

Net neutrality: zero rating and paid prioritization for content providers on both sides of the Atlantic

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On 26 February the FCC adopted new rules to protect the open Internet.¹ On 4 March the EU member states adopted a common position within the European Council on the draft legislation on net neutrality and roaming². The EU and the US are taking different approaches towards net neutrality that are explained further below.

The FCC Bright Line Rules

- **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 favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no “fast lanes.” This rule also bans ISPs from prioritizing content and services of their affiliates.

The rules put zero rating and sponsored data programs under the FCC's review to ensure they are not harming consumers or content providers.

The draft legislation

The draft EU regulation establishes common rules on open internet access safeguarding access to open internet related end-user's rights and ensuring non-discriminatory treatment of traffic in provision of internet access services. Providers of internet access services and end-users may agree on commercial and technical conditions and characteristics of internet access services, such as price, volume and speed. Providers of electronic communications to the public, including providers of internet access services, shall be free to enter into agreements with end-users, including providers of content, applications and services to deliver a service other than internet access services (specialised service), which requires a specific level of quality. Providers of electronic communications to the public, including providers of internet access services, shall ensure provided that sufficient network capacity is available so that the availability and quality of internet access services for other end-users are not impaired in a material manner. Providers of internet access services shall equally treat equivalent types of traffic when providing internet access services. Providers of internet access services may implement traffic management measures. Such measures shall be transparent, non-discriminatory, proportionate and shall not constitute anti-competitive behaviour.

Zero rating and paid prioritization

In Europe the debate mainly focuses on consumer protection as to whether zero rating is harmful to end users. Contrary to the US, there seem to be no concerns in Europe about paid prioritization. Deals between ISPs and Internet content providers like Comcast-Netflix are not considered to be problematic. BEREC, the Body of Telecoms Regulators, is tasked to investigate whether there are any issues with regard to interconnection, transit and peering arrangements.

¹ <http://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-internet>

² <http://data.consilium.europa.eu/doc/document/ST-6482-2015-INIT/en/pdf>

Under the FCC's new rules, it is illegal for ISPs to charge Internet content providers. However, there is no empirical evidence that charging Internet content providers may distort competition. Contrary, the economic rationale suggests that raising retail prices with 1 Euro per month to cover for a substantial growth of demand for internet content services would be more attractive for ISPs than charging Internet content providers that have substantially lower annual ARPUs.³

The adopted version of the EU legislative proposal shows that the majority of member states does not support ex ante rules against zero rating or sponsored data programs. The proposed section containing a prohibition for providers of internet access services not to conduct commercial practices that restrict or distort competition related to the provision of internet access services was deleted. Jeffrey A. Eisenach's recent report on The Economics of Zero Rating finds that 'the most common types of Zero Rating programs are the ones most likely to benefit consumers, not harm them, and the ones most likely to expand consumer choice, not limit it.'⁴ There is no empirical evidence that zero rating has negative effects on increasing access to online communications and information.

In December 2014 Vodafone was fined in the Netherlands for zero rating HBO-GO which is considered to be contrary to the strict Dutch net neutrality provisions. The Slovenian regulator fined Telekom Slovenije for providing free data for the music streamer Deezer, and Si.mobil for cloud storage service Hanger Mapa.⁵ If the EU regulation would be adopted the Netherlands and Slovenia would be forced to loosen their ex-ante rules on zero rating.

Next steps

The Latvian presidency will start negotiations with the European Commission and the Parliament on a common position. It is expected that the first informal trilogue could take place in the second half of March 2015. Subject to the outcome of this first informal trilogue, the second and third informal trilogue could be held in April 2015. In the first informal trilogue, the Latvian Presidency intends to insist on a quick adoption of the proposal which would contain only provisions on roaming and open internet/net neutrality. Next to roaming related issues zero rating and specialised services are expected to remain major points of political discussion.

³ In 2012 IP transit costs were 10 cents as part of 15,1 euros per month for an ADSL customer in France with an ARPU of 40+ Euros per month: Rapport au Parlement et au Gouvernement sur la neutralité de l'Internet, ARCEP 2012. There's No Economic Imperative to Reconsider and Open Internet, Diffraction Analysis April 2013 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244335

⁴ <http://www.nera.com/publications/archive/2015/the-economics-of-zero-rating.html>

⁵ <https://gigaom.com/2015/01/27/dutch-and-slovenian-regulators-nail-carriers-over-net-neutrality/>