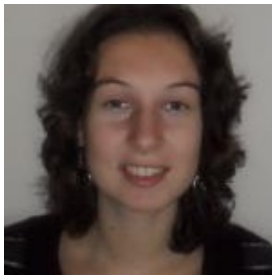


## Why not “Go Dutch” and Protect Net Neutrality without Defining Specialised Services?



*Net neutrality was the most contentious issue in the debates leading up to the passage of the new Connected Continent regulation on 3 April in the European Parliament. FWO PhD Fellow **Inge Graef** of the Interdisciplinary Centre for Law and ICT (ICRI) of the KU Leuven – University of Leuven argues that since the notion of “specialised services” remains in the regulation net neutrality is still at risk.*

The European regulatory framework for net neutrality put forward by Digital Agenda Commissioner Kroes in the **Connected Continent proposal** in September 2013 stirred a lot of controversy among different stakeholders over the past months. The intense review of the Commission’s proposal in the European Parliament ended yesterday with MEPs giving their final opinion on the issue in a **plenary vote**. The **adopted amendments** tighten the regulatory framework of the Commission and would bring European legislation closer to the national rules on net neutrality already in force in the Netherlands and Slovenia. Yet, an important difference remains.

### Specialised services

One of the most contentious issues in the Commission’s Connected Continent package is the introduction of the concept of ‘specialised services’. Under Article 23(2) of the Commission’s proposal, ISPs and content providers would be entitled to offer specialised services with an enhanced quality of service to end-users. Internet activists have argued that this concept would give rise to a **two-tier internet** enabling ISPs to charge content providers for prioritizing traffic from their services. The definition of the term specialised service plays a vital role in the net neutrality debate.

The Commission defines a specialised service as “an electronic communications service or any other service that provides the capability to access specific content, applications or services” (Article 2(2)(15) of the Commission’s proposal). Because of the inclusion of the phrase ‘any other service’ there is a risk that services like Facebook and Netflix that are already available on the open internet would qualify as specialised services. This would enable ISPs to abuse the specialised services exemption by extracting revenues from these providers for an enhanced quality of service, as **has happened in the US**. New and smaller content providers that do not have the necessary funds to pay ISPs for better quality will consequently be pushed into the slow lane. In the long run, this may decrease consumer choice and innovation.

Yesterday, the European Parliament set clear restrictions on the kind of services that ISPs can market as specialised by adopting the following definition:

*an electronic communications service optimised for specific content, applications or services, or a combination thereof, provided over logically distinct capacity, relying on strict admission control, offering functionality requiring enhanced quality from end to end, and that is not marketed or usable as a substitute for internet access service.*

Nevertheless, the issue of specialised services still constitutes an important divergence with the Dutch and Slovenian rules, and a danger to net neutrality.

### Comparison with Dutch net neutrality rules



The **Dutch net neutrality legislation** (see [here](#) for a non-official translation in English), that is comparable to the **Slovenian regulatory framework** (of which a non-official English version is available [here](#)), does not define or even mention the concept of specialised services. Instead, the Dutch legislator has made clear that the net neutrality rules only apply to services or applications on the internet. As a result, services that are not offered via the public internet but through the closed network of the ISP automatically fall outside the scope of the regulatory framework. Examples of such truly distinct and non-internet based services are IP-based television, data-intensive cloud computing and healthcare services like telemedicine. The prioritisation of traffic from these services does not undermine net neutrality and are rightfully excluded from the scope of application of the net neutrality rules.

By mentioning the concept of specialised services the European Commission and the European Parliament have forced themselves to specify under which conditions current and future services are would qualify. This gives rise to the risk that the term specialised services is defined too broadly and will not only apply to non-internet based services provided within closed electronic communications networks, but also to online services that are normally available on the open internet. By restricting the scope of application of net neutrality rules to internet services, it is not necessary to rely on the concept of specialised services to protect the functioning of managed, non-internet based services. Both the open internet and the functioning of non-internet based services are better guaranteed without defining specialised services. In addition, it would make the net neutrality rules better able to withstand the complex and quickly evolving nature of technology that constantly gives rise to new services and business models.

## Way forward

The amended definition of specialised services seems to install sufficient safeguards to prevent ISPs from undermining the principle of net neutrality by charging providers of ordinary online services. But, it remains to be seen whether that definition will not be widened again in the course of the negotiations among the Member States in the Council and in a potential second reading by the new European Parliament. While many stakeholders **welcome the vote of the Parliament**, ETNO, the organisation that represents the interests of ISPs and telecom operators, has already **called upon EU decision makers** to “embrace the spirit of the Commission’s original proposal”.

Whatever definition of specialised services is adopted in the final text of the Connected Continent proposal, only the abandonment of the concept will bring European legislation up to the same level of consumer protection offered by the Dutch and Slovenian net neutrality rules.

*This article gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.*

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