

Dutch Advance Net Neutrality Legislation

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Wednesday, the Dutch parliament passed a balanced and sensible set of [internet neutrality rules](#) [2], thus becoming the first country in Europe, and only the second in the world, to move to protect the openness of the Internet through legislation. (Chile's law went into effect this spring.) Lawmakers also reportedly "accidentally" included a [filtering provision](#) [3], which is expected to be fixed before the Senate passes the bill in a pro-forma review next week. Based on an [unofficial translation](#) [4], the rules look good, although certain ambiguities could potentially lead to some problems. They resemble the rules put forward by the FCC late last year in many ways, and go an important step further in that they fully include mobile wireless Internet providers.

The operative rule is straightforward and captures the most salient issue: "Providers of public electronic communication networks which deliver internet access services and providers of internet access services [may not] hinder or slow down applications and services on the internet," subject to a few exceptions that will sound familiar to neutrality-watchers. This non-interference requirement is appropriately targeted not at all online services, but simply access providers - a key distinction when it comes to Internet regulation (see CDT's [Policy Post](#) [5] on the subject).

One potential problem with this wording is that instead of prohibiting all discrimination, it focuses on hindering and slowing down traffic. Thus it could be argued that carriers may accelerate or prioritize certain traffic without violating the rule. In fact, the risk that carriers would strike deals to favor certain content has arguably been more prominent than blocking in neutrality discussions in the US. I hope that Dutch courts and regulators will recognize that prioritizing some traffic necessarily hinders traffic that doesn't get the same treatment, and accordingly treat prioritization as a violation. But that remains to be seen.

The exceptions to this rule are remarkably similar to those put forward by the FCC as "reasonable network management" and in its carve-out for law enforcement:

1. To minimize the effects of congestion, provided all the traffic of a given type receives equal treatment;
2. To preserve network security, with advance notice to the subscriber when possible;
3. To combat spam, when the user has given consent; and
4. To enforce legislation or a court order.

CDT has previously argued that reasonable network management practices are those that are based on general criteria that are applied fairly and evenly, consistent with common technical standards, and transparent to both subscribers and developers of Internet applications and services. On these three criteria, the Dutch exceptions seem to score pretty well, but the congestion provision could, if poorly interpreted, allow some unacceptable discrimination. In addition, implementing type-based congestion control could raise privacy concerns depending on how traffic is identified. But in general the rules capture the fairness and transparency principles and appropriately balance nondiscrimination with the legitimate need to manage congestion and provide stable, reliable service.

That said, full transparency of network management practices appears to be left out of the law. This is unfortunate because of the benefits to application developers, users, and network operators that can come from all parties knowing how best to use and manage network resources. But non-discrimination is the heart of the neutrality issue, and the law handles that pretty well.

An explanatory memo accompanying the legislation explains (based on the same unofficial translation) that covered service providers remain free to offer what have become known in the US

debate as “specialized services.” Operators may offer stand-alone services, such as VoIP, that use Internet connectivity separately, but anything that resembles access to the rest of the Internet will be subject to the rules. This means that Dutch carriers cannot offer a selective “best of the Internet” package as a way around the prohibition on blocking, but can offer other standalone IP-based services. As [we said](#) [6] at the FCC in regard to specialized services, this is the right approach.

Network operators should have leeway to experiment with service offerings that are not Internet access, so long as such services are not used as a loophole around the rules and do not negatively impact the operators’ Internet access offerings.

Perhaps the best feature of the new Dutch law is just that – that it’s a law. The FCC’s rules, even as they await final publication, are already mired in legal questions the agency’s authority, and are expected to be tangled in prolonged litigation. An attempt to pass nearly identical rules into law last fall stalled before it could be introduced, leaving US Internet neutrality regulation in limbo. It is unfortunate that the US isn’t moving as fast – or as concretely – as other countries to preserve Internet neutrality.

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