NET NEUTRALITY IN THE EU: UNRESOLVED ISSUES UNDER THE NEW REGULATION

Robert O'Donoghue & Tom Pascoe[1]

INTRODUCTION

On 30 April 2016 Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (the "Regulation") will enter into force.

The Regulation is a controversial piece of legislation, ushering in certain requirements as respects net neutrality in the EU. It covers a range of complex issues, further complicated by the fact that the technological environment in which these issues arise is subject to rapid, and in material respects unforeseeable, change (as the three-year review clause in Article 9 of the Regulation attests to). The Regulation is also expressed in extremely telegraphic terms – the key provisions on net neutrality barely cover two full pages and comprise only a couple of Articles. It was the subject of various last-ditch amendments that were not accepted. There was also a strong political dimension as legislators sought to balance consumer and producer interests.[2] Overall, it is fair to say that the Regulation is not exactly a model of clarity and consistency. Unsurprisingly therefore the Regulation raises more questions than answers, which are likely to be litigated in the future. This article explores how these questions might be answered.

As a preliminary issue, it is necessary to set out the services and persons to which the Regulation applies. Article 1(1) of the Regulation provides:

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[1] The authors are practicing barristers at Brick Court Chambers (robert.odonoghue@brickcourt.co.uk, tom.pascoe@brickcourt.co.uk). The views expressed herein are personal only.

[2] For a full discussion see "Enclosing the Democratic Commons: Private Organisations and the Legislative Process," Dr. Roslyn Fuller, INSYTE Research Group (2015).

> *"This Regulation establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights."*

"Internet access services" is, itself, a term of art. It is defined in Article 2(2) of the Regulation as:

> *"a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used"*

In turn, a *"publicly available electronic communications service"* is defined by Ofcom as a limited category of providers of Electronic Communications Services or Networks and excludes those who provide services or networks which are not available to members of the public (typically, private networks and other bespoke services such as those designed for businesses).[3] The Regulation thus only applies to this limited category of services.

However, it is clear that the Regulation also governs certain services which are not internet access services where they are offered by providers of electronic communications services. In particular, Article 3(5) of the Regulation allows providers to offer services *"other than internet access services"* where certain conditions are met. Such services are not defined in the Regulation, but may be referred to as 'specialized services'.[4] As set out below, the purpose of this provision is to ensure that users can access optimised services, including innovative new services such as machine-to-machine communications (recital (16)).

THE UNRESOLVED QUESTIONS

A. The Definition Of Necessity

Article 3(5) of the Regulation provides:

> "*Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.*

[3] http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/general-conditions-guidelines/

[4] In the US, the FCC established a Working Group to define 'specialised services'. In practice, however, they found it too difficult to do so. Initially within the European negotiations, the proposed solution was to require a physically separate network for each category of service. However, it was eventually recognised that this would produce diseconomies of scope as a shared resource would benefit both the specialised and internet access services.

> *Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users.*"

In structural terms therefore Article 3(5) involves: (i) providers of electronic communications to the public; (ii) services other than internet access; (iii) services which are optimised for specific content, applications or services, or a combination thereof; (iv) optimisation must be necessary in order to meet requirements of the content, applications or services for a specific level of quality; (v) a requirement that optimised services do not replace internet access services but are provided in addition to the latter; and (vi) a requirement that optimised services are not to the detriment of quality and availability of internet access services for end users.

The focus of this section of the article is criterion (iv) above. No particular guidance is offered in the Regulation itself on the criterion of necessity. The recitals – which are a permissible source to refer to when interpreting the Regulation[5] – give some further guidance in recital 16:

> "*There is demand on the part of providers of content, applications and services to be able to provide electronic communication services other than internet access services, for which specific levels of quality, that are not assured by internet access services, are necessary. Such specific levels of quality are, for instance, required by some services responding to a public interest or by some new machine-to-machine communications services. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services should therefore be free to offer services which are not internet access services and which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet the requirements of the content, applications or services for a specific level of quality. National regulatory authorities should verify whether and to what extent such optimisation is objectively necessary to ensure one or more specific and key features of the content, applications or services and to enable a corresponding quality assurance to be given to end-users, rather than simply granting general priority over comparable content, applications or services available via the internet access service and thereby circumventing the provisions regarding traffic management measures applicable to the internet access services.*"

From this recital four observations can be made.

First, the recital concerns services that require specific levels of quality that are not assured by internet access services. In principle this should, at least, include levels of quality that exceed (or are different to) those assured by internet access services. This of course raises an important issue as to

[5] This is a trite proposition of English and EU law: see for example *R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council* [2015] UKSC 25, paragraph 16.

by what standard, or measure, one should judge the lower bound of internet access services against which the different quality demanded by services that are optimised for specific content, apps, or services is compared.

In this regard the Regulation does not offer any specific guidance save for the general definition in Article 4(c) of "*the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile network*."

But this in turn rather begs the question of whether the baseline should be the "minimum" or the "normally available" speed or something else and if so, what these are and whether this should be measured on an individual or average basis. It would seem wrong that a particularly inefficient operator should be allowed to take advantage of its inefficiency and use as a low baseline over which it could then offer higher quality non-internet access services (assuming of course that efficiencies are objectively available to that operator but it has simply decided to, e.g., chronically under-invest). Equally, it would be too demanding to take the "maximum" speed as a benchmark, given that Article 3(5) should not be interpreted in a such a way that stifles innovation, as we explain below.

The 2012 BEREC "Guidelines For Quality Of Service In The Scope Of Net Neutrality", which set out guidance on how NRAs should monitor the quality of internet access services in their Member States, appear to suggest that widespread monitoring of contractual and advertised speeds and objective technical measurements could be applied. Consequently, a baseline could be established using the average minimum or normally available average speeds, or a combination of the two. An indication of how this might work can be seen in the Ofcom voluntary code of practice on broadband speeds (the "Code").[6] The Code provides that ISPs should provide information on the access line speed achieved by the bottom 10th percentile (or above) of the ISP's similar customers ("the minimum guaranteed access line speed"), which may be an example of how the minimum and normally available speeds can be combined to establish a fair baseline for an ISP.

Second, the use of the term "*necessity*" of course begs the question of necessary for whom? In this regard it is important to note that recital 16 articulates the basis for Article 3(5) as follows: "*There is demand on the part of providers of content, applications and services to be able to provide electronic communication*

[6] http://stakeholders.ofcom.org.uk/binaries/telecoms/cop/Broadband_Speeds_Code_June_2015.pdf

services other than internet access services, for which specific levels of quality, that are not assured by internet access services, are necessary." Thus, in the first instance, the concept of necessity relates to (i) necessary from the perspective of the demand of providers of content, applications and services and (ii) necessary to ensure particular quality levels that are not assured by (mere) internet access. (i) refers to the requirements of providers of content, applications and services; (ii) refers to the quality requirements that result from that demand on the part of providers of content, applications and services.

This does not mean, however, that end-users' interests or expectations are to be completely ignored. In the first place, recital 16 specifically refers to end-users and states that "*National regulatory authorities should verify whether and to what extent such optimisation is objectively necessary to ensure one or more specific and key features of the content, applications or services and to enable a corresponding quality assurance to be given to end-users, rather than simply granting general priority over comparable content, applications or services available via the internet access service and thereby circumventing the provisions regarding traffic management measures applicable to the internet access services*."

The underlined text suggests that end-user demand may be used as a proxy for demand on the part of providers of content, applications and services. Put another way, a quality characteristic that is entirely disconnected from something that has utility for end-users seems inconsistent with the concept of necessity. In practice the fact that most operators affected by this aspect of the Regulation will not have significant market power ("SMP") means that the vista of them seeking to foist unwanted services or quality characteristics on consumers is remote. On this basis, the general absence of SMP as respects services affected by the Regulation may itself be a reason why those offering enhanced services, and their customers, ought to be entitled to a somewhat more flexible interpretation of Article 3(5).

Third, it is clear that there is no exhaustive definition of optimised content, apps, or services. The recital refers "*for instance…[to] services responding to a public interest or by some new machine-to-machine communications services*." The only other public document we have found that adds anything to this is the Commission's press release accompanying the legislation which states:[7]

> "*These future-proof rules enable continued network and service innovation by defining the principles underpinning the relationship between internet access services and innovative services with specific quality*

[7] See http://europa.eu/rapid/press-release_MEMO-15-5275_en.htm.

> *requirements. The rules will ensure that the quality of the open internet access service will not be hampered by the provision of services such as internet TV or telemedicine which share the same infrastructure.*"

In principle therefore a wide range of services could clearly involve an optimisation requirement and therefore fall within Article 3(5). The precise answer will depend on the particular requirements of the service, app, or content when seen in the particular setting in which they are offered.

In terms of further granularity on how the courts could be expected to deal with the question of "*necessity*," we would add the following comments:

1) The meaning of "*necessary*" under Article 3(5) is an autonomous one. It is clear that the Regulation uses the concept of necessity in a number of settings that may have some non-trivial differences between them. For example, it is clear from recital 11 that the three exceptions for permitted traffic management measures fall to be "*strictly interpreted*." By contrast, the point of departure for Article 3(5) is a different one, namely that there is "*demand*" for innovative services that require particular, higher levels of quality (see recital 16). The issue of strict interpretation is, conspicuously, <u>not</u> mentioned in the context of Article 3(5) measures. It is clear under EU law that a derogating exception (like Article 3(3)(a)-(c)) falls to be narrowly interpreted whereas a general right does not.[8] We strongly infer from this that the concept of necessity under Article 3(5) is not only independent of how that concept would be defined in other contexts under EU law, but is even distinct from how necessity is defined in <u>other</u> aspects of the Regulation.

2) It is important, structurally, that Article 3(5) starts from the premise that one is dealing with services that are, potentially at any rate, innovative in nature. The concern of compromising the offer of innovative services will therefore require necessity to be interpreted flexibly.

3) The guiding principle of "*quality*" raises a series of further questions. The core principles are that: (i) without optimisation, the service or relevant part of the service will not function in such a way to meet the expectations of the consumer/end-user; and (ii) the optimisation improves the level of quality and this improvement can be evidenced by the provider. This

[8] There are hundreds of cases confirming this principle under EU law – see e.g., Case C-8/01 *Assurandør-Societetet, acting on behalf of Taksatorringen Skatteministeriet* ECLI:EU:C:2003:621, paragraph 55.

in turn raises the question of which "consumer(s)/end-users"? Plainly, this cannot mean either the least demanding or most demanding consumers, or consumers who otherwise have eccentric requirements. Our view is that this must refer to the average consumer, which must mean the quality requirements that are, in general, expected by consumers of particular services, apps, or content.

4) It may be reasonable to determine what is "necessary" based on the technology used (i.e. mobile or fixed). We do not think that, in general, it will be possible to say *a priori* that a particular optimisation is more or less "*necessary*" for mobile or fixed technologies. One needs to examine the specific quality requirements of the optimised services, apps, or content at issue and to then see how they might be met by the underlying network technology. We note, however, that the Regulation in various places notes certain inherent limitations in mobile technology: see for example recitals 15, 17, Article 4(1)(d). We also note that BEREC has for example stated that "*Quality measurement for mobile Internet access services is particularly challenging.*"[9] This suggests that it may be harder to measure quality in the context of mobile access services (e.g., problems of ensuring universally consistent QoS in rural locations) and may mean that greater flexibility would be required in the context of interpreting the concept of "*necessity*" in a mobile sphere due to difficulties of a singular quality measurement. Secondly, it may be that the differences in mobile network capabilities and functionality between, say, rural and urban areas mean that the concepts of what is optimisable and what is necessary in that context may also differ. For example, the cost and other demands of making Netflix function at peak times via mobile networks are manifestly different to a high quality fibre network..

5) The core principle of end-user choice runs as a theme throughout the Regulation. As set out above, end-users' expectations and choice are an essential principle in establishing whether optimisation is necessary. This is consistent with Article 3(1), which applies to both Internet Access Services and (other) services falling within the scope of Article 3(5). Article 3(1) provides that, whilst discrimination should not be imposed on customers, they should nonetheless be free to access and distribute information or content of their choice. In our view, it follows that customers should also be free not to access certain information or

[9] See 2012 BEREC "Guidelines For Quality Of Service In The Scope Of Net Neutrality," page 4.

content, for example by choosing to block adult content.

In terms of evidencing necessity, we think one can envisage a cascade of evidence:

1) The simplest category would be where particular, defined requirements were set out in public standards or private quality of service standards which are open and non-discriminatory and generally applied in the industry.

2) The other category would be services, apps and other content which have different, and not necessarily compatible, quality parameters which are not prescribed in public or private standards (optimisation for delay, jitter, latency, use of quiet time, efficiency, etc.) In this respect, it must be borne in mind that "quality" is not a static term and its meaning can change rapidly in the context of innovative services. It is difficult in the abstract to predict how particular "quality" requirements might be approached, and evidenced, in litigation. This does, however, mean that providers will have a degree of discretion so long as the particular type of optimisation has a plausible, objective link with the service, app, or content at issue. For example, in the recent *Streetmap v Google* judgment,[10] the High Court found that a significant issue for Google is latency, i.e., delay in generating the search engine results page for users. Google's evidenced this by an experiment reported in November 2006 revealed that a 0.5 second delay in generating the SERP caused a 20% drop in traffic. In short, provided the particular type of optimisation sought has an objective link with quality features that are of value to the provider (using its consumers as a proxy) and there is some evidence to support this (e.g., surveys, experiments), there should be some latitude available under Article 3(5).

In conclusion, the question of whether optimisation of a particular service is "necessary" will depend upon whether there is an inherent characteristic or requirement that necessitates a higher (or otherwise different) level of quality than internet access services. It should be assessed from the perspective of demand on the part of content, application and service providers, using end-user demand as a proxy. Necessity must be assessed in the context of Article 3(5) being intended to apply to potentially innovative services. All else equal, this points in favour of a flexible (since otherwise innovation would be stymied).

[10] Case No: HC-2013-000090, judgment of 12 February 2016, paragraph 166.

B. The Concept Of "Detriment"

As noted above, under Article 3(5) optimised services are subject, among other things, to a requirement that such services shall not be to the "*detriment*" of the availability or general quality of internet access services for end-users. .

The no detriment requirement in Article 3(5) is framed negatively. It does not require that capacity is held separately for optimized services. This gives rise to a possibility that where demand for optimised services (and internet access services) is not entirely predictable (coupled with the fact that the addition of capacity takes time), this aspect of Article 3(5) could potentially be used as a basis to find that optimised services violated Article 3(5) by "recklessly" using up disproportionate spare capacity. In other words, even if there was sufficient spare capacity to accommodate both internet access services and specialised services at the outset, the growth of specialised services could use up the spare capacity disproportionately, thus causing detriment to internet services. Providers will therefore need to plan their capacity around all of the services they offer, including specialised services.

Some further clues on the meaning of *"detriment"* are offered in recital 17 which states:

> "*The provision of such services other than internet access services should not be to the detriment of the availability and general quality of internet access services for end-users. In mobile networks, traffic volumes in a given radio cell are more difficult to anticipate due to the varying number of active end-users, and for this reason an impact on the quality of internet access services for end-users might occur in unforeseeable circumstances. In mobile networks, the general quality of internet access services for end-users should not be deemed to incur a detriment where the aggregate negative impact of services other than internet access services is unavoidable, minimal and limited to a short duration*."

This wording suggests that where the cumulative impact of optimised services on internet access is unavoidable, minimal, and of short duration, this does not give rise to a detriment. By contrast, where the impact is avoidable, significant, and not of short duration, issues of detriment may arise. Of course, all of this in turn is likely to beg questions about what is avoidable, minimal, short etc.

The impact on quality of internet access services should therefore be assessed over a period of time across all services offered by a provider, rather than on an individual basis (as individual remedies for consumers are addressed separately by Article 4(4) of the Regulation). This highlights the need for an average baseline assessment of internet access services against which the impact of specialised services can be measured.

C. Whether The Prohibition On Conduct Based On Commercial Considerations In Article 3(3) Also Applies To Article 3(5)

As a strict legal matter, it is clear that the prohibition on "*commercial considerations*" in Article 3(3) is referable only to Article 3(3) and does not appear in Article 3(5). On the face of it, this seems like a significant difference. In practice, however, the difference may not be particularly significant. It is clear that the term "*commercial considerations*" in Article 3(3) sits in contradistinction to "*objectively different technical quality of service requirements of specific categories of traffic*." It can be argued with some force that these distinctions are in practice very close to the distinction posited under Article 3(5) between "*necessary*"/"*objective necessity*" measures and subjective or otherwise unnecessary measures. To be clear, however, once a service, content, or app falls within the concept of "*necessity*" (defined in the light of the considerations outlined above), it is obviously permissible for an operator to charge in full for that optimised access. To that extent, "*commercial considerations*" plainly are allowed under Article 3(5).

Equally, it seems to us obvious that an operator who supports optimised services, content, or apps can charge customers different prices for objectively different forms of optimised service, content, or app support. Indeed, the entire basis of Article 3(5) is that the optimised service, content, or app has an objectively higher quality requirement than normal internet service access. If so, it also seems obvious that in so far as different types of services, content, or apps have higher quality requirements than other services, content, or apps, then the provider is perfectly entitled to reflect this higher level of service provision in its pricing. In simple terms those getting more in quality terms should pay more.

D. The scope and meaning of "Reasonable Traffic Management Measures" Under Article 3(3)

Whilst Article 3(5) is a permissive provision, Article 3(3) is prohibitive. The latter requires providers to treat all internet traffic equally when providing internet access services, subject to an exception for *"reasonable traffic management measures"*. This raises an interesting question as to the relationship between the two provisions. If Article 3(5) does not apply, for example because optimisation cannot be said to be necessary, could a measure prioritising certain types of traffic nonetheless be said to be a *"reasonable traffic management measure"*, and therefore be permissible, under Article 3(3)?

The answer will of course clearly depend on the particular measure being applied. However, in our view there is room for providers to justify a measure that does not meet the requirements of Article 3(5) in this way (although only if the traffic management measure in question is applied to *"internet access services"*, since providers are not entitled to provide services other than internet access services unless the Article 3(5) requirements are met).

It is significant in this respect that the right to apply reasonable traffic management measures under the second paragraph of Article 3(3) is *additional to* providers' right to apply such measures in the specific circumstances set out in the third paragraph of that provision (e.g. in order to comply with national law or protect the integrity of the network). In other words, whilst Articles 3(3)(a)-3(3)(c) set out quite prescriptive requirements for three specific categories of traffic management measures, it is very clear that these are particular examples and that the concept of "*reasonable traffic management measures*" goes beyond these examples. The exception for *"reasonable traffic management measures"* is thus a relatively open-textured provision, although it is of course subject to the restrictions on *"commercial considerations"* set out above.

It is fair to say that the concept of *"reasonable traffic management measures"* is nebulous and is therefore likely to lead to litigation. For example a concern arises as to whether the blocking of websites based on their content, such as websites appearing on the Internet Watch Foundation ("IWF") list, constitute reasonable traffic management measures, or otherwise fall within the exception for complying with national law under Article 3(3)(a), given that the websites appearing on such a list have not been declared unlawful by a court or public authority. We note, however, that *"self-regulatory schemes"* are addressed specifically by Article 10(3) of the Regulation. Such schemes must be notified to the Commission, and may only be maintained until 31 December 2016. It is to be hoped that BEREC guidance, which must be issued before 30 August 2016 pursuant to Article 5(3), will provide some clarification on difficult issues such as this one.

In conclusion, customer choice is a key principle running through the Regulation, enabling them to choose to access, or not access, content and information and allowing customers to agree commercial and technical conditions with content providers and providers of internet access services. This should therefore be part of the assessment of what is "necessary" for the customer and the content provider, as well as what is a *"reasonable traffic management measure"*.

E. Conclusions

In summary, whilst the Regulation is not a model of clarity, we think that the following conclusions can be drawn from the above analysis:

(a) The question of whether optimisation of a particular service is "necessary" is an objective one which depends upon whether there is an inherent characteristic or requirement that necessitates a higher (or otherwise different) level of quality than internet access services. It should be assessed from the perspective of demand on the part of content, application and service providers, using end-user demand as a proxy;

(b) Necessity must be assessed in the context of Article 3(5) being intended to apply to potentially innovative services. All else equal, this points in favour of flexibility of interpretation (since otherwise innovation would be stymied);

(c) Customer choice is a key principle running through the Regulation, enabling them to choose to access, or not access, content and information and allowing customers to agree commercial and technical conditions with content providers and providers of internet access services. This should therefore be part of the assessment of what is "necessary" for the customer and the content provider, as well as what is a *"reasonable traffic management measure"*;

(d) Providers are entitled to take into account *"commercial considerations"* when providing optimised services under Article 3(5);

(e) Prioritisation of traffic may be justified as a *"reasonable traffic management measure"* under Article 3(3) even if it does not meet the specific requirements for optimisation under Article 3(5);

Finally, as a general point, it is worth noting that recital (8) of the Regulation provides that "*according to general principles of Union law and settled case-law, comparable situations should not be treated differently and different situations should not be treated in the same way unless such treatment is objectively justified.*" The non-discrimination principle is a general principle of EU law, and therefore a higher legal norm than the Regulation. This has two important consequences. The first is that any interpretation of the Regulation, as a piece of EU legislation, must be consistent with the general principle of non-

discrimination.[11] The second is that it may, in future litigation, be possible to challenge various aspects of the Regulation, or at least certain suggested interpretations of it, on the basis that they would be inconsistent with the concept of non-discrimination as a (higher) general principle under EU law. Similarly, both Union institutions and Member States are required to apply the Regulation compatibly with fundamental rights provided by the EU Charter, including the freedom to conduct a business under Article 16 and the right to property under Article 17. This may provide ammunition for future arguments that restrictions on the provider's right to operate its business in accordance with its own wishes, and those of its customers, should be more limited than the terms of the Regulation might suggest on its face.

[11] See, for example, Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-2679, paragraph 41.