

Citizens' Rights Amendments (Part III)

Draft recommendation on Common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services

Amendment 1

Council common position - amending act

Recital 22

Council common position

Given the increasing importance of electronic communications for consumers and businesses, users should be fully informed of the traffic management policies of the service and/or network provider with which they conclude the contract. Where there is a lack of effective competition, national regulatory authorities should use the remedies available to them under Directive 2002/19/EC (Access Directive) to ensure that users' access to particular types of content or application is not unreasonably restricted.

Amendment by Parliament

With respect of their right to freedom of expression under Article 11 of the Charter of Fundamental Rights of the European Union, end-users should be able to access and distribute any content and to use any applications and/or services of their choice in accordance with the relevant rules of Community law and the national substantive and procedural law, without prejudice to the need to preserve the integrity and security of networks and services. Given the increasing importance of electronic communications for consumers and businesses, users should be fully informed of the traffic management policies of the service and/or network provider with which they conclude the contract. ***Disclosure should be such that consumers are able to make an informed decision, and enable them to freely choose among service and/or network providers. The information*** on the provider's traffic management policies should include ***the technology implemented by the operator for managing traffic, as well as rules and criteria such as the thresholds that will trigger changes in the users' experience of the services. It shall, where necessary, disclose specific actions included in the traffic management policy. Depending on the technology used, this may require user consent under Article 6 paragraph 3 Directive 2002/58/EC.***

Justification

Properly implemented traffic management policies are a powerful tool, but traffic management could also lead to discriminating against some technologies without a stringent technical justification. End-users should be able to make an informed decision about their access to content, applications and services by means of electronic communications. Such decision should be based on consumers' free choice, which can only be ensured if consumers are aware of traffic management policies implemented by providers. Only in that case the implementation of traffic management policies will not be in conflict with the fundamental rights of citizens, including their right to privacy, the right to freedom of expression and the right to due process, in accordance with Article 32a of Directive 2002/22/EC adopted in first reading (Amendment 166). The amendment to Recital 22 calling for strengthened transparency in relation to traffic management policies implemented by undertakings provides substantive support to the

proposed amendments to Article 20 paragraph 1 point (b) and to Article 21 paragraph 3 point (b). It also aims to restore the core of the substantial changes introduced by Recital 14 adopted in first reading (Amendment 11), that has been almost entirely reformulated by the Common Position, which simply turned the recital into a competition policy issue, suggesting that remedies should be relevant only in the lack of effective competition, partly those introduced by Recital 14b adopted in first reading (Amendment 194)) and partly those introduced by Recital 14c adopted in first reading (Amendment 190).

Amendment 2

Common council position - amending act

Recital 26

Council common position

A competitive market should ensure that users enjoy the quality of service they require, but in particular cases it may be necessary to ensure that public communications networks attain minimum quality levels so as to prevent degradation of service, the blocking of access and the slowing of traffic over networks.

Amendment by Parliament

A **harmonised regulatory framework for electronic communications services** should ensure that users enjoy the quality of service they require, but in particular cases it may be necessary to ensure that public communications networks attain minimum quality levels so as to prevent degradation of service, the blocking of access and the slowing of traffic over networks. **Traffic management rules or policies shall not discriminate among individual data streams. Traffic can be prioritized, blocked or filtered for certain streams only when such measures are both limited in time and supported by justified technical reasons, such as acute network congestion or in response to malicious activities threatening network security or end-user security. In any case, such measures should be as neutral as possible in respect of content and applications and must not result in the user not being able to access content, services and applications. Operators shall in any case respect the fundamental rights and freedoms of users and not give preferential treatment to their services or applications or of those of their partners. The above does not preclude that prioritization, blocks and filters can be activated upon express request by the end-user, provided that the same can at least disable them at will.**

Since inconsistent remedies will significantly impair the achievement of the internal market, the Commission should assess any requirements set by national regulatory authorities for possible regulatory intervention across the Community and, if necessary, adopt technical implementing measures in order to achieve consistent application throughout the Community.

Justification

Directive 2002/22/EC aims to create a harmonised regulatory framework that secures the delivery of services. The provision of quality electronic communications services, about the characteristics of which

end-users should be sufficiently informed, underpins citizens' right to access information in accordance with Article 11 of the Charter of Fundamental Rights of the European Union. This amendment serves the call for protection of citizens' rights and for more transparency in the way providers of electronic communications services traffic data, which is implemented in more detail in Article 20 paragraph 1 point (b) and to Article 21 paragraph 3 point (b).

The amendment intends to ensure that access to electronic communication services is not unduly restricted in light of the balanced approach between the right of end-users to freedom of expression, and their right to privacy and protection of personal data, and the rights and freedoms of others, including the right to the protection of intellectual property, and the protection of public safety and security, provided by Article 32a of Directive 2002/22/EC adopted in first reading (Amendment 166).

It also aims to restore some of the core substantial changes introduced by Recital 14b adopted in first reading (Amendment 194) and partly those introduced by Recital 14c adopted in first reading (Amendment 190), as well by Recital 14d adopted in first reading (Amendment 14).

Amendment 3

Common council position - amending act

Article 1 - Point 13

Directive 2002/22/EC

Article 20 paragraph 1 point (b)

Council common position

- (b) the services provided, including in particular,
- information on the provider's traffic management policies,
 - the minimum service quality levels offered, namely the time for the initial connection and, where appropriate, other quality of service parameters, as defined by the national regulatory authorities,
 - the types of maintenance service offered and customer support services provided, as well as the means of contacting these services,
 - any restrictions imposed by the provider on the use of terminal equipment supplied;

Amendment by the Parliament

- (b) the services provided, including in particular,
- information on the provider's traffic management policies, ***including the technology implemented by the operator for managing traffic, as well as rules and criteria such as the thresholds that will trigger changes in the users' experience of the services or, where necessary, specific actions included in the traffic management policy. Depending on the technology used, this may require user consent under Article 6§3 Directive 2002/58/EC,***
 - the minimum service quality levels offered, namely the time for the initial connection and, where appropriate, other quality of service parameters, as defined by the national regulatory authorities,
 - the types of maintenance service offered and customer support services provided, as well as the means of contacting these services,
 - any restrictions imposed by the provider on the use of terminal equipment supplied;

Justification

The amendment underpins the balanced approach in protecting the rights and freedom of end-users and the rights and freedoms of others provided in Article 32a of Directive 2002/22/EC adopted in first reading (Amendment 166). The amendment strengthens transparency with respect to the way providers of electronic communications services are operating to enable end-users' access to content, applications, and services of their choice. The provision of information related to the traffic management policies provided by electronic communications providers is an essential prerequisite to implement the principle of protecting fundamental citizens' rights provided by Amendment 166.

Amendment 4

Council common position - amending act

Article 1 - Point 13

Directive 2002/22/EC

Article 21 paragraph 3 point (b)

Council common position

Amendment

(b) inform subscribers of any change to the provider's traffic management policies;

(b) inform subscribers of any change to the provider's traffic management policies, ***including the technology implemented by the operator for managing traffic, as well as rules and criteria such as the thresholds that will trigger changes in the users' experience of the services or, where necessary, specific actions included in the traffic management policy. Depending on the technology used, this may require user consent under Article 6§3 Directive 2002/58/EC;***

Justification

The amendment underpins the balanced approach in protecting the rights and freedom of end-users and the rights and freedoms of others provided in Article 32a of Directive 2002/22/EC adopted in first reading (Amendment 166). The amendment strengthens transparency with respect to the way providers of electronic communications services are operating to enable end-users' access to content, applications, and services of their choice. The provision of information related to the traffic management policies provided by electronic communications providers is an essential prerequisite to implement the principle of protecting fundamental citizens' rights provided by Amendment 166.

Amendment 5

Council common position - amending Act

Article 1 – point 13

Directive 2002/22/EC

Article 22 paragraph 3a (new)

| <i>Council common position</i> | <i>Amendment by Parliament</i> |
|--------------------------------|---|
| | <p>3a – The rules and guidelines that a network operator has put in place to control the flow of traffic on the network for whatever purpose, or traffic management policies, shall not discriminate among individual data streams. Traffic can be prioritized, blocked or filtered for certain streams only when such measures are both limited in time and supported by justified technical reasons, such as acute network congestion or in response to malicious activities threatening network security or end user security. In any case, such measures should be as neutral as possible in respect of content and applications and must not result in the user not being able to access content, services and applications. Operators shall in any case respect the fundamental rights and freedoms of users and not give preferential treatment to their services or applications or of those of their partners. The above does not preclude that prioritization, blocks and filters can be activated upon express request by the end-user, provided that the same can at least disable them at will.</p> |

Justification

“Traffic management policies” can be beneficial to solve temporary congestion or exceptional situations, and operators should be able to deal with those short term and exceptional situations. But traffic management could also lead to discriminating against some technologies without a stringent technical justification. The amendment aims to preserve that the communication infrastructure remains as neutral as technically feasible (in a similar way to the Guidelines published in February 2000 by the Norwegian Post and Telecommunications Authority (NPT), Principle 3). This amendment also provides an implementation of the principles laid down by Article 32a of Directive 2002/22/EC adopted in first reading (Amendment 166) in the specific case of technical measures – and traffic management are technical measures – because they can either be totally neutral or considerably damaging to individual's and enterprise's freedom, as well as hindering some information society services by discriminating them. Recent cases of blocking of services because in competition with the services provided by network communication providers or their affiliates are eloquent of already present risks. This is the single most subtle area where users' rights can be jeopardized and where EU legislation must more clearly provide guidance to the network operators as to what is a technical measure and what instead is abusive and damaging to citizens and enterprises

Amendment 6

Council common position - amending Act

Article 1 – point 13

Directive 2002/22/EC

Article 22 paragraph 3a (new)

Council common position

Amendment by Parliament

3b –Member States shall ensure that national regulatory authorities are able to require undertakings providing public communications networks to provide information regarding any traffic management policies and make them well publicized in an easily understandable and consistent way. Member States shall ensure that national regulatory authorities have all the powers necessary to investigate cases of undisclosed traffic management policies and/or cases in which such policies conflict with art. 22 point 3a and to take appropriate remedies. National regulatory authorities shall additionally ensure that there is a facility in place by which users can monitor and identify any problems created by traffic management policies in cases where disputes may arise].

Justification

This amendment aims to restore Article 28 paragraph 2a of Directive 2002/22/EC adopted in first reading (Amendment 101) and to coordinate the language with the use of “traffic management policies” concepts, and to place the investigatory and regulatory powers provisions more close to the substantive provisions of citizens rights. As with Amendment [XXX] providing a new Art. 22.3a, the aim is to prevent that technical measures are put in place and conflict with user's rights and/or hinder information society's services by discriminating against some of them. The proposed Article introduces an overseeing power and duty upon the national regulatory authorities which reads directly on the obligations laid down by Art. 22.3.

Amendment 7

Common council position - amending act

Article 2 - Point 7 (a)

Directive 2002/19/EC

Article 9 paragraph 1

Common council position

National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including traffic management policies and prices.

Amendment by the Parliament

National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including traffic management policies and prices.

Traffic management policies are the rules and guidelines which a network operator has put in place to control the flow of traffic on the network for whatever purpose. Disclosure should be such that it facilitates undertakings seeking interconnection and/or access to operators' networks or associated facilities [to the benefit of end-users, who will eventually be able to freely choose among services and/or network providers].

Justification

This amendment provides an implementation of the principles laid down by Article 32a of Directive 2002/22/EC adopted in first reading (Amendment 166) in the specific case of technical measures – and traffic management are technical measures – because they can either be totally neutral or considerably damaging to individual's and enterprise's freedom, as well as hindering some information society services by discriminating them. Recent cases of blocking of services because in competition with the services provided by network communication providers or their affiliates are eloquent of already present risks.