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Comments on the Compromise Proposal by the Latvian Presidency for the Telecoms Single Market Regulation

June 1, 2015

After reviewing the Council's latest compromise proposal for the Telecoms Single Market regulation,[1] the Center for Democracy & Technology (CDT) offers the following observations and suggestions in the hope that they contribute to the promulgation of meaningful open internet protections. These observations draw in part from CDT's past comments[2] on the proposed Regulation as well as CDT's comments and analysis of the United States Federal Communications Commission's *Open Internet Order*.[3]

I. Defining "Net Neutrality" in the Regulation is Unnecessary and Perhaps Ill-Advised

Some advocates have expressed concern that the Council text would drop the definition of "net neutrality" contained in the Parliament text. In CDT's view, this concern is misplaced. While basic principles of non-discrimination and application agnosticism are essential to a meaningful net neutrality regulation, net neutrality itself is a principle that is susceptible to more than one accurate articulation. Indeed, the term now appears in the Merriam-Webster dictionary with a definition that varies in subtle but meaningful ways from the definition in the Parliament text. The dictionary definition of net neutrality is "the idea, principle, or requirement that internet service providers should or must treat all internet data as the same regardless of its kind, source, or destination."[4] This definition differs from the Parliament's definition of net neutrality as "the principle according to which all internet traffic is treated equally, without discrimination, restriction or interference, independently of its sender, recipient, type, content, device, service or application."

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[1] 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 (Latvian Presidency, 26 May 2015), *available at* http://data.consilium.europa.eu/doc/document/ST-9165-2015-INIT/en/pdf.

[2] CDT Recommendations for EU Net Neutrality Policy (May 2013), *available at* https://cdt.org/files/pdfs/CDT%20views%20on%20EU%20net%20neutrality.pdf.

[3] Protecting and Promoting an Open Internet, *Report and Order on Remand and Declaratory Ruling*, Federal Communications Commission (26 February 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

[4] "Merriam-Webster adds 'net neutrality'", The Hill (27 May 2015), *available at* http://thehill.com/policy/technology/243177-merriam-webster-defines-net-neutrality.

These are both appropriate articulations of the basic principle of net neutrality. However, our understanding of that principle has evolved and may continue to do so. Provided that the Regulation's protections for an open Internet are sufficiently clear, it is not necessary or necessarily advisable to define the term "net neutrality" in the Regulation.

Further, by incorporating the definition of "net neutrality" into the definition of "internet access service," and then attaching regulatory obligations and prohibitions to "internet access service" could lead to a troubling loophole. A network operator could argue that an electronic communications service that provides access to the internet but fails to adhere to basic nondiscrimination requirements is not in fact an "internet access service" and therefore not subject to the Regulation's open internet obligations placed on that service. Removing "net neutrality" from the definition of "internet access service" avoids this potential loophole. Removing the definition of "net neutrality" from the Regulation, as the Latvian Presidency's compromise proposal suggests, does not weaken the Regulation and may in fact strengthen it.

II. Net Neutrality Requires More Than Treating Equivalent Types of Traffic Equally

Net Neutrality is, at its core, a principle of nondiscrimination. Thus, CDT prefers the earlier Council text's formulation of Article 1, which referred to the rules' objective of "ensuring non-discriminatory treatment of traffic" to the current text's formulation of that objective as ensuring "equal treatment of traffic."

More importantly, the Council text continues to depart from the application agnosticism that is a core principle of net neutrality. Although Article 3(3) now states that internet access service providers "shall treat all traffic equally," it immediately qualifies that requirement by stating that providers may implement "reasonable traffic management measures" that, in addition to other requirements such as transparency and proportionality, "shall be based on objectively different technical quality of service requirements of specific categories or classes of traffic." As with earlier versions of the Council text, this express permission of type-based discrimination is at odds with the net neutrality principle of treating all content, applications, and services equally.

While there may be particular circumstances in which a network operator needs to depart from that principle – such as during periods of congestion – that departure should be the exception, not the norm. The Parliament text limited differentiated treatment of "specific categories or entire classes of traffic" to specific legal compliance or network management purposes. The Council text, however, makes type-based discrimination a broadly acceptable practice even in the absence of congestion or certain limitations of specific technologies. Although the text states that reasonable traffic management measures "shall not be maintained longer than necessary," there is no clear requirement that any departure from application agnosticism be tied to a network management purpose, such as congestion or inherent limitations of certain platforms or technologies. Given the obvious tension between net neutrality and type-based discrimination, a clearer nexus between differentiated treatment and a network management purpose is necessary. The "default setting" of the network should be application agnostic.

III. Meaningful Open Internet Protections Require a Clear Separation Between Internet Access and Specialised Services

A clear and comprehensive definition of the class of services that do not provide internet access and therefore are not subject to open internet protections but rely on the same infrastructure has proven elusive for regulators in many jurisdictions. The U.S. *Open Internet Order* did not define "non-broadband internet access services" (non-BIAS data services). Instead, the *Order* acknowledged the potential benefits of such services, exempted them from the open internet rules, but also made clear that the FCC would continue to monitor non-BIAS data services to ensure that they were neither offered or used in ways that would undermine open internet protections.

Similarly, neither the Parliament nor the Council defines specialised services in their latest proposals. However, the Council text provides few clear protections against the possible encroachment of specialised services on open internet protections. The text states only that (1) such services may be provided only if there is sufficient capacity to offer them in addition to internet access service, (2) they are not "usable as a substitute" for internet access services, and (3) they are not "to the *material* detriment of the availability or quality of internet access services for *other end-users*."[5] Recital 11 instructs national regulatory authorities to assess whether the "negative impact on the availability and quality of internet access service is material" and lists a set of criteria such as jitter and packet loss by which to make that assessment. However, it remains unclear whether network operators can market a specialised service as a partial substitute to internet access service and – beyond making a certain minimum amount of bandwidth available for internet access – what limitations are placed on the offering of those services.

In past comments, CDT has advocated for a clearer separation between specialised services and internet access. CDT recommended clarifying that specialised services should not be marketed as internet access or anything confusingly similar.[6] While the Parliament text does contain this limitation, the Council text does not. Including a limitation in how such services are marketed would improve the Regulation. Further, CDT encourages the Commission, Parliament, and Council to consider the three factors identified by the FCC's Open Internet Advisory Committee as characteristics of specialised services: (1) the services are not used to reach large parts of the internet, (2) the services are not a "generic platform" but rather a specific "application-level" service, and (3) the services use some form of network management to isolate the capacity used by these services from the capacity used for internet access service.[7] CDT believes that consumers, network operators, and content, application and service providers may all benefit from innovation in the development and offering of specialised services. However, to ensure that such services do not impede innovation on the internet, a clearer separation between the offering of specialised services and internet access service is required.

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[5] Latvian Presidency compromise proposal, Article 3.5 (emphasis added).
[6] CDT May 2013 Comments at 6.
[7] See Open Internet Order at ¶ 209.