

The Importance of Net Neutrality



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Net Neutrality, the principle that all data should be treated equally on the internet, is of utmost importance to start-ups. On 30 June 2015, the European Parliament and the European Commission reached an agreement on strong net neutrality rules. Following a final confirmation, the new regulatory package will enter into force in April 2016. Although the Telecoms Single Market regulation will have an EU-wide effect, it nevertheless remains relevant for start-ups to know the position Member States have taken vis-à-vis net neutrality hitherto.

Net Neutrality and its importance to Start-Ups

Digital innovation requires connectivity. Start-ups developing internet tools and applications are therefore reliant on pervasive broadband networks and online services provided in a fair and open way.

Net neutrality is the principle that **Internet Service Providers and governments should treat all data on the Internet equally**: not discriminating or charging differentially by user, content, site, platform, application, type of attached equipment, and modes of communication. For digital start-ups, and those who develop *disruptive technology* in particular, the principle of net-neutrality is of utmost importance. **If incumbent network operators were to implement content and application-specific traffic management regimes, the utility value of a start-up's application could drop.**

The most frequently reported restrictions are the blocking and throttling, i.e. intentionally slowing down the speed, of peer-to-peer and VoIP services¹. In the app industry, incumbent Telco's may launch 'zero-rated' apps, i.e. apps that, unlike

Prioritization

Prioritization is the practice of favouring one's own service above those of the competition. Imagine a start-up developing a new video streaming service similar to Netflix. These services are in competition with the digital television services offered by many ISPs in Europe.

- The digital service provider, recognizing the use of broadband for competitive services, could slow down the broadband access for the video streaming service. As a result, the video streaming service has to slow down traffic to his service to accommodate current viewers.
- The digital service provider, recognizing that a consumer views the streaming service instead of digital television, could slow down the consumer's internet for that specific service, whilst retaining fast internet speed for his digital service.

their competitors' applications, do not count against the end user's data volume allowance. Through these practices ISPs may weaken the position of their competitors that are threatening the traditional services such as telephony, SMS and digital television services offered by ISPs. Consequently, start-ups and investors may reconsider developing certain technologies if they risk being discriminated against by ISPs.

For start-ups the permissionless nature of the Internet is an important driver for their creativity. Pay-to-play internet, i.e. providing preferential access at a higher price, could be detrimental for early stage, internet driven undertakings as they would be unable to compete with larger players on the markets. Net neutrality should thus be safeguarded.

European Member States' Position on Net Neutrality

Net neutrality is considered to be a very important principle for digital start-ups. Although a pan-European net neutrality framework is scheduled to enter into force in April 2016, there is currently no pan-European legal instrument assuring the application of net neutrality principles. Member States are free to decide whether or not to impose on incumbent operations the obligation to treat data equally. However, if all conditions are fulfilled, data discrimination could still be considered abuse of a dominant position under EU and national competition law.² Start-ups should be made aware of this.

As mentioned, the Telecoms Single Market regulation will impose net neutrality obligations on all EU Member States. Still, it may be relevant for start-ups to know how Member States have positioned themselves vis-à-vis net neutrality. A free and open internet is conducive towards innovation. If a Member State has shown to be protective towards industry giants when it comes to regulating the internet, this may also be reflected in other areas of importance.

The following list gives an overview of net-neutrality regulation in those member states having the greatest number of start-ups in Europe. Depending on the services offered by the start-up, a government's position on net-neutrality may be a decisive factor when choosing a place of establishment. If Member States have allowed incumbents to distinguish network quality among market participants, start-ups should fear disadvantageous treatment when their applications could be considered competition to those players.

The Netherlands - Amsterdam

As one of few member states to have net neutrality legislation, The Netherlands has enshrined the net-neutrality principle in its Dutch

Telecommunications Acts. As of January 2013, internet services or applications can no longer be blocked or slowed down. Moreover, providers cannot charge extra for the use of specific services. ISPs are nevertheless allowed to offer

THE NETHERLANDS - KPN FINED FOR VIOLATING NET NEUTRALITY

Skype, once itself a European start-up, is a heavy proponent of Net Neutrality. As a provider of VoIP services, it is in heavy competition with long-established telecommunications players. However, these players often also serve as the main Internet Service Providers (ISPs) on the European continent. This position allows them to exert their influence on data streams within their networks.

Dutch ISP KPN had blocked VoIP services on its free, wireless hot-spots. Without the principle of net-neutrality this would not have been a contestable practice. However, in the Netherlands, where Net Neutrality is enshrined within the national framework, it is. Therefore, KPN was fined 250.000 euros by the Dutch competition authority.

These events showcase the importance of net-neutrality as a legal principle, and of strong regulatory support⁴.

different payment schemes for the use of data. The Dutch net neutrality rules only apply to services and applications on the internet though. Consequently, services offered through the closed network of the ISP, such as IPTV, data-intensive cloud computing and telemedicine fall outside the regulatory framework³.

United Kingdom - London

No regulation on Net Neutrality has been implemented in the UK. Ofcom, the national regulatory authority for electronic communications services, has stated that there were benefits associated with both "sustaining the quality and performance of the best-efforts internet and the provision of managed services, and that one key aim was for a regulatory framework which enabled both of these concepts to be accommodated"⁵.

Although Ofcom is concerned about mobile operators blocking some services, their view remains that competition between operators should be an effective means to address this, as long as consumers are made aware of these practices. Therefore, operators should be able to manage their network capacity efficiently, which may include traffic management. Still, this should not extend to outright blocking, throttling or anti-competitive prioritisation. Differentiation may be applied for the provision of enhanced quality

content, as long as general best-efforts internet remains available to anyone.

Germany - Berlin

Net-neutrality is not protected via German regulation. The Digital Germany 2015 strategy did address the legal framework for telecommunications and network neutrality: non-discrimination should be guaranteed in the future⁶. Chancellor Merkel however stated that some key services in the digital economy require reliable transmission quality. Therefore, some data may have to be treated differently.

In 2013, Deutsche Telekom, Germany's largest telecom operator, officially confirmed that it had abandoned all contracts offering flat rates for fixed internet connections, discriminating other services in favour of its own.

France - Paris

Even though there is no current legislation on net neutrality in France, there is an on-going debate concerning the principle. The French electronic communications regulatory authority (ARCEP) has issued recommendations on the principle in the form of 10 proposals⁷. Investigations into possible discriminatory tactics by ISPs have turned out negative⁸.

A law on the protection of digital rights and freedoms is planned for April. This law will contain a section on net-neutrality. Clarity concerning the exact position of the French legislator is lacking and some fear that the bill will be geared more towards protecting the interests of the operators.

United States

On February 26, 2015, the FCC adopted new Open Internet rules. Overall, it seems the US adopted a ruleset in favour of strong net neutrality, banning practices known to harm the Internet in clearly defined standards⁹.

- **No Blocking:** broadband providers may not block access to legal content, applications, services or non-harmful devices
- **No Throttling:** broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.
- **No Paid Prioritization:** broadband providers may not favour some lawful Internet traffic over other lawful Internet traffic in exchange for consideration. Under this rule, ISPs are also banned from prioritizing content and services of their affiliates.

European Union – Telecoms Single Market Regulation¹⁰

The EU Telecoms Single Market Regulation will cement the principle of net-neutrality in the European legislative framework. The new regulation should come into force in April 2016. Following final confirmation, the regulatory package will end discriminatory blocking and throttling measures. Traffic management must be non-discriminatory, proportionate and transparent to users. In a press release, the European Commission expressly stated that it will no longer be possible to unfairly slow down access to a start-up's website in favour for bigger companies.¹¹

According to the new ruleset, all internet traffic will have to be treated equally. Exceptions may apply, but only in strict and clearly defined cases of public interest, such as network security or the combatting of child pornography. Internet service providers must also ensure an efficient day-to-day network management.

Analogous to postal and airline services, **companies would still be allowed to differentiate between offers. Prices could then fluctuate according to the quality of service offered. These services however may not be supplied at the expense of the quality of an open internet.** In order to meet end-users demand for better service quality, content providers may also close agreements with ISPs to assure this quality. This will enable telecom operators to generate additional revenue from over the top players.

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