Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No 531/2012 (Text with EEA relevance)

[[F1]REGULATION (EU) 2015/2120 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 25 November 2015

laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No 531/2012**]**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) This Regulation aims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. It aims to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation. Reforms in the field of roaming should give end-users the confidence to stay connected when they travel within the Union, and should, over time, become a driver of convergent pricing and other conditions in the Union.

(2) The measures provided for in this Regulation respect the principle of technological neutrality, that is to say they neither impose nor discriminate in favour of the use of a particular type of technology.

(3) The internet has developed over the past decades as an open platform for innovation with low access barriers for end-users, providers of content, applications and services and providers of internet access services. The existing regulatory framework aims to promote the ability of end-users to access and distribute information or run applications and services of their choice. However, a significant number of end-users are affected by traffic management practices which block or slow down specific applications or

Changes to legislation: *There are outstanding changes not yet made to Regulation (EU) 2015/2120 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

services. Those tendencies require common rules at the Union level to ensure the openness of the internet and to avoid fragmentation of the internal market resulting from measures adopted by individual Member States.

(4) An internet access service provides access to the internet, and in principle to all the end-points thereof, irrespective of the network technology and terminal equipment used by end-users. However, for reasons outside the control of providers of internet access services, certain end points of the internet may not always be accessible. Therefore, such providers should be deemed to have complied with their obligations related to the provision of an internet access service within the meaning of this Regulation when that service provides connectivity to virtually all end points of the internet. Providers of internet access services should therefore not restrict connectivity to any accessible end-points of the internet.

(5) When accessing the internet, end-users should be free to choose between various types of terminal equipment as defined in Commission Directive 2008/63/EC[(4)]. Providers of internet access services should not impose restrictions on the use of terminal equipment connecting to the network in addition to those imposed by manufacturers or distributors of terminal equipment in accordance with Union law.

(6) End-users should have the right to access and distribute information and content, and to use and provide applications and services without discrimination, via their internet access service. The exercise of this right should be without prejudice to Union law, or national law that complies with Union law, regarding the lawfulness of content, applications or services. This Regulation does not seek to regulate the lawfulness of the content, applications or services, nor does it seek to regulate the procedures, requirements and safeguards related thereto. Those matters therefore remain subject to Union law, or national law that complies with Union law.

(7) In order to exercise their rights to access and distribute information and content and to use and provide applications and services of their choice, end-users should be free to agree with providers of internet access services on tariffs for specific data volumes and speeds of the internet access service. Such agreements, as well as any commercial practices of providers of internet access services, should not limit the exercise of those rights and thus circumvent provisions of this Regulation safeguarding open internet access. National regulatory and other competent authorities should be empowered to intervene against agreements or commercial practices which, by reason of their scale, lead to situations where end-users' choice is materially reduced in practice. To this end, the assessment of agreements and commercial practices should, inter alia, take into account the respective market positions of those providers of internet access services, and of the providers of content, applications and services, that are involved. National regulatory and other competent authorities should be required, as part of their monitoring and enforcement function, to intervene when agreements or commercial practices would result in the undermining of the essence of the end-users' rights.

(8) When providing internet access services, providers of those services should treat all traffic equally, without discrimination, restriction or interference, independently of its sender or receiver, content, application or service, or terminal equipment. According

***Changes to legislation:** There are outstanding changes not yet made to Regulation (EU) 2015/2120 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

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.

(9) The objective of reasonable traffic management is to contribute to an efficient use of network resources and to an optimisation of overall transmission quality responding to the objectively different technical quality of service requirements of specific categories of traffic, and thus of the content, applications and services transmitted. Reasonable traffic management measures applied by providers of internet access services should be transparent, non-discriminatory and proportionate, and should not be based on commercial considerations. The requirement for traffic management measures to be non-discriminatory does not preclude providers of internet access services from implementing, in order to optimise the overall transmission quality, traffic management measures which differentiate between objectively different categories of traffic. Any such differentiation should, in order to optimise overall quality and user experience, be permitted only on the basis of objectively different technical quality of service requirements (for example, in terms of latency, jitter, packet loss, and bandwidth) of the specific categories of traffic, and not on the basis of commercial considerations. Such differentiating measures should be proportionate in relation to the purpose of overall quality optimisation and should treat equivalent traffic equally. Such measures should not be maintained for longer than necessary.

(10) Reasonable traffic management does not require techniques which monitor the specific content of data traffic transmitted via the internet access service.

(11) Any traffic management practices which go beyond such reasonable traffic management measures, by blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, or specific categories of content, applications or services, should be prohibited, subject to the justified and defined exceptions laid down in this Regulation. Those exceptions should be subject to strict interpretation and to proportionality requirements. Specific content, applications and services, as well as specific categories thereof, should be protected because of the negative impact on end-user choice and innovation of blocking, or of other restrictive measures not falling within the justified exceptions. Rules against altering content, applications or services refer to a modification of the content of the communication, but do not ban non-discriminatory data compression techniques which reduce the size of a data file without any modification of the content. Such compression enables a more efficient use of scarce resources and serves the end-users' interests by reducing data volumes, increasing speed and enhancing the experience of using the content, applications or services concerned.

(12) Traffic management measures that go beyond such reasonable traffic management measures may only be applied as necessary and for as long as necessary to comply with the three justified exceptions laid down in this Regulation.

(13) First, situations may arise in which providers of internet access services are subject to Union legislative acts, or national legislation that complies with Union law (for example, related to the lawfulness of content, applications or services, or to public

Changes to legislation: *There are outstanding changes not yet made to Regulation (EU) 2015/2120 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

safety), including criminal law, requiring, for example, blocking of specific content, applications or services. In addition, situations may arise in which those providers are subject to measures that comply with Union law, implementing or applying Union legislative acts or national legislation, such as measures of general application, court orders, decisions of public authorities vested with relevant powers, or other measures ensuring compliance with such Union legislative acts or national legislation (for example, obligations to comply with court orders or orders by public authorities requiring to block unlawful content). The requirement to comply with Union law relates, inter alia, to the compliance with the requirements of the Charter of Fundamental Rights of the European Union ('the Charter') in relation to limitations on the exercise of fundamental rights and freedoms. As provided in Directive 2002/21/EC of the European Parliament and of the Council[(5)], any measures liable to restrict those fundamental rights or freedoms are only to be imposed if they are appropriate, proportionate and necessary within a democratic society, and if their implementation is subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms, including its provisions on effective judicial protection and due process.

(14) Second, traffic management measures going beyond such reasonable traffic management measures might be necessary to protect the integrity and security of the network, for example by preventing cyber-attacks that occur through the spread of malicious software or identity theft of end-users that occurs as a result of spyware.

(15) Third, measures going beyond such reasonable traffic management measures might also be necessary to prevent impending network congestion, that is, situations where congestion is about to materialise, and to mitigate the effects of network congestion, where such congestion occurs only temporarily or in exceptional circumstances. The principle of proportionality requires that traffic management measures based on that exception treat equivalent categories of traffic equally. Temporary congestion should be understood as referring to specific situations of short duration, where a sudden increase in the number of users in addition to the regular users, or a sudden increase in demand for specific content, applications or services, may overflow the transmission capacity of some elements of the network and make the rest of the network less reactive. Temporary congestion might occur especially in mobile networks, which are subject to more variable conditions, such as physical obstructions, lower indoor coverage, or a variable number of active users with changing location. While it may be predictable that such temporary congestion might occur from time to time at certain points in the network – such that it cannot be regarded as exceptional – it might not recur so often or for such extensive periods that a capacity expansion would be economically justified. Exceptional congestion should be understood as referring to unpredictable and unavoidable situations of congestion, both in mobile and fixed networks. Possible causes of those situations include a technical failure such as a service outage due to broken cables or other infrastructure elements, unexpected changes in routing of traffic or large increases in network traffic due to emergency or other situations beyond the control of providers of internet access services. Such congestion problems are likely to be infrequent but may be severe, and are not necessarily of short duration. The need to

***Changes to legislation:** There are outstanding changes not yet made to Regulation (EU) 2015/2120 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

apply traffic management measures going beyond the reasonable traffic management measures in order to prevent or mitigate the effects of temporary or exceptional network congestion should not give providers of internet access services the possibility to circumvent the general prohibition on blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, or specific categories thereof. Recurrent and more long-lasting network congestion which is neither exceptional nor temporary should not benefit from that exception but should rather be tackled through expansion of network capacity.

(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.

(17) In order to avoid the provision of such other services having a negative impact on the availability or general quality of internet access services for end-users, sufficient capacity needs to be ensured. Providers of electronic communications to the public, including providers of internet access services, should, therefore, offer such other services, or conclude corresponding agreements with providers of content, applications or services facilitating such other services, only if the network capacity is sufficient for their provision in addition to any internet access services provided. The provisions of this Regulation on the safeguarding of open internet access should not be circumvented by means of other services usable or offered as a replacement for internet access services. However, the mere fact that corporate services such as virtual private networks might also give access to the internet should not result in them being considered to be a replacement of the internet access services, provided that the provision of such access to the internet by a provider of electronic communications to the public complies with Article 3(1) to (4) of this Regulation, and therefore cannot be considered to be a circumvention of those provisions. 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