

# DIGITAL SINGLE MARKET - PART 1

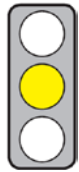
## NET NEUTRALITY AND END-USER RIGHTS

cepPolicyBrief No. 2014-03

### KEY ISSUES

**Objective of the Regulation:** The Commission wants to create an EU single market for electronic communications.

**Affected parties:** Telecomms providers, internet access providers, service providers and end-users.



**Pro:** (1) Agreements on data volume limitations and special services are permitted.

(2) EU-wide fully-harmonised end-user rights contribute to the completion of the single market.

**Contra:** (1) The imprecise definition of special services inhibits innovation and broadband development.

(2) A statutory requirement for net neutrality makes it more difficult for end-users to conclude more cost-effective contracts and is only justified where an internet access provider has a dominant position in the end-user market.

(3) The right to terminate contracts after six months, and the mandatory conversion from long-term contracts to contracts with one month's notice, inhibit broadband development.

### CONTENT

#### Title

**Proposal COM(2013) 627** of 11 September 2013 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

#### Brief Summary

Part 1 of the cepPolicyBrief concerns net neutrality and the full harmonisation of the rights of end-users. Part 2 deals with the notification requirement for telecomms providers, radio frequencies and virtual broadband access. The change to the Roaming Regulation and cross-border fixed-network connections within the EU will be considered in Part 3.

#### ► Objective of the Regulation

- The objective is the "completion of a European single market for electronic communications" (Art. 1 (1)). To this end, the Commission wants, inter alia,
  - to introduce uniform rules on net neutrality and
  - fully harmonise the rights of end-users of telecomms services EU-wide.
- This shall reduce the costs for telecomms providers and "strengthen the trust of end-users" (Recital 40).

#### ► Definitions

- End-users are commercial or non-commercial users (latter: "consumers") of public communications networks and/or publicly available electronic communications services.
- Providers of electronic communications to the public (hereinafter: telecomms providers) are undertakings providing public electronic communications networks or those transmitting signals on such networks (Art. 2 (2) in conjunction with Art. 2 c Framework Directive).
- Internet access providers are telecomms providers providing end-users with a connection to the internet (cf. Art. 2 (14)).
- Providers of content, applications or services (hereinafter: service providers) are undertakings providing end-users with specific services on the internet.

#### ► Net neutrality

- Internet access providers may conclude contractual agreements with end-users on data volume limitations and speeds (Art. 23 (1), sub-para. 2).
- Within these agreements, internet access providers may only block, slow down, degrade or discriminate against contents, applications or services or specific classes thereof, where it is necessary in order, inter alia (Art. 23 (5)):
  - to prevent or impede "serious crimes"
  - to preserve the integrity and security of the network, the services provided and the end-user terminals,
  - to block unsolicited emails to end-users who have given their prior consent, or
  - to minimise the effects of network congestion whereby equivalent "types of traffic" must be treated equally.
 These "traffic management measures" must be transparent, non-discriminatory and proportionate (Art. 23 (5)).
- Telecomms providers and service providers can offer end-users "an enhanced quality of service" in return for payment ("specialised services") (Art. 23 (2), sub-para. 1).

- In order to ensure the quality of specialised services, telecomms providers and service providers can agree with each other to give priority to certain types of data traffic (Art. 23 (2), sub-para. 2).
- Specialised services are not permitted to impair "in a recurring or continuous manner" the "general quality" of the "open" internet. In order to ensure this, the national regulatory bodies may impose "minimum quality of service requirements" on telecomms providers. The EU Commission imposes "uniform conditions for the implementation of these obligations" by way of implementing acts. (Art. 23 (2), sub-para. 2, Art. 24 (2) and (3))

► **End-user Rights: Information requirements**

- Internet access providers must publish, in particular, the following information (Art. 25 (1) (e)):
  - the data speed available for download and upload, including at peak-hours,
  - any data volume limitations and the prices for increasing these limitations on an ad hoc or lasting basis,
  - the data speed, and its cost, available in excess of these limitations,
  - a "clear and comprehensible" explanation as to how limitations on data volume and actual data speed "practically impact the use" of content.
- Contracts between telecomms providers and internet access providers, on the one hand, and end-users, on the other, only become effective when all the required information has been made available. Providers may conclude agreements with commercial end-users which diverge from this. (Art. 26 (1) and (2))
- The Commission may adopt implementing acts, inter alia, on (Art. 25 (2) and Art. 26 (4)):
  - "the content, form and manner" of the information to be published, and
  - the methods for measuring the actual data speed.
- In order for end-users to be able to compare electronic communications networks and services and the cost thereof, the Member States must create a voluntary certification scheme, e.g. for comparison websites (Art. 25 (3)).
- Where required, telecomms providers must (Art. 27 (1) and (2)) ensure, free of charge, that
  - the cost of using telecomms services does not exceed a specified upper limit set by the end-user, and
  - notify the end-user when 80% of this limit has been reached.

► **End-user Rights: Duration of contracts and termination rights**

- Telecomms providers must give end-users the opportunity to conclude a contract with a maximum period of twelve months (Art. 28 (1), sentence 2).
- Telecomms providers are not permitted to conclude a contract with consumers with a minimum period of over 24 months (Art. 28 (1), sentence 1).
- The minimum contract period does not restart when the end-user subscribes to an additional service from the telecomms provider. An exception applies, for example, where the additional service costs "significantly" more than the initial service. (Art. 28 (6))
- Where six months or more have elapsed since conclusion of the contract, end-users may terminate a contract at any time with one-month's notice (Art. 28 (2)).
  - Commercial end-users can waive the termination right by agreement (Art. 28 (2)).
  - In the case of termination, providers cannot claim compensation other than for (Art. 28 (2) and (4))
    - the residual value of subsidised equipment sold on conclusion of the contract, and
    - a pro rata temporis reimbursement for any other promotional advantages.
- In the case of a change in the contractual conditions which is unfavourable to end-users, the latter may terminate the contract without incurring any costs (Art. 28 (4)).
- Telecomms providers must inform end-users, one month prior to expiry of the contract, that the contract will be extended tacitly if the end-user does not object. In the event of a tacit extension, end-users may terminate the contract at any time with one month's notice without incurring costs. (Art. 28 (3))

► **End-user Rights: Facilitating change of providers**

- Where there is a change of provider, the contract with the transferring telecomms provider will be terminated automatically (Art. 30 (5)).
- End-users have the right to retain their number(s) when they change provider (Art. 30 (1)). The transfer of a number must take place within one working day (Art. 30 (3)).
- The pricing between telecomms providers for transferring numbers must be "cost-oriented". Any costs to end-users cannot be used as a disincentive for them to change provider (Art. 30 (2))

## Main Changes to the Status Quo

- ▶ Until now, the information obligations of the telecomms providers and the rules on transferring numbers when changing provider were contained in Art. 20 (1), Art. 21, Annex II, Art. 22 (1) and Art. 30 of Directive 2002/22/EC [Universal Service Directive (USD)]. In future they will be governed by the Regulation.
- ▶ Until now, the national regulatory authorities have only had to "encourage" the provision of e.g. comparison websites (Art. 21 (2) USD). In future, Member States will have to create a voluntary certification scheme.
- ▶ Until now, only providers of data roaming services were obliged to notify the end-user when 80% of the maximum limit or volume limitation had been reached [Art. 15 (3), sub-para. 6 of the Regulation (EU) No. 531/2012 (Roaming Regulation)]. In future, this provision will apply to all telecomms providers.
- ▶ Until now, the maximum period of 24 months only applied to the "initial" minimum contractual period (Art. 30 (5) USD); in future it will apply to all types of minimum contractual period.
- ▶ Until now, end-users had a special right of termination in the event of any change to the contract (Art. 20 (2) USD). In future, this right will only apply in the case of changes which are unfavourable to the end-user.
- ▶ The rules on net neutrality are new.

## Statement on Subsidiarity by the Commission

The focus of the proposal is to "establish a single market for electronic communications" which, according to the Commission, can only be regulated at EU level. The Commission does not provide any separate statement on subsidiarity for the rules on net neutrality and end-user rights.

## Policy Context

Alongside the proposal for a Regulation, the Commission has published a Communication on the Telecommunications Single Market [COM(2013) 634] and a Recommendation on consistent non-discrimination obligations and costing methodologies [C(2013) 5761].

## Legislative Procedure

11 September 2013	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

## Options for Influencing the Political Process

Directorate General:	DG Connect
Leading Committee of the EP:	Industry, Rapporteur: Pilar del Castillo Vera (EVP, ES)
Leading Federal Ministry:	Federal Ministry for Economy and Technology
Leading Committee of the BT:	TBA
Decision mode in the Council:	Qualified majority (Adoption by a majority of the Member States and with 260 of 352 votes; Germany: 29 votes)

## Formalities:

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative Procedure:	Art. 294 TFEU (Ordinary legislative procedure)

# ASSESSMENT

## Economic Impact Assessment

In view of the ideological debates, **it is appropriate for the Commission to clarify that contractual agreements** between internet access providers and end-users, **on data volume limitations** and speeds, **are permitted**. This should be obvious; otherwise low-level users would have to cross-subsidise high-level users. **The same applies to the authorisation to offer higher quality services ("specialised services")**. However, **the imprecise definition of specialised services** creates legal uncertainty; they are not clearly distinguished from other services. Also, the requirement that the "general quality" of the "open" internet cannot be impaired, is not explained in more concrete terms. This **inhibits innovation** in the case of quality-sensitive applications such a telemedicine **and** has a negative effect on the revenues of internet access providers which are necessary for **broadband development**.

Notwithstanding these positive elements, however, the Commission is needlessly restricting entrepreneurial and contractual freedom, including that of consumers. Particularly hard to comprehend is **the requirement for net neutrality** which states that internet access providers must, in principle, treat all data and services equally, and that "traffic management measures" are only permitted in narrowly defined exceptional cases. This needlessly **makes it more difficult for** internet access providers and **end-users to conclude more cost-effective contracts which leave out individual services**. Particularly problematic is the fact that such rules apply irrespective of whether internet access providers have a dominant market position ("symmetrical regulation"). **A statutory requirement for net neutrality is only - if at all - justified, however, where an internet access provider has a dominant position in the end-user market**. Without such market

dominance, competition for end-customers will sufficiently regulate the conduct of internet access providers. The special right allowing end-users to terminate contracts, in the case of changes which are unfavourable to them, strengthens this mechanism; where providers restrict free data traffic they can expect terminations by end-users.

This also applies - in a slightly modified form - to vertically integrated internet access providers who give priority to their own services. Only where the internet access provider has a dominant position in the market for the relevant service, is it necessary to allow intervention. In this regard, general competition law is sufficient; the sector-specific regulation proposed by the Commission is not necessary. (For more detail on the relevance of competition law see: [cepStudy – Net neutrality as a regulatory objective](#)).

**EU-wide fully harmonised end-user rights are an important step towards completing the single market in the telecommunications sector** because companies only have to take account of one consumer law system rather than 28. It also reduces the costs for providers who operate in several Member States. End-users ultimately profit from this due to lower prices.

However: full harmonisation does not take account of national differences when it comes to the likes and dislikes and the habits of consumers nor does it take account of the differences in the intensity of competition which determine the required level of stringency of consumer protection. A reduction in the level of consumer protection in some Member States cannot therefore be ruled out. Whether this will "strengthen the trust of end-users" (Recital 40) in countries with high levels of consumer protection is open to doubt.

The arrangement of contractual periods and termination rights should generally be left up to the contracting parties. **The mandatory right of termination after the expiry of six months, and the mandatory conversion of long-term contracts, which have been tacitly extended, into contracts with one month's notice, are particularly overbearing. They hinder the providers' calculations and thereby inhibit broadband development.**

## Legal Assessment

### Legislative Competency

The Regulation is rightly based on Art. 114 TFEU (Internal Market).

### Proportionality

Since the Commission is aiming for an EU-wide harmonised law, the legal form of a Regulation is proportionate.

### Compatibility with EU Law in other Respects

By allowing traffic management measures - such as blocking access - in order to prevent or impede serious crimes, the Regulation encroaches, on the one hand, upon the end-user's freedom of communication [Art. 7 Charter of Fundamental Rights (CFREU)] because, at EU level, the freedom of communication also protects against the obstruction of communication (ECHR, No. 10802/84 of 25 February 1992, para. 43 et seq.; Art. 52 (3) CFREU). Blocking access obstructs communication between the end-users and the blocked internet sites. On the other hand, it encroaches upon the service provider's freedom of expression and upon the end-user's freedom of information (Art. 11 CFREU).

The EU is bound to uphold and therefore to protect fundamental rights. **By placing traffic management measures to prevent or impede serious crimes largely within the scope of discretion of the private internet access providers, the Regulation encroaches upon the aforementioned fundamental rights.** This encroachment by the EU is unjustified and therefore violates the EU Charter of Fundamental Rights. This is, firstly, **because the Regulation is too imprecise**: depending on the technical arrangement used to block access, it allows significant encroachment upon fundamental rights, so perfunctorily restricting it to the prevention of serious crimes is insufficient. In addition, it is disproportionate; although it appears to be suitable, since the blocking of access does at least hinder the commission of serious crimes, one must consider, with regard to proportionality, inter alia, that blocking access may not sufficiently distinguish between lawful and unlawful content (cf. ECJ, Case C-70/10 "Scarlet Extended", 24 November 2011, para. 52).

### Impact on German Law

Since the Regulation proposes full harmonisation of end-user rights, it is highly doubtful whether diverging provisions, such as the special termination right in the case of relocation (Section 46 (8) Telecommunications Act (TKG)), can be retained.

## Conclusion

It is appropriate to clarify that contractual agreements on data volume limitations and specialised services are permitted. However, the imprecise definition of specialised services inhibits innovation and broadband development. A statutory requirement for net neutrality makes it more difficult for end-users to conclude more cost-effective contracts that leave out individual services, and is only justified at all if an internet access provider has a dominant position in the end-user market. EU-wide fully-harmonised end-user rights contribute to the completion of the single market. The right to terminate contracts after six months, and the mandatory conversion from long-term contracts to contracts with one month's notice, inhibit broadband development. By placing traffic management measures, to prevent or impede serious crimes, largely within the scope of discretion of the private internet access providers, the Regulation encroaches upon fundamental rights. This intervention by the EU is unjustified because the Regulation is too imprecise.