

Dear Commissioner,

I am a Dutch law student/practitioner currently writing a master thesis on the topic of net neutrality, mainly from a fundamental freedoms perspective. I have provided input for the reaction EDRI and Bits of Freedom (BOF) submitted earlier today, which I strongly support, and hereby wish to provide just a few viewpoints of my own (my time schedule is limited right now, I'd be happy to provide further input at a later time).

Although net neutrality and the question whether the internet should be regulated can at times seem too complex to answer at all, and although ISP's and their lawyers and economists are eager to add even more complexity to it in order to convince regulators that ex ante regulation is unnecessary, unwanted and impossible to get right, I believe they are wrong and so should you.

In fact, the ex ante rule or principle that enabled the internet to grow so vital and central to people's lives that broadband access may today be called 'the oxygen of the modern age' or 'modern humanity's lungs', has been there all along. End-to-end could, and in my view should, be regarded as the constitution of the net. It is what makes sure that ISP's do not rule their networks as oligarchs, but rather as democratically elected officials in service of the people. In a similar fashion as trias politica, as enacted in democratic constitutions, safeguards the balance of power in democratic models of governance, so does end-to-end warrant that ISP's do not become judge, jury and executioners of the net.

In terms of concrete regulation that can be worked with, a parallel can be sought with article 10 ECHR, which grants citizens all over Europe a very real and beneficial protection of their right to receive and impart information and ideas, while at the same time respecting the autonomy of individual member states' governments. The Convention and the body of jurisprudence based on it, basically provide for a rule which prohibit states to restrict people's freedom to communicate, unless such restriction is necessary in a democratic society and proportional to an accepted, beneficial cause. As has been formulated by EDRI and BOF, a similar style rule could provide end users of the internet with substantial legal protection of their internet freedoms, while at the same time respecting the autonomy of the ISP's and reaping the benefits of letting the free market do it's work.

The rule described above, could be summarized as either 'no discrimination against internet traffic by ISP's unless..' or 'no application-specific features should be implemented in the network's core unless..' Both end-to-end and non-discrimination principles thus provide a very workable litmus test for ISP's traffic management practices. If an ISP implements features in the core of the network, which can really also be implemented at the edges, it is basically grabbing internet user's freedoms and turning it into more 'provider power' for itself. Measures such as this are generally not proportionate to the goal of furthering the interest of the end users of the network and should therefore not be allowed. On the other hand, features of which, at the applicable moment, regulators cannot say with certainty that they can also be correctly and fully implemented end-to-end and which may reasonably be held to yield benefits for the end users, fall under the 'margin of appreciation' of the ISP's. Until it becomes possible and feasible to implement such feature end-to-end too. It can be argued that speeding up and slowing down traffic where such may reasonably may be held as beneficial for the users, can at the moment not (yet) be properly implemented at the end hosts, and can therefore be implemented in the network's core, as long as the beneficial results cannot be achieved through other measures which can be properly implemented at the edges.

This is as much as I have time for now, I hope this contribution helps in any way. As mentioned earlier, I'd be happy to provide further comments.

Kind regards,
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