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EBU comments on the EC draft Regulation on the completion of the single market for electronic communications

- **Clarify the coexistence and distinction between Internet access services and managed services. Providers of Content, Applications and Services should always be able to access end-users on the Open Internet without "permission" or payment**
- **Strengthen the protections against unacceptable blocking or degradation in the open Internet and address the risk of anti-competitive and discriminatory arrangements**
- **Clarify that transparency with regard to speeds and traffic shaping shall be verifiable and measurable in the interest of the end-user**
- **Spectrum: recognise the importance of DTT, Member States' competence as well as the safeguards for cultural diversity and media pluralism included in the 2012 RSPP and the 2009 "electronic communications" package**

1. Clarify the coexistence and distinction between Internet access services and managed services. Providers of Content, Applications and Services should always be able to access end-users on the Open Internet without "permission" or payment

EC proposed draft Regulation	proposed amendment *(changes in bold)*
Article 2 - Definitions For the purposes of this Regulation, the definitions set out in Directives 2002/21/EC, 2002/20/EC, 2002/19/EC, 2002/22/EC and 2002/77/EC shall apply. The following definitions shall also apply for the purposes of this Regulation:	Article 2 - Definitions For the purposes of this Regulation, the definitions set out in Directives 2002/21/EC, 2002/20/EC, 2002/19/EC, 2002/22/EC and 2002/77/EC shall apply. The following definitions shall also apply for the purposes of this Regulation: [...] **(14) "internet access service" means a publicly available electronic communications service that provides connectivity to the Internet. In**

	principle, an Internet access service allows for reachability between all endpoints connected to the Internet without any form of restriction to the content exchanged. It enables end-users to run any application utilising the electronic communication function of the Internet. **(15) "managed or specialised services" means electronic communications services that (a) are made available to all end-users including providers of content, applications and other services on fair, reasonable and non-discriminatory terms); (b) are provided and operated within closed electronic communications networks using the Internet Protocol; and (c) which guarantee a defined level of quality of service. These networks rely on strict admission control and they are often optimised for specific applications based on extensive use of traffic management in order to ensure adequate service characteristics.**
Justification As highlighted by BEREC as well as several NRAs, there needs to be a clear distinction between internet access services and managed services. Though some of the language in the Regulation hints at such a differentiation, a clear definition of either internet access or managed services is not included. The definition of Internet access is based upon the BEREC's Guidelines for quality of service in the scope of net neutrality BOR (12) 131 of 26 November 2012.	
Article 20 - Quality of service, freedom to provide and avail of open internet access 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 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 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 agree with each other on the treatment of the related data volumes or on the transmission of traffic with a defined quality of service. 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 20 - ~~Quality of service, freedom to provide and avail of o~~**Open** internet access**, managed services** and reasonable traffic management 1. End-users ~~shall be free~~ **shall have the right** to access and distribute information and content, run applications and use services of their choice. ~~In pursuit of the foregoing freedom, end-users 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 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 agree with each other on the treatment of the related data volumes or on the transmission of traffic with a defined quality of service.~~ **The right does not preclude providers of electronic communications to the public from offering internet access offers with varying data volumes, speeds and general quality characteristics. Any traffic discrimination relating to the content, application or service themselves, or specific classes thereof, including through price surcharge or preferential treatment, shall be prohibited.** **The right to internet access does not preclude providers of electronic**

Article 22, paragraph 2, of this Regulation.	**communications to the public from supplying managed or specialised services, provided that these services (a) have been expressly requested by the end-user, and (b) do not degrade or hinder internet access services, in terms of affordability or quality, beyond restrictions mentioned in Article 20 paragraph 2.** The exercise of these ~~freedoms~~ **rights** 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.
Justification For the sake of legal certainty, a distinction needs to be established between on the one hand the rights attributed to end-users and providers of content, applications and services and on the other hand the obligations this implies on providers of electronic communications to the public. This is essential if the Regulation is to deliver on its stated objective of "innovative service provision" (Art 1.2(c)) and ensure that the internet remains "an engine of innovation" (recital 6). At present, Art 20.1 could be interpreted to allow ISPs to charge providers of content, applications and services (PCASs) for access to end-users on the Open Internet. There is a need to make a clear distinction between Internet access and managed services and that providers of Content, Applications and Services should always be able to access end-users on the Open Internet without "permission" or payment. OFCOM articulated well why this would pose "several different risks" including: 1) emergence of a new "competitive bottleneck" allowing ISPs to charge PCASs above the rates that a competitive market would provide; 2) ISPs setting prices at a level that restricts the ability of new entrants to launch services, a particular risk in cases of vertical integration; and 3) that transaction costs for PCASs increasing as they must negotiate terms with several ISPs. Such transaction costs would again raise barriers to entry and increase deadweight costs. Plum consultancy added a further economic analysis of the undesirability of the development of such a "two-sided market".[1]	
(42) "The Internet has developed over the past decades as an open platform for innovation with low access barriers for end-users, content and application providers and Internet service providers. It is paramount to maintain this openness to foster growth and innovation and the accessibility of information to the benefit of citizens and businesses. The Union's regulatory framework as adopted in 2009 comprises the objective of promoting the ability of end-users to access and distribute information or run applications and services of their choice. Recently, however, BEREC's report on traffic management practices published in May 2012 documented that a significant number of end-users are affected by traffic management practices which block or slow down specific applications. These tendencies require clear rules at the Union level to maintain the open Internet and to avoid fragmentation of the	(42) "The Internet has developed over the past decades as an open platform for innovation with low access barriers for end-users, content and application providers and Internet service providers. It is paramount to maintain this openness not only to foster growth and innovation but also to ensure citizens' enjoyment of a range of fundamental rights and objectives such as freedom of expression and access to information, pluralism and diversity. Member States shall ensure the respect of these fundamental rights and objectives within their competencies. The Union's regulatory framework as adopted in 2009 comprises the objective of promoting the ability of end-users to access and distribute information or run applications and services of their choice. Recently, however, BEREC's report on traffic management practices published in May 2012 documented that a significant number of end-users are affected by traffic management practices which block or slow down specific applications. These

[1] http://www.plumconsulting.co.uk/pdfs/Plum_Oct11_The_open_internet_-_a_platform_for_growth.pdf

single market through individual Member States' measures.	tendencies require clear rules at the Union level to maintain the open Internet and to avoid fragmentation of the single market through individual Member States' measures. **The best effort open Internet should not be undermined by the development of managed services or traffic with a guaranteed quality of service. The open internet should remain the norm, not the exception.**

2. Strengthen the protections against unacceptable blocking or degradation in the open Internet and address the risk of anti-competitive and discriminatory arrangements

Article 20	Article 20
2. Within the limits of any contracted data volumes or speeds, providers of electronic communications to the public shall not restrict the foregoing freedoms by employing traffic management practices solely or primarily to block, slow down or otherwise degrade specific services or applications, or specific classes thereof, unless, and only to the extent that, such restrictions are necessary to:	2. **In the open Internet,** ~~Within the limits of any contracted data volumes or speeds,~~ **providers of electronic communications to the public shall not** ~~restrict the foregoing freedoms by employing traffic management practices solely or primarily to~~ **block, slow down or otherwise degrade specific services or applications**~~, or specific classes thereof,~~ unless, and only to the extent that, **such restrictions** are necessary to:
a) implement a legislative provision or a court order;	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;*	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;	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.	d) *minimise the effects of* **verifiable cases of** exceptional congestion provided that equivalent types of traffic are treated equally
	Anti-competitive and discriminatory behaviour of providers of electronic communications to the public shall be prohibited.

Justification *Getting rid of blocking or throttling practices has been presented as the centrepiece of Vice-President Kroes's new protections on net neutrality.*[2] It is necessary to prevent discriminatory behaviour and address the malpractices identified by BEREC. However, Article 20, par 2 contains a number of caveats to undermine its stated intention. In particular, the use of the words "primarily" and *above all "solely" could be used to justify a whole manner* of unacceptable and discriminatory traffic management practices. As recently highlighted by BEREC *in a report on differentiation practices* (BoR (12) 132), ISPs have clear incentives to engage in differentiation practices. Addressing the risk of anti-competitive arrangements and preventing new forms of traffic discrimination should stand out clearly in a provision aimed at safeguarding net neutrality. These risks are particularly high in case of vertically integrated companies, which have an obvious incentive *to offer better access to their own content* offers than those of others. Some companies (eg. Deutsche Telecom) have already launched offers with data caps which exclude their own services from these data caps, thereby positively discriminating in favour of their content offers. This is a threat to "innovative service provision" and as much an aspect of discriminatory behaviour as *the blocking and degradation of traffic prohibited in* Art 20.2.	
Article 20 3. National regulatory authorities shall closely monitor and ensure the effective ability *of end-users to exercise the freedoms defined in* paragraph 1, the compliance with paragraph 2, and the transparency and proportionality of traffic management practices 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.*	Article 20 3. National regulatory authorities shall closely monitor and *ensure the effective ability* of end-users to exercise the ~~freedoms~~ **rights** defined in paragraph 1, the compliance with paragraph 2, and the objective necessity, transparency, proportionality **and compliance with the principles of fairness, reasonableness and non-discrimination** of traffic management practices 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.* .
Justification There is a danger that ISPs could collude to degrade the best efforts internet as a policy to such an extent resulting in *content providers having to purchase managed services to ensure* quality of service. This requires special scrutiny by national regulatory authorities to address the risk of anti-competitive arrangements and prevent new forms of traffic discrimination to arise.	
(recital 44) National regulatory authorities have an essential role in ensuring the effective ability of end-users to exercise this freedom. To this end national regulatory	(recital 44) National regulatory authorities have an essential role in ensuring the effective ability of end-users to exercise *this ~~freedom~~ right. To this end national*

[2] *"But equally it's clear to me that many Europeans expect protection against such commercial tactics. And that is exactly the EU safeguard we will be providing. A safeguard for every European, on every device, on every network: a guarantee of access to the full and open internet, without any blocking or throttling of competing services.", according to Vice-President Kroes on 4 June:* http://europa.eu/rapid/press-release_SPEECH-13-495_en.htm

authorities should monitor closely and ensure that traffic management measures are transparent and proportionate and that specific services or applications or classes *thereof are not* blocked, slowed down or otherwise degraded, save for the legitimate reasons foreseen in this Regulation. National regulatory authority should be *empowered to impose non-discriminatory* minimum quality of service requirements on all or individual providers of electronic communications to the public if this is *necessary to prevent the general* degradation of the quality of service, *inter alia* of Internet access services which are available outside specific quality agreements,.	regulatory authorities should monitor closely and ensure that traffic management measures are **relevant, efficient,** transparent, **non-discriminatory** and proportionate and that specific services or applications or classes thereof are not blocked, slowed down or otherwise degraded, save for the legitimate reasons foreseen in **Article 20**~~this Regulation~~. National regulatory authorities should be empowered to impose non-discriminatory minimum quality of service requirements on all or individual providers of electronic communications to the public if this is necessary to prevent the general degradation of the quality of service, inter alia of Internet access services, **or to safeguard the ability of end-users to access and distribute content or information or to run applications and services of their choice** ~~which are available outside specific quality agreements,~~.

3. Clarify that transparency with regard to speeds and traffic shaping shall be verifiable and measurable in the interest of the end-user

Article 21- Transparency and publication of information	Article 21- Transparency and publication of information
1. Providers of electronic communications to the public shall publish transparent, comparable, adequate and up-to-date information on:	1. Providers of electronic communications to the public shall publish transparent, comparable, adequate and up-to-date information on:
g), *with respect to their Internet access services*:	g), with respect to their Internet access services:
- *actually available data speed for download and upload in the end-user's Member* State of residence, including speed ranges, speed averages and peak-hour speed;	- *actually available* data speed for download and upload in the end-user's Member State of residence, including **minimal and maximal sustained bandwidth**, speed *ranges, speed averages and peak-hour* speed, **all of which can be measurable real-time by the end-user**;
...	...
- information on any procedures put in place by the provider to measure and shape traffic so as to avoid congestion of a network or the filling or overfilling of a network link, and on how those procedures could impact on service quality;	- information on any procedures put in place by the provider to measure and shape traffic so as to avoid congestion of a network or the filling or overfilling of a network link, and on how those procedures could impact on service quality **and verifiable information on how those procedures actually impact the quality of service at a given moment**;
...	...
Such information shall be published in a clear, comprehensive and easily accessible form in the language of the Member State where the service is offered, and be updated regularly. The information shall, on request, be supplied to the relevant national regulatory authorities in advance of its publication. Any differentiation	

between consumers and other end-users has to be made explicit.	Such information shall be published in a clear, comprehensive and easily accessible form in the language of the Member State where the service is offered, and be updated regularly. **Information about actual activated traffic shaping measures shall be updated real-time and shall include this information in the data packets.** The information shall, on request, be supplied to the relevant national regulatory authorities in advance of its publication. Any differentiation between consumers and other end-users has to be made explicit.

Justification

Transparency regulation should not only aim at contractual statements concerning details of ISPs' internet connection offers to end consumers, but should also contain specifications of compulsory *real time* information that should be made available by network operators about the status of the traffic travelling over the internet. This is necessary to enable end users or third parties to check if the contractual statements of ISPs are met, but also to enable an environment where content providers can help end users to solve problems with accessing internet services and deliver the best Quality of Experience possible. In its guidelines on transparency (BoR (11) 67), BEREC identified real-time information tools as one of the important methods to maximize transparency.

Common standard terminology is necessary to help end users to decide what kind of internet connection they need. Broadcasters and many other content providers can only state what speed their content is delivered to the internet as a whole. It is a specification stating what minimum sustained throughput is needed between the server where the content is stored and the end user device in order to allow uninterrupted playback of the content. Therefore, the EBU suggests opting for a *Minimal Sustained Bandwidth* specification as a standard term to describe this. An ISP should therefore mention what the minimal sustained connection speed is to allow end users to decide if the connectivity offered by that ISP would be sufficient to watch the content (quality) they prefer. Ideally, this minimal sustained bandwidth specification should also define minimum values for packet loss, jitter, upstream and downstream as well as reveal (missing) support of BitTorrent and Multicast.

For more information we refer to the EBU response to the EC Public Consultation on specific aspects of transparency, traffic management and switching in an Open Internet 2012.

4. *Spectrum*: recognise the importance of DTT, Member States' competence as well as the safeguards for cultural diversity and media pluralism included in the 2012 RSPP and the 2009 "electronic communications" package

(18) Spectrum is a public good and an essential resource for the internal market for mobile, wireless broadband and satellite communications in the Union. Wireless *broadband communications* contribute to the Digital Agenda for Europe and in particular to the aim of securing access to broadband at a speed of no less than 30 Mbps by 2020 for all Union citizens and at providing the Union with the highest possible broadband speed and capacity, as set by Article 3(c) of the Radio Spectrum Policy Programme (RSPP). *However, the Union has fallen behind other major global* regions - North America, Africa and parts of Asia - in terms of the roll-out and penetration of the latest generation of wireless broadband technologies that are necessary to achieve those policy goals. The piecemeal process of authorising and making available the 800 MHz band for wireless broadband communications, with over half of the Member States failing to do so by the deadline laid down in the RSPP, is eloquent testimony to the urgency of action even within the term of the current RSPP.	(18) *Spectrum is a public good and an essential resource for* ***essential sectors and services, including*** *mobile, wireless broadband, satellite communications* ***and television and radio broadcasting***. Wireless broadband communications contribute to the Digital Agenda for Europe and in particular to the aim of securing access to broadband at a speed of no less than 30 Mbps by 2020 for all Union citizens and at providing the Union with the highest possible broadband speed and capacity, as set *by Article 3(c) of the Radio Spectrum Policy Programme* (RSPP). However, the Union has fallen behind other major global regions - North America, Africa and parts of Asia - in terms of the roll-out and penetration of the latest generation of wireless broadband technologies that are necessary to achieve those policy goals. The piecemeal process of authorising and *making available the 800 MHz band for wireless broadband* communications, with over half of the Member States failing to do so by the deadline laid down in the RSPP, is eloquent testimony to the urgency of action even within the term of the current RSPP.
(19) The application of various national policies creates inconsistencies and fragmentation of the internal market which hamper the roll-out of EU-wide services *and the completion of the internal market for wireless broadband communications.* It could in particular set unequal conditions for access to such services, hamper competition between undertaking originating in different Member States and stifle investments in more advanced networks and technologies and the emergence of innovative services, thereby depriving *citizens and businesses of ubiquitous* integrated high-quality services and wireless broadband operators of increased efficiency gains from large-scale more integrated operations. Therefore, action at Union level regarding certain aspects of spectrum assignment should accompany the development of wide integrated coverage of advanced wireless broadband communications services throughout the Union. At the same time, Member States retain the right to adopt measures to organise their spectrum for public order, public security purposes and defence.	(19) The application of various national policies creates inconsistencies and fragmentation of the internal market which hamper the roll-out of EU-wide services and the completion of the internal market for wireless broadband communications. It could in particular set unequal conditions for access to such services, hamper competition between undertaking originating in different Member States and stifle investments in more advanced networks and technologies and the emergence of *innovative services, thereby depriving citizens and businesses of* ubiquitous integrated high-quality services and wireless broadband operators of increased efficiency gains from large-scale more integrated operations. Therefore, action at Union level regarding certain aspects of spectrum assignment should accompany the development of wide integrated coverage of *advanced wireless broadband* communications services throughout the Union. At the same time, Member States retain the right to adopt measures to organise their spectrum for public order, public security purposes, defence **and broadcasting**.
Justification The political signal sent out by the Regulation is that some uses of spectrum which are extensively described in the Regulation (eg. wireless broadband) are inherently more valuable than those which are not mentioned, eg. DTT. 250 million of EU citizens depend on DTT and it is forecast to be a major TV platform for the foreseeable future (beyond 2030 according to Ofcom and beyond 2020-25 according to CSA). Its value – and the legal underpinnings of DTT allocation in the *acquis* (RSPP requirement to provide "adequate spectrum" and Telecoms Package safeguards) – must be referenced.	

(Article 8, par 2, subpara 2) In the application of Articles 8, 8a(1) and (2), 9, 9a and 9b of Directive 2002/21/EC and of Articles 5 to 8, 12, 13 and 14 Directive 2002/20/EC, and having regard to *Articles 2 and 3 of Decision No 243/2012/EU, competent* national authorities shall refrain from applying procedures or imposing conditions for the use of spectrum which may unduly impede European electronic communications providers from providing integrated electronic communications services and networks in several Member States or throughout the Union.	Deleted

Justification

The proposed Regulation introduces better coordination and consistency of authorisation conditions for the bands harmonised for wireless broadband. By prescribing that national authorities shall henceforth refrain from applying procedures or conditions for *spectrum use which may unduly impede electronic communications* providers from providing integrated services and networks across borders, it creates uncertainty as to what extent the safeguards included in the framework of Directives 2002/21/EC and 2002/20/EC as well as Decision 243/2012/EU (RSPP) to take account particular general interest objectives such as cultural diversity and media pluralism still apply.