

The EU rules on network neutrality: key provisions, remaining concerns

SUMMARY

Network neutrality can be described essentially as a non-discrimination principle, requiring that all electronic communication passing through an internet service provider (ISP) network is treated equally. After a lengthy debate, on 27 October 2015, the European Parliament adopted the **Telecoms Single Market (TSM) Regulation** which includes, inter alia, new rules to safeguard open internet access in the European Union (EU).

The TSM Regulation enshrines a right for end users to access and distribute content of their choice on the internet in EU law and imposes a **non-discrimination obligation** on ISPs to ensure all internet traffic is treated equally in a way that safeguards the end user's rights. However, ISPs can still depart from the non-discrimination principle in **exceptional cases** and to implement **reasonable traffic management** measures. The possibility for ISPs to offer innovative services, i.e. '**specialised services**' such as telemedicine services (e.g. health services carried out at a distance), which usually require guaranteed service quality and traffic management has been approved. ISPs and end users also remain free to conclude **commercial agreements** (e.g. on prices, volume and speed) on the features of the internet access services delivered. However, **safeguards** have been put in place to ensure that ISPs do not circumvent the non-discrimination principle through the use of specialised services and commercial agreements.

While the compromise text is seen by many commentators as a major step towards ensuring network neutrality in the EU, some remain critical of outstanding loopholes and ambiguities. **Concerns** have been expressed in particular on how to implement the rules on reasonable traffic management, specialised services and price discrimination practices such as **zero rating**. Common guidance is needed to avoid diverging approaches throughout the EU.



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Background

Open internet access and network neutrality principle

Open internet access refers to the notion of '**network neutrality**' – which has been defined in very [different](#) ways – and can be described essentially as a non-discrimination principle requiring that all electronic communication passing through an internet service provider (ISP) network is treated equally.¹

Network neutrality depends very much on how the internet traffic is delivered by the ISPs to the end users and if some forms of **quality discrimination** are implemented. The transport of internet traffic is primarily governed by the principle of '**best effort**', i.e. ISPs transport the traffic as well as they can, but without a guarantee of quality or obligation of result. However, [traffic management](#) practices (e.g. traffic prioritisation) can also be used to improve quality of service on a network.

Such traffic management measures can potentially be employed in an [anti-competitive](#) manner, and some practices such as **blocking** or **degradation of traffic** can be implemented by ISPs with a detrimental effect on competition and users' interests.

Furthermore, as shown in a recent [European Parliament study](#), discriminatory practices occurring in internet provision are at the centre of a number of important **public concerns**, including issues of anticompetitive behaviour by dominant network operators affecting other operators, content and application service providers, as well as the conditions for innovation and investment in new and innovative products and services, and end users' freedom of expression, privacy and data protection rights.

In 2012, a [study on traffic management](#) conducted by the **Body of European Regulators of Electronic Communications (BEREC)**,² showed that, while a majority of ISPs offer internet access services with no application-specific restrictions, **at least 20% of mobile internet users** in the EU had experienced some form of restriction on their ability to access voice over internet services. Against this background, BEREC stated that implementing effective transparency measures, guaranteeing that end users can switch service provider easily, and imposing, if needed, additional obligations on the ISPs (including quality of service requirements), might suffice to address network neutrality concerns in the EU in the short term. BEREC also acknowledged that 'rapidly evolving practices make it credible – though not certain – that problems will arise more frequently in the future', which may make [regulatory intervention](#) necessary on a case-by-case basis. More recently, a 2015 BEREC research on [how consumers value net neutrality](#) found that, while ISPs seemed largely compliant with net neutrality principles, **consumers are increasingly sensitive to traffic management features**.

Network neutrality debate

The [long-lasting debate](#) amongst stakeholders, academics and policy makers originally started in the [United States](#), and opposes those who support legislative or regulatory intervention to ensure network neutrality to those who see no sufficient grounds for public intervention – other than via traditional competition law.

Proponents of network neutrality regulation call for a legislative intervention, *inter alia*, to avoid that [competition](#) from content and services providers (such as Skype or Netflix) is impaired if ISPs block or slow down their services, or ask them to pay fees to reach their users; and to ensure that [freedom of expression](#) is not limited by traffic management practices, which could make some content more difficult to access.

Opponents of network neutrality regulation argue *inter alia* that over-restrictive network neutrality rules would prevent ISPs from efficiently managing their networks.

They stress economic theory [shows](#) that discrimination practices are not bad per se, price and product differentiation can in fact be good for consumers, and imposing a network neutrality obligation on ISPs could significantly affect their ability to innovate and invest.

The adequacy of general competition law alone for tackling discrimination practices arising on the internet is also discussed in the background of the legislative process. Some scholars have [stressed](#) that EU competition law (e.g. Article 102 and related Court of Justice of the European Union (CJEU) case law on refusal to deal, leveraging, discrimination and quality degradation, and vertical agreements) were likely to solve many of the concerns of network discrimination without any need for adopting an ad hoc regulation. Others have [argued](#) that, whilst part of the discrimination practices (e.g. blocking) could in theory be adequately addressed with competition law, there is little or no grounds under those rules for prohibiting other practices such as traffic prioritisation, and have called for legislation.

Stepping in to the debate in 2009, a European Commission [declaration](#) set out its commitment to preserving the open and neutral character of the internet, and enshrined net neutrality as a policy objective and regulatory principle to be promoted by national regulatory authorities in the EU. The Commission [argued](#) there was clear evidence of services being blocked or degraded, harming competition and the interests of consumers,³ and that the current EU legislation did not sufficiently empower national regulators to sanction blocking or other unreasonable traffic-management practices. The Commission also stressed the risk of divergent approaches to address this issue at national level leading to the fragmentation of the single market.

The question of whether evidence gathered of services being blocked or degraded in the EU was sufficient to trigger the enactment of **network neutrality legislation** has been much [debated](#) amongst stakeholders. ISPs have generally been against regulation, while content and service providers, consumer associations and associations engaged in the defence of freedom of expression support legislation. Some scholars [support](#) the adoption of detailed non-discrimination rules in Europe. Others have concluded there are few [grounds](#) for a legislative intervention and [call for](#) avoidance of what they refer to as an overly rigid and premature regulatory response in the EU.

The EU legislative process

The European Commission presented its [proposal](#) for a **Regulation to achieve a telecoms single market** ('Connected Continent') including rules to safeguard an open internet access environment in September 2013, following several resolutions of the European Parliament⁴ calling for ensuring network neutrality in the EU. The European Parliament (EP) substantially amended the Commission's initial proposal in its [first reading](#) of the draft legislation in April 2014 in order to tighten the proposed network neutrality rules. After a [lengthy negotiation](#) process, a compromise was reached between the three institutions (i.e. the 'trilogue'). The Regulation was formally approved by the [Council](#) on 1 October 2015 and by the [European Parliament](#) on 27 October 2015.

End users' rights to open internet access

The aim of the EU legislation was much debated between the co-legislators. The EP initially called for the inclusion of a **definition of 'net neutrality'** in EU legislation, and a strict non-discriminatory treatment of traffic in order to strengthen the network

neutrality principle. The Council instead favoured a more flexible obligation for equal treatment of internet traffic.

The compromise text thus does not include a precise definition of network neutrality. However, in line with the EP's wish, the Regulation clearly states that common rules are adopted 'to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and safeguard end users' rights'.

The Regulation enshrines in EU law a **right to open internet access** for the benefit of end users. The scope of this right is broadly defined. End users should be able to access and distribute information and content, use and provide applications and services without discrimination via their internet access services, using the technical equipment of their choice. They are also granted a right to be informed about traffic management implemented by the ISPs and the impact on the services they buy.

ISP non-discrimination obligation

Principle

As matter of principle, the Telecoms Single Market (TSM) Regulation imposes on ISPs a non-discrimination obligation to ensure all internet traffic is treated equally in a way that safeguards end users' rights. Therefore, under the new EU rules, ISPs are not allowed to block, or slow down or discriminate in other ways, the internet access services they provide to end users. Accordingly, **all traffic must be treated equally**, without discrimination, restriction and interference, and irrespective of the sender and receiver, the content accessed or distributed, and the applications or services used. ISPs cannot implement **paid prioritisation** practices (e.g. treat more favourably content providers' traffic against payment). However, this general prohibition of discriminatory practices is subject to some narrowly defined limitations and exceptions.

Limitations and exceptions

Firstly, the non-discrimination principle does not prohibit ISPs to conduct **reasonable traffic management measures** in order to use their networks more efficiently and adapt the quality of the provision of internet access as required by the specific content, services and applications which end users request. In line with the EP's position, the possibility to depart from the non-discrimination principle for traffic management reasons has been limited. Accordingly, ISPs can implement reasonable traffic management measures only in cases of objectively different technical quality of service requirements, for a limited period of time and not for commercial reasons, i.e. not to treat more favourably some content providers' traffic against payment.

Secondly, ISPs may depart from the non-discrimination principle to implement measures going even beyond reasonable traffic management (for example, blocking or degrading quality) in three **exceptional cases**: when legal obligations require so (e.g. in compliance with criminal or copyright law), when network congestion arises temporarily, or in exceptional circumstances (i.e., traffic can be slowed down to avoid broader quality deterioration when there is congestion), and for reasons of network security (e.g. to avoid cyber-attacks).

The TSM Regulation enshrines a specific legal basis in EU law for tackling discriminatory practices arising with respect to the provision of internet access services to end users. A new obligation has been created requiring all ISPs – independently of whether they are dominant operators or not – to treat all traffic equally when providing internet access services, except in some cases where traffic management practices are justifiable. A key issue will be to identify what are the **justifiable 'reasonable' traffic management practices**. In this regard, the TSM Regulation requires conducting a **proportionality test** in order to ensure that the non-discrimination principle, which is at the core of the new legislation, is not circumvented. In this respect, the EU case law could provide some guidance for national regulators when they assess discrimination and **objective technical justifications**. It has [proved](#), however, to be a challenging exercise to decide when objective justifications exist under EU law.

Specialised services

The possibility for ISPs to offer innovative services, i.e. '[specialised services](#)', such as **telemedicine services** (e.g. health services carried out at a distance) which require guaranteed quality of service, and usually traffic management, is a contentious issue, which was intensely debated throughout the legislative process. The key question was whether ISPs should be able to reserve part of their network – exempted from the network neutrality rule – for providing such services. The EP argued for restricting this option, while Council was in favour of allowing ISPs more leeway in this regard.

Concerns were [voiced](#) regarding the fact that ISPs would undermine the network neutrality principle if they offer specialised services on '**fast lanes**' in such a way as to make non-prioritised services unattractive. Therefore some stakeholders have [called](#) for a clear differentiation between 'specialised services' (the exception) and 'best-effort internet' (the principle). Other experts have, however, [argued](#) such concerns are [speculative](#), as ISPs have no interest in allowing managed services to substantially deteriorate traffic quality, since end users could switch to a competing ISP.

Compromise text

The TSM Regulation intends to strike a balance between safeguarding the general quality of internet access for all users ('best effort') and enabling innovative services, such as telemedicine services to flourish. The possibility for ISPs to offer '**specialised services**' is **guaranteed**, but some **safeguards** have been set in order to ensure that ISPs do not circumvent the non-discrimination principle, which is at the core of the new legislation, through the use of specialised services.

Against this background, to be acceptable, specialised services must be, as matter of principle, clearly differentiated from traditional internet access services. To that end, evidence must be available that an optimisation of the internet access service is objectively necessary for providing such specialised services. Furthermore, sufficient network capacity must be available to provide such innovative services in addition to traditional internet access service, and there should be no detrimental impact on the 'best effort' internet access service.

Remaining concerns

The compromise text assigns the responsibility to conduct a **substitution test** to national regulators, in order to check that an alleged specialised service is not simply replacing a traditional internet access service which, for instance, could be used by 'over-the-top' or OTT market players (i.e. such as Skype) for providing their services online. However the compromise text does not give detailed guidance – in addition to

the safeguard conditions mentioned above – on the criteria to be used for assessing substitution.

The lack of clear distinction between best effort internet access services and broadly defined 'specialised services' may have some detrimental consequences for some commentators. Critics [argue](#) for instance that companies willing to pay extra fees may attempt to use this exception to get a faster internet access service, while those who cannot pay extra fees (such as start-ups or small businesses) will have to resort to best effort internet access services and will be put at a disadvantage.

Economists [warn](#) that distinguishing specialised services and identifying harm to best effort internet access is not straightforward, and will require regulators to conduct well designed monitoring processes. From a legal point of view, how regulators assess **functional substitution** between specialised services and other services must be explored further. While there is some evidence of increasing [substitution](#) between traditional electronic communication services and OTT services, **common guidance on special services is needed to avoid diverging approaches**.

Zero rating and data caps

Commercial agreements

ISPs routinely conclude specific commercial agreements with their customers regarding the features (e.g. prices, volume and speed) of the internet access services they provide. The issue here is to what extent the non-discrimination obligation imposed on ISPs limits their freedom to conclude such commercial agreements with their end users.

Compromise text

The TSM Regulation does not prevent ISPs and end users from concluding commercial agreements regarding the features of internet access services provision. For instance, ISPs remain free to provide services with **data caps** according to which they can slow down data speeds, charge extra fees, or prevent further usage when a user has reached a monthly limit on the amount of data the user may access via internet connection. Similarly, the TSM Regulation does not prohibit **zero rating** practices.

Zero rating is a price discrimination practice which consists of allowing end users to access particular content, services or applications without being charged for, or without taking their data usage into account (e.g. streaming of a provider's music offer does not count in the subscriber's data cap).

However, the text attempts to avoid such commercial agreements being used to circumvent the central goal of the legislation to safeguard the right to open internet access. Therefore national regulators must be empowered to assess the legality of such commercial agreements and, where necessary prohibit a particular offer.

Remaining concerns

While the implementation of data caps is considered less problematic from a network neutrality perspective,⁵ price discrimination practices such as zero rating, increasingly implemented by ISPs, are today under scrutiny.

Critics of zero rating practices generally warn that such price discrimination can be implemented [discriminatorily](#). The practice allows ISPs to strike preferential commercial agreements that raise significant [concerns](#). They may also have a [detrimental](#) impact on other non-zero rated services, which are degraded when end users reach their volume caps. Furthermore, some commentators [raise](#) the issue that zero rating practices may limit user access to services and applications chosen by dominant technologies and

telecom companies, and therefore limit internet users' free expression and access to information. Courts and regulators in the **Netherlands** and **Slovenia** have already found some of these practices to be [abusive](#), and some Member States have expressed [concerns](#) regarding the lack of a clear ban on price discrimination in the TSM Regulation.

Proponents of zero rating [argue](#), on the contrary, that offering service for free is a competitive method for steering the demand for online content and distribution services, which generates investment in networks as well as economic social benefits, and believe that concerns about foreclosing competition or limits to freedom of expression are unfounded.

The compromise text does not provide detailed guidance on the criteria to be used for assessing the lawfulness of zero rating and data cap practices, but leaves this task to national regulators and to other competent authorities on a case-by-case basis.

In the United States (US), the [2015 Federal Communications Commission's](#) net neutrality rules also allow ISPs to provide specialised services and to implement zero rating and data cap practices. Administrative complaints are heard by the Federal Communications Commission (FCC), the US agency for telecommunications regulation, to assess the legality of such practices. Some scholars have argued for a per se [ban](#) of some of these practices. According to other experts, a [rule of reason approach](#) (i.e. an assessment of the pro-competitive features against the anticompetitive effects) could be used in the EU to identify abusive zero rating practices. While, the Member States which have already adopted national network neutrality rules have to assess if they are consistent with EU legislation, and if necessary, repeal their national laws, **common guidance on data caps and zero rating practices are needed to avoid diverging approaches throughout the EU.**

Stakeholder views

ISP associations, such as [ETNO](#), largely support the compromise text agreed by the Council and the EP, which enshrines a flexible network neutrality principle in EU law which still allows them to differentiate their services. They stress that uniform implementation of the rules across Europe will prove crucial.

Other stakeholders generally applaud the adoption of principles prohibiting internet access discrimination in the EU, but remain critical of some aspects of the Regulation. [BEUC](#), the European consumers association, disapproves of the authorisation of zero rating practices and stresses that safeguards against the undue impact of specialised services are not strong enough. [EDRI](#), which groups together privacy and civil rights organisations, and [La Quadrature du Net](#), a non-profit association supporting network neutrality rules, both warn that the compromise text still contains a number of **loopholes or ambiguities** and call upon BEREC and national regulators to elaborate clear implementation rules to uphold the network neutrality principles enshrined in the TSM Regulation.

Other [commentators](#) and [organisations](#) stress that the TSM Regulation leaves key questions unanswered with regard in particular to the identification of specialised services and the assessment of zero rating practices.

Next steps

The rules on network neutrality in the EU are applicable from **30 April 2016**. However, the debate on neutrality in the internet environment is not over yet.

In the short term, the implementation of the EU network neutrality rules will be discussed, since the Regulation includes a duty for **BEREC to lay down guidelines** on the supervision, enforcement and transparency measures for ensuring open internet access and the consistent application of the EU legislation. The guidelines will be adopted no later than nine months after the Regulation enters into force. In that context, the uncertainties remaining in how to consistently apply the rules related to reasonable traffic management, to specialised services and to zero rating practices could be clarified.

In the medium term, the policy debate will shift to what has been termed '**platform neutrality**', i.e. whether [expanding](#) neutrality rules beyond ISP networks to the 'web giants' such as Google and Apple services. Under the [Digital Single Market Strategy for Europe \(DSM\)](#) the Commission has launched a [public consultation](#) on this topic, and the EP is currently working on an [own initiative report on the DSM](#), after which it may take a position.

Main references

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Scott Marcus, J., [Network Neutrality Revisited: Challenges and Responses in the EU and in the US](#), European Parliament Directorate-General for Internal Policies, 2014

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Endnotes

¹ See BEREC draft Report for public consultation '[Differentiation practices and related competition issues in the scope of Net Neutrality](#)', Body of European Regulators for Electronic Communications (12) 31, 2012, p.4.

² BEREC is an agency of the European Union.

³ A 2012 European-wide survey showed that one in four internet users in the EU experience blocking of internet content.

⁴ Including the European Parliament [resolution of 17 November 2011](#) on the open internet and net neutrality in Europe, and the European Parliament [resolution of 11 December 2012](#) on completing the Digital Single Market.

⁵ See BEREC [Report on How Consumers Value Net Neutrality in an Evolving Internet Marketplace: a report into ecosystem dynamics and demand side forces](#), Body of European Regulators for Electronic Communications (15) 65, 2015, p.21. BEREC stresses that if all traffic is handled equally there is less concerns regarding abuse.

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