

Monica Horten: Proposed New EU Telecoms Package Doesn't Uphold Net Neutrality



*Under the title “Connected Continent” the EU’s Digital Agenda Commissioner Neelie Kroes introduced a draft **new legislative package on telecommunications** to the European Parliament. Policy analyst and LSE visiting fellow **Monica Horten** of lptegrity.com, argues that draft legislation does quite not deliver the net neutrality promised.*

In the controversy over the new Telecoms Regulation, the European Commissioner, Neelie Kroes, insists that she has protected net neutrality, but an analysis of the text of her proposed law suggests that she is being somewhat disingenuous. The text does indeed contain words to the effect that ISPs should not discriminate, but it falls a long way short of the kind of non-discrimination rule that would ensure they won't.

Instead, the overall impact of the proposed law would mitigate in favour of those ISPs who want to charge for content delivery. In a nutshell, no roadblocks are permitted, but selective VIP lanes are. ISPs may also vary the speed limits so that people simply cannot get where they want to go in the time required – if where they are going does not suit the ISP.

To put it another way, they may not block but they may prioritise.

ISPs will not be permitted to block competitors, but they can provide a fast lane for those who are willing to pay for it or who offer some other kind of favourable deal. *De facto*, those who don't pay, will be left behind.

Here's an example. If you use a streaming service, the ISP has two choices. It can do a deal with one streaming service and then provide that one in the 'free' bundle it gives you. If you want to use any other streaming service of your choice, you may do so – for a fee. (This example drawn from the analysis of [Innocenzo Genna](#)).

Alternatively, the ISP does a deal with a streaming service, which may mean it pays for the content, and then it makes sure that your bandwidth allowance and quality of service is just ok for that favoured service, and not ok for the other services you may choose to use. By manipulating your network access quality, your ISP will determine what streamed services you decide to use.

This is discrimination by another name, and it is explicitly permitted in the Commission's draft Telecoms Regulation Article 23, points 1,2 and 5.

1. End-users shall be free to access and distribute information and content, run applications and use services of their choice via their internet access service.

End-users shall be free to enter into agreements on data volumes and speeds with providers of internet access services and, in accordance with any such agreements relative to data volumes, to avail of any offers by providers of internet content, applications and services.

2. End-users shall also be free to agree with either providers of electronic communications to the public or with providers of information society services on the provision of specialised services with an enhanced quality of service.

3. [...]providers of content, applications and services and providers of electronic communications to the public shall be free to agreeenter into agreements with each other on the treatment ofto transmit the related data volumes or on the transmission of traffic as specialised services with a defined quality of service[...]

[...]

5 [...]providers of internet access services shall not restrict the freedoms provided for in paragraph 1 by blocking, slowing down, degrading or discriminating against specific content, applications or services, or specific classes thereof, except in cases where it necessary to apply reasonable traffic management measures. Reasonable traffic management measures shall be transparent, non-discriminatory, proportionate and necessary to:

a) implement a legislative provision or a court order, or prevent or impede serious crimes;

Point (a) means the ISPs may block if there is a court order from, for example, the copyright industries, but why is 'implement a legislative provision' in there – what legislative provisions? 3 strikes? Web blocking?

The wording of 'impede serious crimes' leaves the door wide open to interpretation. Certain types of copyright infringement are a crime in some Member States.

The Commission has removed the little barrier that used to be in place against ISPs adopting such practices – the 'conditions limiting' language is no longer there. Nothing has taken its place. It's actually not clear to me what the ISPs are obligated to tell you about how they are manipulating your service. There is some text in Article 26.2 on contracts, but it really will need a lawyer to disentangle it.

What's also very concerning is that the Commission is giving itself the power to regulate this area. It's very concerning because this method brings with it no accountability, and it means the Commission may impose measures on Member States after the law has been approved. For example, in Article 26.4.

The idea of a pan-European regulator has been dropped however. That would never have flown, as it was already rejected in 2009. (See also [EU midsummer horror: leaked draft of new Telecoms Regulation](#)) What is still in there, under a new name, is the Single Authorisation.

The Telecoms Regulation addresses a number of very important issues for regulation of the telecoms market, but, like its predecessor the 2009 Telecoms Package, net neutrality is the one that has got the public focus. However, the criticality of the issue has increased since 2009, and it now sits at the centre of all the other provisions. What we are just beginning to work out, is what was the true content of the deal that was cut by the Commission.

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* The title of the document is the *Regulation [...] laying down measures to complete the European single market for electronic communications and to achieve a Connected Continent*

**I also owe thanks to [Innocenzo Genna for his analysis published here](#)

***More analysis from [European Digital Rights \(Edri\)](#)

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