

EDRI

PROTECTING DIGITAL FREEDOM

# Net Neutrality in the Telecom Single Market Regulation

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**commercial  
practices**

application specific  
data volumes

# 3 types

1. zero-rating for a fee
2. zero-rating some apps, but not similar apps  
(no fee)
3. zero-rating a whole class of applications (no fee)

# Zero-rating

just another tool to favour  
some applications over  
others

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others

creation of a new termination  
monopoly

# Why is zero-rating a problem?

- distorts competition
- limits freedom to provide services
- limits user-choice
- perpetuate low data volumes
- often include technical discrimination
- harmful to the level playing field of the internet economy

Art. 3(2): Commercial practices “shall not limit the exercise of the right of end user”



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- (1) to access the applications, content, and services of their choice

AND

- (2) to distribute and provide the applications, content, and services of their choice.

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→ consumers

AND

- (2) to distribute and provide the applications, content, and services of their choice.

→ producers

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# Zero-rating

case by case

vs

bright-line rule

# problems of case-by-case

- 31 enforcement agencies
- no normative effect
- complex monitoring
- extensive litigation
- legal uncertainty
- reduce ability of SMEs to attract investment

# Zero-rating

Why?

BEREC should contribute  
with its mandate to the  
“*consistent application  
of this Regulation*”

– Article 5(3)

# Recital 7

- NRAs “**should be required [...] to intervene** when agreements or commercial practices would result in the undermining of the essence of the end-users’ rights”

**indication for a bright-line rule**



**“[This Regulation] aims to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation.”**

– Recital (1)

# Zero-rating

How?

“National regulatory  
authorities shall [...] ensure compliance with  
articles 3 and 4”

– Article 5(1)

# Recital 7

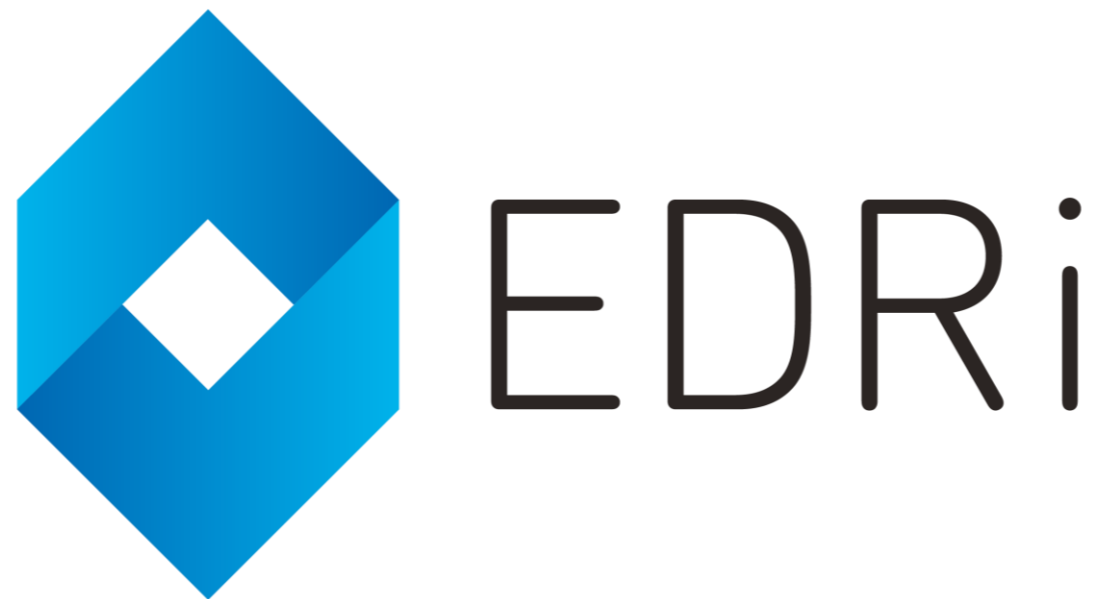
- "should be empowered to intervene" ... "materially reduced in practice"
- "should be required to intervene" ... "undermine the essence of this right"

# Recital 7

- "should be empowered to intervene" ... "materially reduced in practice"
- "should be required to intervene" ... "undermine the essence of this right"

**provides a floor, not a ceiling**

# Thank you



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**Specialised Services**

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3

**traffic management**

2

**Specialised Services**



# Specialised Services

should not deteriorate  
IAS quality

Paragraph 118

Article 3(5)

“and shall not be to the detriment of the availability or general quality of internet access services for end-users.”

Article 3(5)

“and shall not be to the detriment of the availability or general quality of internet access services for ~~other~~ end-users.”

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contradicts Article 4(1)(d), including implementation in paragraphs 142 and 144

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“and shall not be to the detriment of the availability or general quality of internet access services for ~~other~~ end-users.”

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xDSL cases: Why minimum speed and not normally available (average) speed?

# Specialised Services

risk circumventing  
the regulations ban  
on “paid prioritisation”

legitimate SpS  
vs.  
reclassified online  
services

Article 3(5)

"services other than internet access services which are optimised for specific content, applications or services, or a combination thereof,



Article 3(5)

"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."

Article 3(5)

“where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.”

Recital 16

“objectively necessary”

Article 3(5)

“where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.”

IF service CANNOT function in the open internet

→ allows specialised service that could otherwise not exist

Article 3(5)

“where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.”

IF service CAN function in the open internet

→ circumvents ban on paid fast lanes

## Who sets quality requirements?

Paragraph 102: CAP or ISP

Paragraph 104: contractual obligations

Recital 16

“objectively necessary”

“key features”

“AND [...] corresponding quality assurances to be given to the end-user ”

3

traffic management

# Traffic Management

should be as  
application-agnostic as  
possible

# types of TM

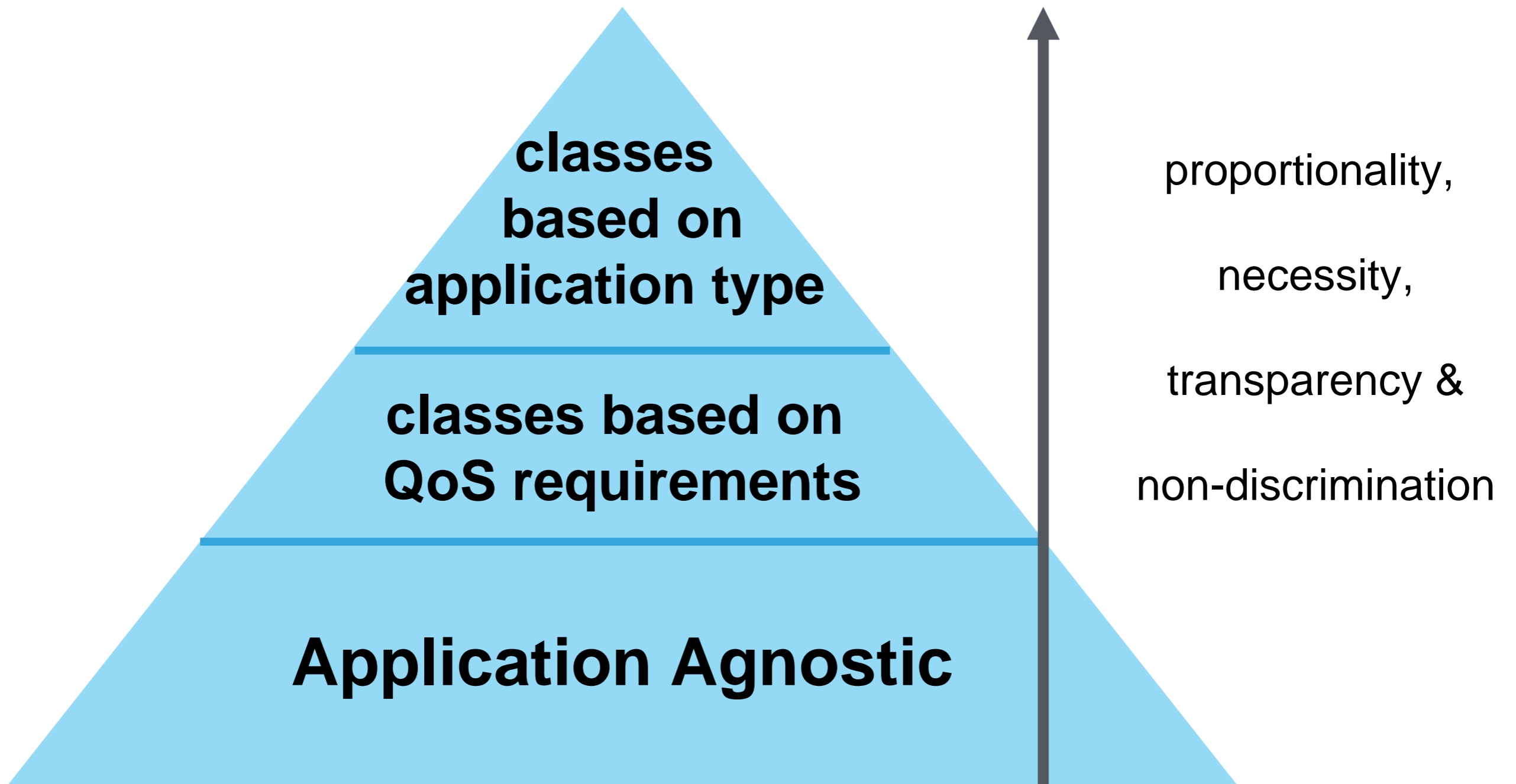
- application-agnostic
  - best effort
  - consumption based (RFC6057)
  - user-controlled QoS  
(objectively different technical QoS requirements)
- application-specific or classes-based on:
  - objective QoS requirements  
(sensitivity to delay, jitter, packet loss and latency)
  - functionality provided (video streaming, VoIP)





proportionality,  
necessity,  
transparency &  
non-discrimination

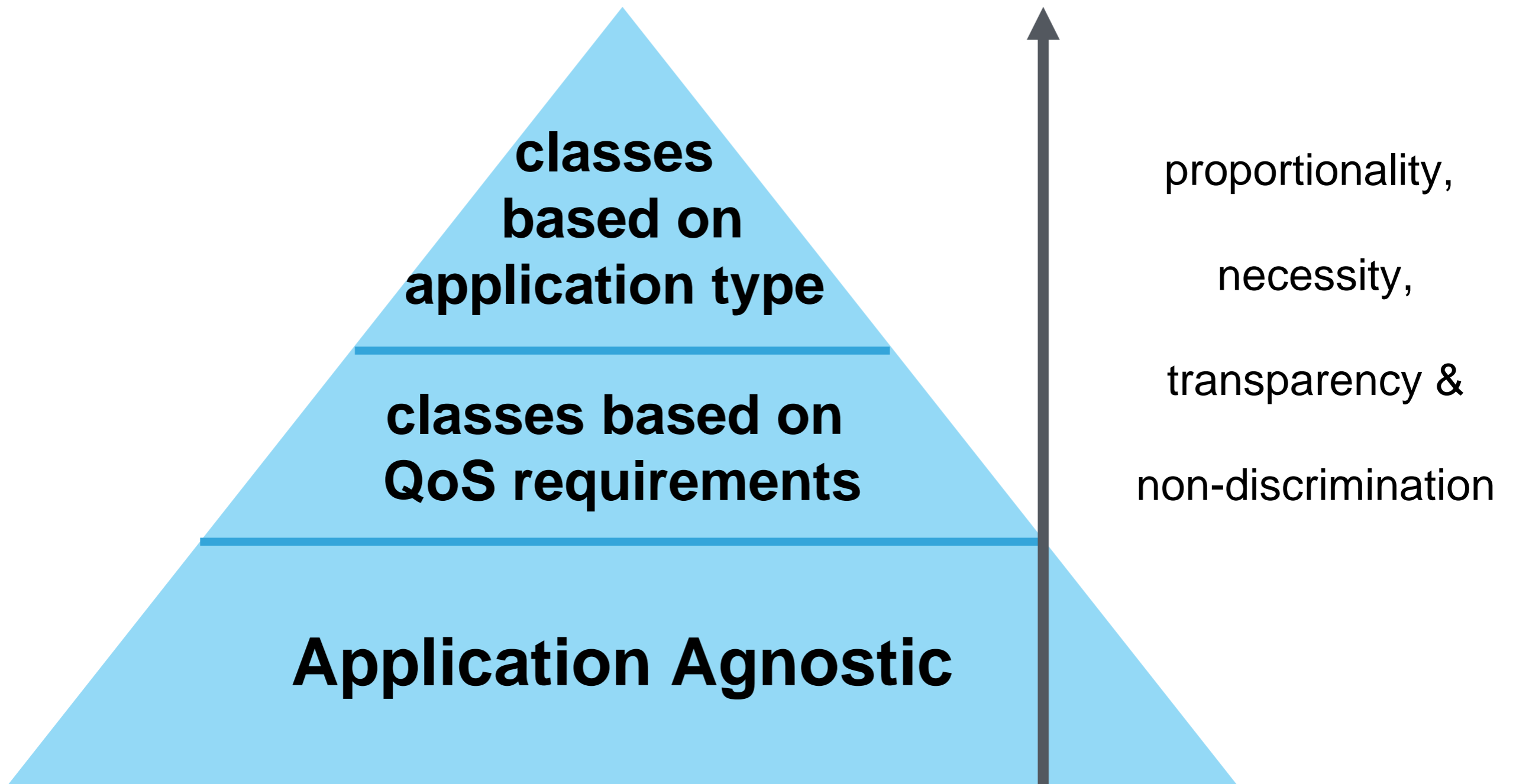
*Article 3 (3) subparagraph 1-3 (c)*



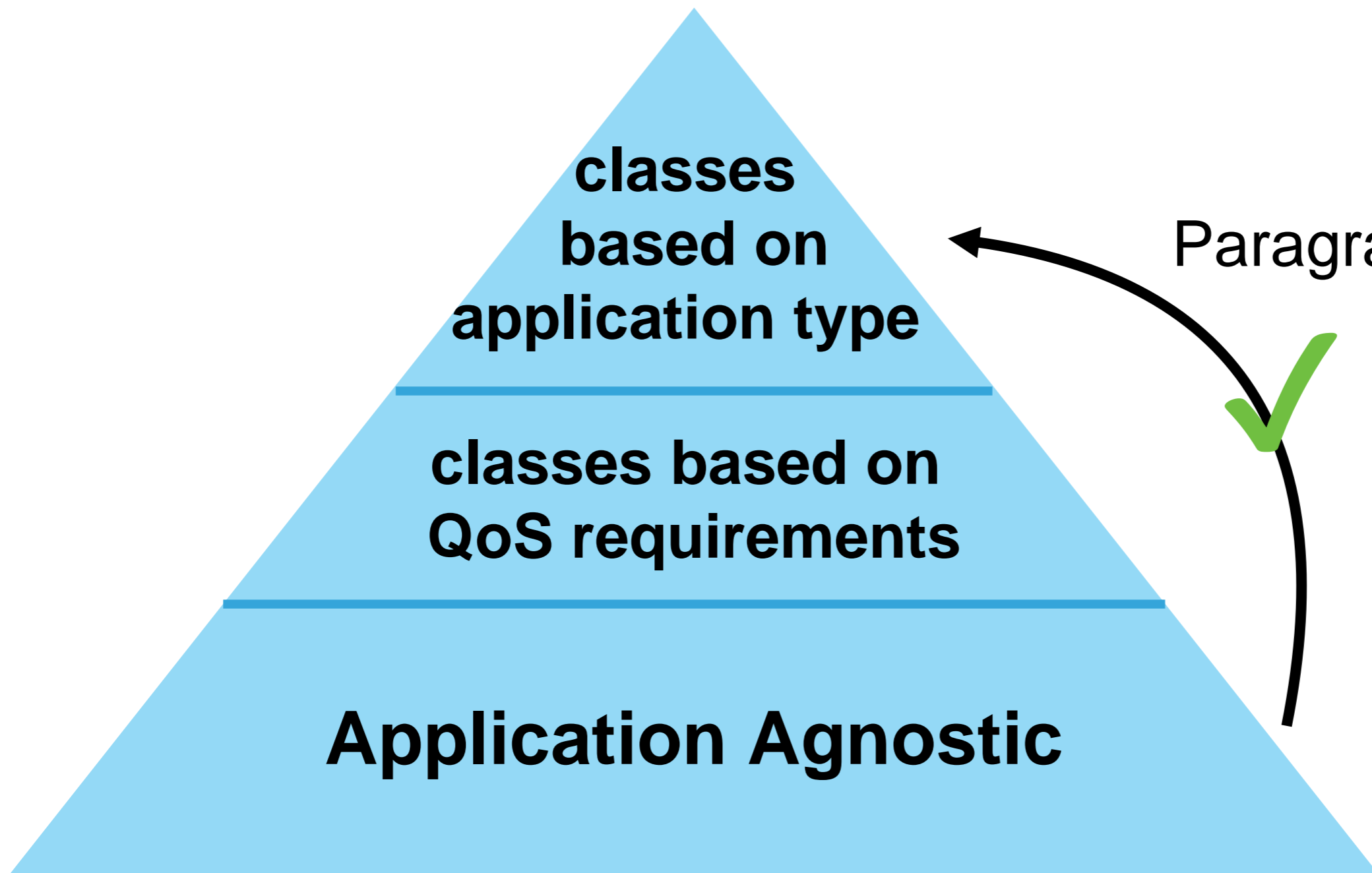
*Article 3 (3) subparagraph 1-3 (c)*

# problems with class-based TM

- could result in ISPs distorting competition
- inadvertently discriminate against new applications
- stifles innovation & creates uncertainty
- intransparent for user & CAP
- risks discriminating against encrypted traffic (*is still the case*)
- harms individual users
- creates regulatory overload

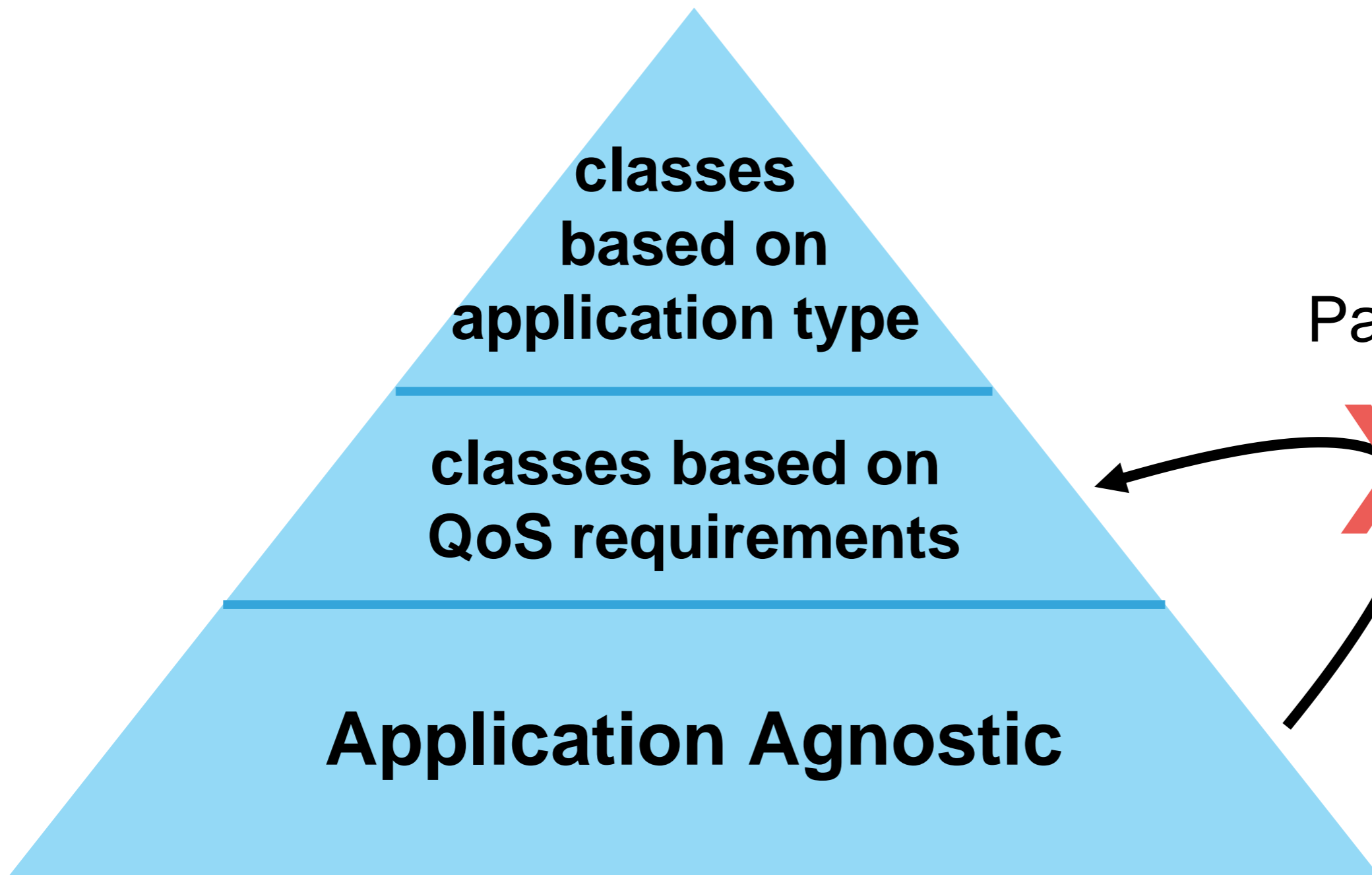


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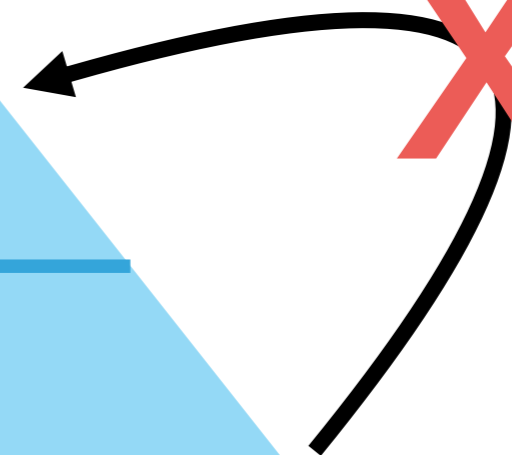


Paragraph 87 & 88

*Article 3 (3) subparagraph 1-3 (c)*



Paragraph 63



*Article 3 (3) subparagraph 1-3 (c)*

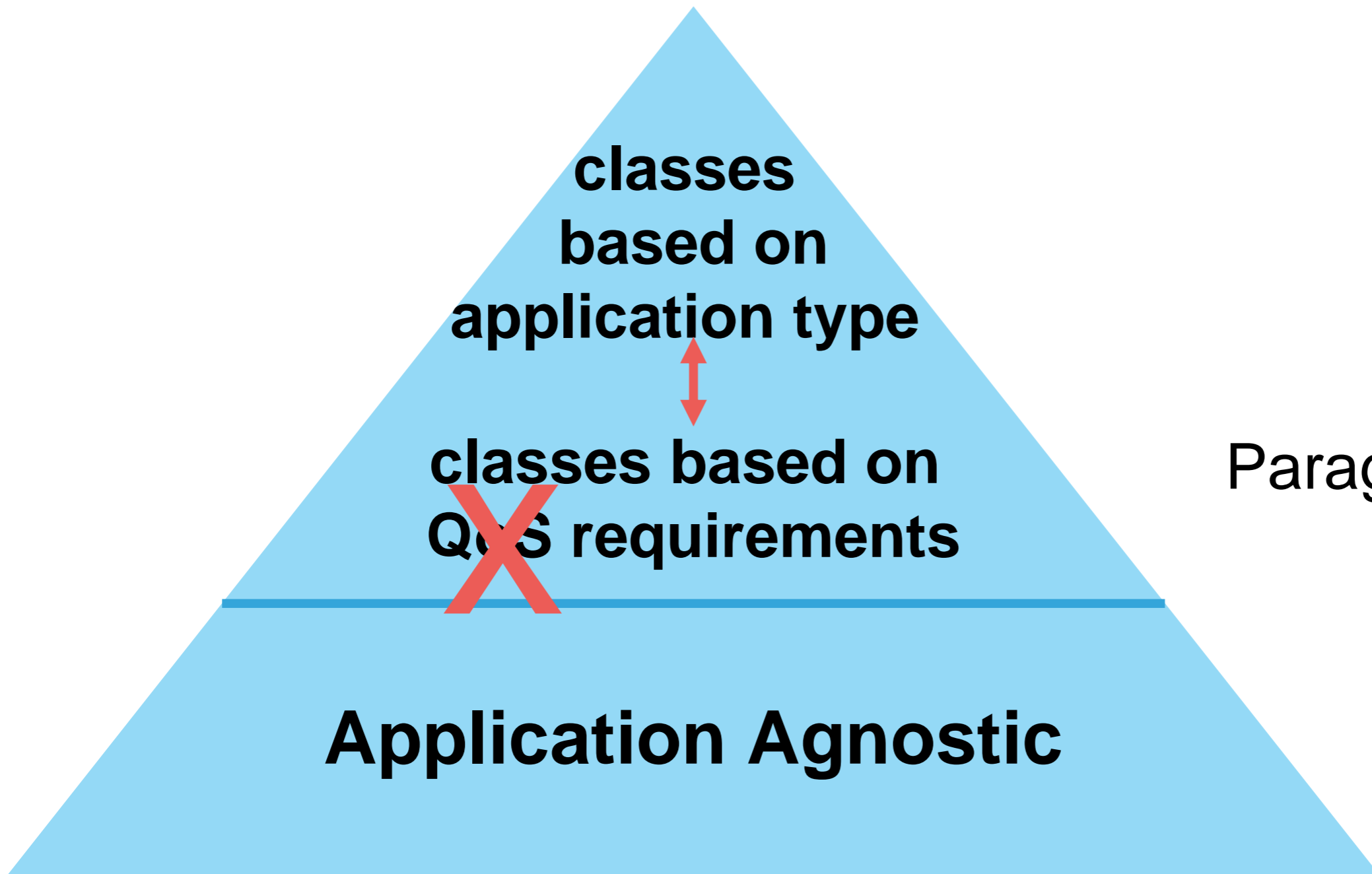
**classes  
based on  
application type**

**classes based on  
~~QoS~~ requirements**

Paragraph 63

**Application Agnostic**

*Article 3 (3) subparagraph 1-3 (c)*



Paragraph 63

*Article 3 (3) subparagraph 1-3 (c)*



# TM considerations

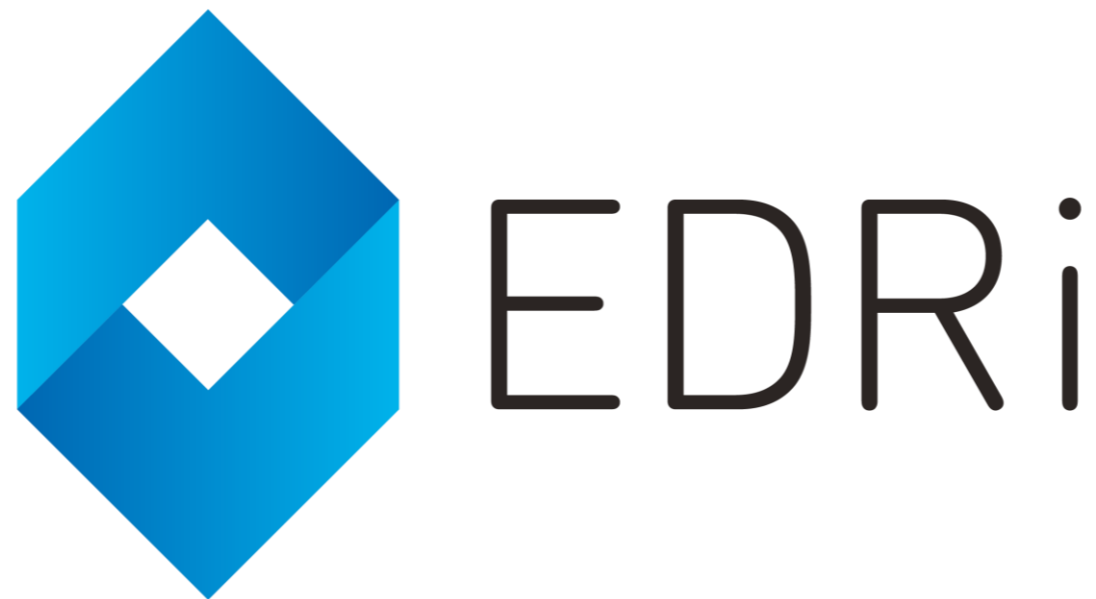
- 2011 Guidelines: “if it is possible to use application-agnostic methods, then it is less proportionate to use application-specific methods“
- Para 58: “appropriate” (balance competing interests)
- Para 58: necessary to achieve the aim  
(Recital 9: “optimisation of overall transmission quality”)
- Recital 9: “Such measures should not be maintained for longer than necessary.”
- Recital 9, Para 71, Article 3(3) subpara 1-3: *reasonable TM* must differentiate at a ‘higher level’ than application-type

**“discriminate between  
specific content,  
applications or services, or  
specific categories thereof”**

– Article 3(3) subparagraph 3 in reference to  
subparagraph 2

acknowledged in Paragraph 71 of the Guidelines

# Thank you



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