

CLIENT ALERT

ISP-Liability & Media Law

July 1, 2010

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On the ARCEP (L'Autorité de Régulation des Communications Electroniques et des Postes) Conference in Paris, Neelie Kroes, the Commissioner responsible for the Digital Agenda, has announced that the European Commission will launch a public consultation on the issue of network neutrality. Her intention is to report back to the European Parliament before the end of the year whether regulatory action on net neutrality is necessary.

The main issues in the net neutrality debate

The debate over net neutrality originated in the U.S. where it has become an important regulatory issue and where the question of whether the U.S. Federal Communications Commission can mandate it, has already reached the courts. In Europe, the debate is still at an earlier stage but through the years it has become a hot topic, causing heated discussions between advocates and opponents of regulatory intervention.

On the one hand, supporters of net neutrality argue that without regulatory intervention the following types of behavior occur:

- *Blocking Applications:* an ISP may decide to block applications, services or content. This already happens in cable networks for P2P traffic in order to avoid bandwidth intensive and often illegal usage of the Internet.
- *Access-tiering:* this occurs when an ISP reserves specific bandwidth (at a price independent from internet access fees) to Internet application providers and Internet content providers that are willing to pay for enhanced or guaranteed service quality.
- *Intentional quality degradation:* ISPs may intentionally degrade the quality of non-prioritized traffic, so that downgraded Internet application providers and Internet content providers have a stronger incentive to pay for higher service quality.
- *Preferential arrangements with content providers:* net neutrality advocates are concerned that ISPs could conclude preferential agreements with specific Internet content providers to prioritize their traffic. This could harm competition between content providers, as some content would enjoy superior service quality than others. Even more, if an ISP is vertically integrated into content provision, it may decide to favor its own content.
- *Consumer-tiering:* ISPs may have an incentive to capture their end users' willingness to pay for internet access by differentiating their offer according to access speed offered.

On the other hand, network operators and ISPs contend that some degree of traffic shaping is needed and desirable in order to secure that high-speed broadband networks perform their functions properly. Indeed, net-work based applications such as

streaming video and voice telephony place our existing internet infrastructure under increased pressure in terms of required bandwidth and service quality. Therefore some kind of differentiation might be desirable.

A number of industry players also argue that, if net neutrality is made mandatory, and ISPs have no possibility of charging for different levels of service quality, incentives to invest in Next Generation Networking (NGN) would be jeopardized. In addition to that, they are moreover of the opinion that European competition policy is sufficient to tackle possible anticompetitive behavior of ISPs.

Regulatory intervention in Europe

On the ARCEP Conference in April 2010, Commissioner Kroes stated that the reformed Telecom package adopted in 2009 , complemented with the forthcoming NGA Recommendation and Spectrum Policy, already provides a good framework to deal with net neutrality issues.

After all, under EU's revised telecoms rules, national telecoms authorities are required to promote "the ability of end-users to access and distribute information or run applications and services of their choice". This sets an important principle for net neutrality, as it explicitly recognizes and safeguards the basic freedoms of internet users.

Moreover, under the new framework, national telecoms authorities will have the power, after consulting the Commission, to set minimum quality levels for network transmission services. This should ensure that traffic management and possible prioritization does not lead to degradation of content and services provided by non-commercial actors or by new entrants.

Finally, the new framework provides strong transparency measures to ensure that consumers are informed – before signing a contract – about the nature of the service to which they are subscribing, including traffic management techniques and their impact on service quality, as well as any other limitations (such as bandwidth caps or available connection speed).

Taking this existing framework into account, Commissioner Kroes is of the opinion that any further regulatory intervention should be duly justified by the need to tackle specific problems which could possibly emerge. Therefore, she announced her intention to launch a public consultation before the summer and to report back to European Parliament before the end of the year whether further regulatory action on net neutrality is necessary. However, she set the bar for introducing new regulation high, recognizing that one should avoid taking unnecessary measures which may hinder new efficient business models from emerging.

References and links :

- <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/153>
- <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/491>

A. RENDA, "I own the pipes, you call the tune. The net neutrality debate and its (ir)relevance for Europe", www.ssrn.com

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