

Chilean Congress Approves Bill on Net Neutrality:

Chile becomes the first country to integrate net neutrality principles into its legislation

After a three year long discussion on the Congress, last August 26th 2010 a law on net neutrality was published on Chile's Official Gazette, amending the Telecommunications Act and making Chile the first country to integrate this principle in their legislation.

I. The Legislative Process

The project was filed for discussion before the House of Representatives on March 2007, and consisted of a few articles which were originally intended to be inserted in and to modify the Consumer Protection Act, considering the effectiveness and flexibility of the consumers' actions from that law. Later on, the Commission of Science and Technology of the House of Representatives modified the project to include it on the Telecommunication Act, considering the characteristics of the Internet as a support for a variety of distance communications, as well as of other services or applications. In addition to that, it was argued that the regulatory authority vested on the Under Secretariat of Telecommunications would be an adequate venue to interpret the regulation of the users' rights, providing the flexibility that is necessary for a subject matter like the Internet and its changing uses and applications.

The bill was finally approved by the House of Representatives on July 13th, 2010; and published on the Official Gazette on August 26th 2010, following its enactment on August 18th.

II. The Bill on Net Neutrality: Main Obligations and Prohibitions

The law project inserts three new articles on the Telecommunications Act.

Internet access providers ("IAP") are defined as those who provide commercial services of connectivity between users or their networks and the Internet. The Bill sets forth obligations and prohibitions for both IAPs and the concessionaires of public services of telecommunications who provide services to an IAP (hereinafter collectively referred to as "ISP").

The main legal obligations and prohibitions for ISPs are:

- **Net neutrality.** ISPs cannot arbitrarily block, interfere, discriminate, hinder nor restrict the right of any internet user to use, send, receive or offer any legal content, application or service through the internet, as well as any activity or legitimate use conducted through the Internet. The service cannot arbitrarily distinguish contents, applications or services based on the source or property of said contents. ISPs are allowed, however, to take measures and actions that are necessary for the management of traffic and networks, as long as they are not intended to or may affect free competition.
- **Block of access upon user's request.** ISPs are authorized to block access to certain contents, applications or services only upon the users' request, and at the user's cost. Under no circumstances such block will arbitrarily affect the online service and application providers.
- **Free use of peripherals.** ISPs cannot limit the right of a user to incorporate or use any

kind of instruments, devices or appliance on the net; as long as these devices are legal and don't damage the net or the quality of the service.

- **Information and publicity obligations.** ISPs must publish on their websites all information related to the characteristics of the internet access they offer, its speed, quality of national and international connections, and the nature and guarantees of the service.

The establishment of the minimal conditions to be met by the ISPs in regards to their information and publicity obligations is left for a special regulation to be issued by the Telecommunications Under Secretariat. This regulation will set forth the activities that may be considered restrictive to the freedom to use online available content, applications or services.

The Under Secretariat of Telecommunications will also sanction any legal or regulatory infringements associated with the implementation of the principle of net neutrality that may prevent or hinder the rights that derive from it.

III. Comments to the Project on Net Neutrality

With the enactment and publication of this law, Chile has become the first country to legalize the principle of net neutrality.

It has been argued that the consecration of this principle is far from absolute,¹ since the user's rights are subject to several limitations and exceptions, the main one being the use of the word "arbitrary" when stating that the service cannot arbitrarily distinguish contents, applications or services. Although there is no legal definition of the word arbitrary, jurisprudence has been fairly consistent in understanding that an arbitrary act is an act derived from irrationality or whim, or that lacks a justification. Therefore, some critics to the law project point out that if the prohibition for ISPs only refers to making "arbitrary" differences on the management of traffic or access on their networks, then any other action which distinguishes contents, applications or services based on their source or on their property, may be legally permitted.

Another area of potential conflict is the interpretation of the word "legal" when prohibiting

ISPs from blocking, interfering or hindering the right of internet consumers to use any legal content, application or service online. In a similar way, it has been argued that an unwanted outcome of this wording would be that ISPs may feel authorized to take measures against the principle of net neutrality, by arguing that the content is illegal; which would in turn may also be unlawful, since it is only the law or the Courts who are authorized to assert on the legality of an action.

Nevertheless, the regulatory powers vested on the telecommunications authority may diminish the risk of this law from being interpreted in ways that oppose the principle of net neutrality. Under this scenario, the Under Secretariat of Telecommunications will face a challenging task when defining and interpreting the limits of this future law's obligations and restrictions.

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¹ Lara J Carlos, "Las Dudas Sobre el Proyecto de Ley Sobre Neutralidad en la Red", available in <http://www.derechosdigitales.org/2010/07/27/las-dudas-de-la-ley-sobre-neutralidad-en-la-red/>; Instituto Libertad y Desarrollo, "Principio de Neutralidad en Internet. Boletín 4915-19", available in http://www.lyd.com/lyd/centro_doc/documents/ri-844-4915-19-principio%20de%20neutralidad%20en%20internet.pdf