On the other hand, such a solution would not ensure a consistent approach across the Union.

Secondly, an issue was raised whether internet service providers should be allowed to block and/or discriminate against certain content acting on the basis of self-regulatory regimes which pursue recognised public interests. However, this request appears to raise certain legal issues relating to the Charter of Fundamental Rights of the European Union and/or the 2002/58 ePrivacy Directive, including with respect to confidentiality of communications.

In case legal issues are resolved and Member States would support the inclusion of self-regulatory regimes, the Presidency would consider the addition of appropriate text in that respect.

Article 2 - Definitions

[] “Internet access service” means a publicly available electronic communications service that provides access to the internet, and thereby connectivity between substantially all end points of the internet, irrespective of the network technology and terminal equipment used;

Article [23] - Safeguarding of open internet access and traffic management

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 in accordance with this Article.
2. Providers of internet access services and end-users may agree on commercial and technical conditions and characteristics of internet access services. Providers of electronic communications to the public, including providers of internet access services, shall be free to enter into agreements with end-users and/or providers of content, applications and services to deliver a service other than internet access services, which requires a specific level of quality, provided that sufficient network capacity is available so that the availability and general quality of internet access services are not impaired in a material manner.
3. Subject to this paragraph, providers of internet access services shall treat all traffic equally in the operation of their networks.

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

- a) implement a legislative provision or an order by a court or other public authority vested with relevant enforcement powers under national and/or Union law;
 - b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminal equipment;
 - c) prevent imminent network congestion and mitigate the effects of exceptional network congestion, provided that equivalent types of traffic are treated equally;
 - d) comply with an explicit request from the end-user, including but not limited to, in order to prevent transmission of unsolicited communication and to implement parental control measures.
4. Traffic management measures may only entail processing of personal data that is necessary and proportionate to achieve the objectives of paragraph 3 (a – d). Such processing shall be carried out in accordance with Directive 95/46. Traffic management measures shall comply with Directive 2002/58, in particular with respect to confidentiality of communications.
 5. This Article is without prejudice to Union or national legislation related to the lawfulness of the information, content, application or services and of the terminal equipment connected.

Article [24] - Safeguards for quality of service and the availability of internet access services

1. National regulatory authorities shall closely monitor and ensure compliance with Article [23], and shall promote the continued availability of internet access services at levels of quality that reflects advances in technology. For those purposes national regulatory authorities may impose technical characteristics and minimum quality of service requirements. 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 internet access services shall make available, at the request of the national regulatory authority, information about how their network traffic and capacity are managed, as well as justifications for any traffic management measures applied. Article 5 of the Framework Directive shall apply, *mutatis mutandis*, in respect of the provision of information under this Article.
 3. No later than six 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 competent authorities under this Article, including with respect to the application of traffic management measures set out in Article [23 (3)] and for monitoring of compliance.
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