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## Recommended Amendments to Net Neutrality Provision of Draft EU Regulation on Single Market for Electronic Communications

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The European Commission is circulating a draft regulation aimed at completing the European single market for electronic communications. Article 20 of the draft regulation relates to net neutrality. Unfortunately, as currently structured, Article 20 would undermine rather than protect the Internet's open and neutral nature. It would also undermine rather than promote a single European market for Internet-delivered goods and services. The core problem is that the draft regulation fails to distinguish between *Internet access services*, which should be neutral in nature, and *specialized services*, which need not be – a distinction that has been recognized as essential by a number of Member State expert bodies that have analyzed the issue.

CDT's specific proposed textual amendments to Article 20 are set forth immediately below, followed by further explanation concerning these proposed changes. For a more detailed explanation of CDT's views concerning what is at stake in the net neutrality debate, see <https://www.cdt.org/files/pdfs/CDT%20views%20on%20EU%20net%20neutrality.pdf>.

CDT would welcome the opportunity to discuss these proposed amendments with any interested EU officials. For more information, please contact

### Proposed Amendment

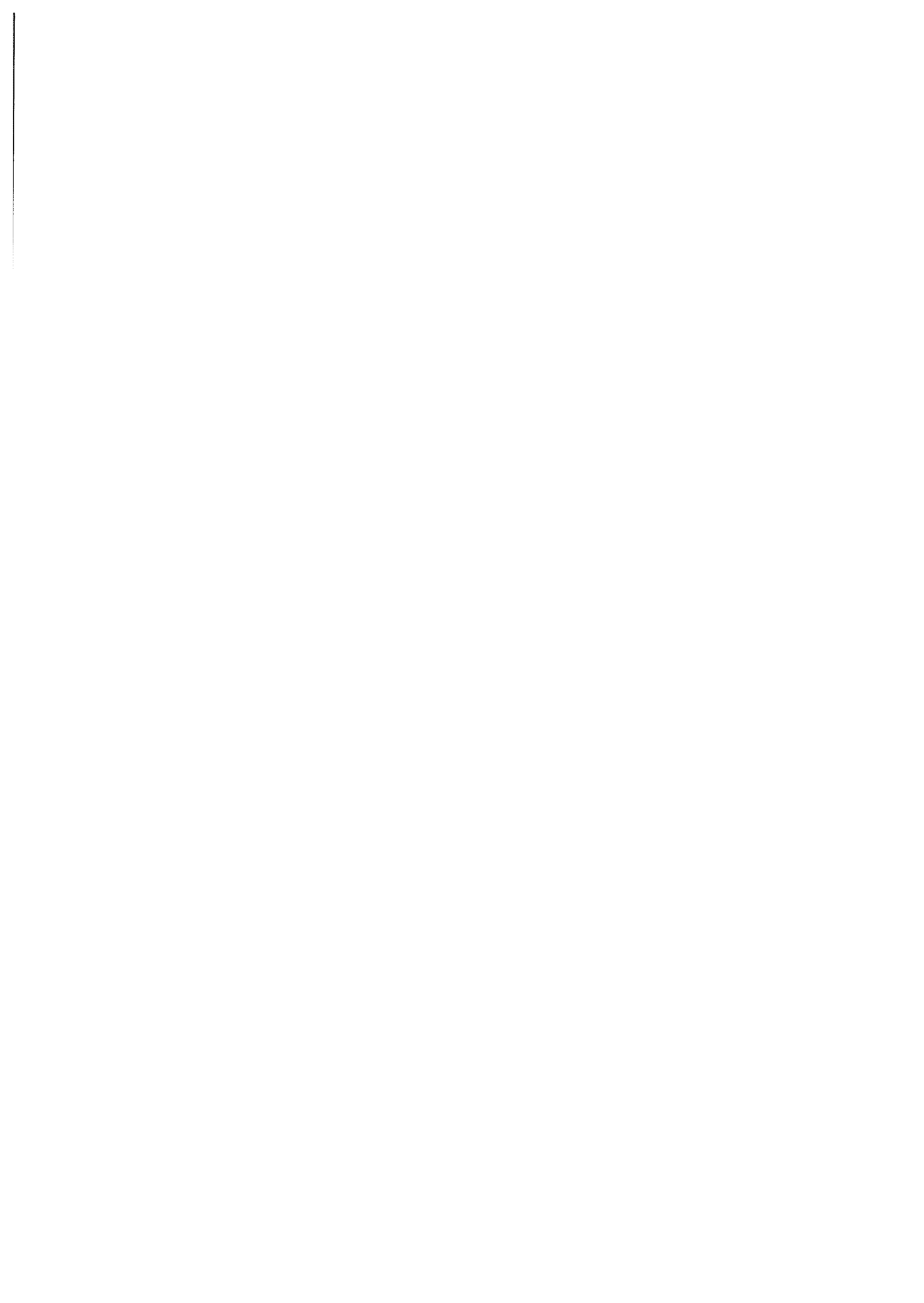
CDT recommends amending Article 20 to read as follows. (Additions to the draft text are in underlined boldface; deletions are in double strike-through.)

Article 20 - ~~Quality of service, Freedom to provide and avail of open internet access,~~  
specialized services, and reasonable traffic management

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

In pursuit of the foregoing freedom, end-users of Internet access shall be free to agree on data volumes, speeds and general quality characteristics with providers of electronic communications to the public and, in accordance with any such agreements relative to data volumes, to avail of any offers by providers of Internet content, applications and services, ~~including offers with defined quality of service.~~ To the same end, providers of content, applications and services and providers of electronic communications to the public shall be free to enter agreements with each other ~~to transmit on the treatment of~~ the related data volumes or ~~on the transmission of traffic~~ as specialized services with a defined quality of service or dedicated capacity, so long as the provision of such specialized services does not substantially impair the quality of Internet access offered to the public.

The exercise of these freedoms shall not be restricted by national competent authorities, or, as regards the freedom laid down for end-users, by providers of electronic communications to the public, save in accordance with the provisions of this Regulation, the Directives and other provisions of Union law.



End users shall be facilitated in the exercise of these freedoms by the provision of complete information in accordance with Article 21, paragraphs 1 and 4, and Article 22, paragraph 2, of this Regulation.

2. Within the limits of any contracted data volumes or speeds, **and except for reasonable traffic management as described in paragraph 3**, providers of **Internet access services** ~~electronic communications to the public shall not restrict the foregoing freedoms by employing traffic management practices solely or primarily to~~

**a) blocking, slowing down or otherwise degrading specific content, applications, services or applications, or specific classes thereof;**

**b) prioritizing or otherwise discriminating among Internet traffic based on its content, application, or service, in a manner that may slow or otherwise degrade the transmission of non-prioritized traffic; or**

**c) discriminating in the charges assessed to end users based on the specific content, applications, or services they choose to access.**

**3. Providers of Internet access services may engage in reasonable traffic management. Traffic management practices are reasonable if they are relevant, proportional, efficient, and nondiscriminatory means ~~unless, and only to the extent that, such restrictions are necessary to:~~**

a) implement a legislative provision or a court order;

b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminals;

c) prevent the transmission of unsolicited communications to end-users who have given their prior consent to such restrictive measures ;

d) minimise the effects of exceptional congestion provided that equivalent types of traffic are treated equally.

~~34.~~ National regulatory authorities shall closely monitor and ensure the effective ability of end- users to exercise the freedoms defined in paragraph 1, **the continued availability of nondiscriminatory Internet access at levels of quality that reflect advances in technology and are not impaired by the specialized services offered by providers of electronic communications**, the compliance with paragraph 2, and the transparency and **consistency** ~~proportionality~~ of traffic management practices **with paragraph 3 in general**. In order to prevent the general degradation of quality of service for Internet access services or for certain types of traffic, or to safeguard the ability of end-users to access and distribute content or information or to run applications and services of their choice, national regulatory authorities shall have the power to impose minimum non-discriminatory quality of service requirements on providers of electronic communications to the public.

National regulatory authorities shall provide the Commission, in good time before imposing any such requirements, with a summary of the grounds for action, the envisaged requirements and the proposed course of action. This information shall also be made available to BEREC. The Commission may, having examined such information, make comments or recommendations thereupon, in particular to ensure that the envisaged requirements do not adversely affect the functioning of the internal market. The envisaged



requirements shall not be implemented during a period of two months from the receipt of complete information by the Commission unless otherwise agreed between the Commission and the national regulatory authority, or the Commission has informed the national regulatory authority of a shortened examination period, or the Commission has made comments or recommendations. National regulatory authorities shall take the utmost account of the Commission's comments or recommendations when deciding on the requirements and shall inform the Commission [and BEREC] of the implemented requirements.

45. The Commission may, by means of an implementing act adopted pursuant to Article 27 of this Regulation, define uniform conditions for the implementation of the obligations of national competent authorities under this Article.

*New definitions*

*(could be included as a new paragraph in Article 20, or incorporated into Article 2)*

**“Internet access service” means a retail service that provides the capability to send and receive data using the Internet Protocol to and from all or substantially all publicly available Internet endpoints.**

**“Specialized service” means an electronic communications service that (i) provides the capability to access a limited set of specific content, applications, or services, or provides the capability to send or receive data to or from a limited number of parties or endpoints; and (ii) is not intended, marketed, or widely used as a substitute for Internet access service.**

## **Explanatory Notes**

- Numerous reports and analyses regarding net neutrality, including European expert bodies such as BEREC, Ofcom, and ARCEP, have recognized that net neutrality policy must distinguish between Internet access services and other communications services that are “specialized” or “managed.” Internet services are expected to be neutral and nondiscriminatory; specialized or managed services (the two terms are generally used interchangeably, to denote non-Internet services) carry no such expectation. Both types of service have a role in a vibrant electronics communications marketplace. As Ofcom has put it, the policy goal should be to “ensure that managed services continue to co-exist with ‘best efforts’ access to the open Internet” (*Ofcom’s approach to net neutrality*, 24 Nov. 2011, p. 27).
- Because it lumps Internet and specialized/managed services together, Article 20 of the draft regulation is forced to choose between the open, nondiscriminatory model of the Internet and the specialized services model of special deals and service quality guarantees. Rather than protecting the two models’ continued co-existence, it endorses the model of carriers striking special deals and playing favorites – even with respect to regular Internet traffic.
- Embracing special treatment and favoritism on the Internet, as Article 20 appears to do, is the *opposite* of net neutrality. Most net neutrality laws, rules, or regulations feature some form of nondiscrimination principle. Article 20 appears to treat any such principle as a violation of an ISP’s freedom to strike special deals for special treatment. Article 20 therefore runs directly contrary to net neutrality principles adopted or endorsed in countries from Norway to the United States to Chile.



- Endorsing discrimination on the Internet would have serious detrimental consequences. It would undermine innovation, by giving carriers tremendous leverage to pick winners and losers in the online marketplace and thus preventing the Internet from serving as a level playing field. It would cement the position of today's Internet giants, who are in the best position to partner with (or pay) ISPs for preferred treatment. And it would undermine Europe's single market for Internet content, applications and services. Instead of being able to quickly offer Internet-based services across the single market, upstart companies would find that successfully penetrating each local market would require the complex task of negotiating deals with the local ISPs. Services without the support of local ISPs would simply be unable to match the performance of their more local competitors.
- Article 20 seems to assume that it is fine for ISPs to *prioritize or favor* selected traffic, so long as they are not *blocking or degrading* selected traffic. But in practice, when selected traffic is prioritized, the performance of the non-prioritized traffic is degraded. A good analogy is to people waiting in line. Granting some people the privilege of moving to the front of the line is not harmless to the other people waiting; it forces everyone else to wait a little longer. The more people are favored and allowed to move to the front, the slower the line will move. Prioritizing certain traffic on the Internet works the same way.
- CDT's proposed amendments aim to address these problems by distinguishing between Internet access services and specialized services. Internet access would be subject not just to prohibitions on blocking and degradation, but also to basic non-discrimination requirements. Carriers would remain free to enter into agreements to provide specialized services, so long as the offering of such services does not substantially impair the provision of regular Internet services. Reasonable traffic management would be permitted, subject to principles reflected in prior recommendations from BEREC.
- CDT's proposed amendments would not interfere in any way with carriers' ability to offer multiple tiers of Internet service; establish caps on the volume of data Internet subscribers are entitled to transmit; employ usage-based pricing structures under which heavy bandwidth users are charged more than those who use less; or offer premium, quality-controlled specialized services as an additional option to their basic, nondiscriminatory Internet access services.

