

BACKGROUND

INTERNET BLOCKING IN AUSTRIA

Analysis of the proposed amendments to the Telecommunications Act 2013¹ regarding Internet blocking

Subject

By making use an exception in the EU regulation on net neutrality, it is proposed to enable Internet access providers to block content deemed "criminally relevant" and improper for minors.

Summary

The current legislative proposal presents a turnaround from the principle of net neutrality and most likely incompatible with EU law. The proposal contains very broad blocking provisions, allowing access providers to block any section of the Internet presumed to offer illegal content. The offences listed in the proposal only serve as examples; other criminally relevant actions can be used as justification for content blocking. The proposal does not provide legal protections for affected services or customers. Content blocking can become part of the access providers' product design, affecting a product's price.

Detailed Objections

- An arrangement such that "providers of Internet Access Services can offer traffic management measures" leaves the decision of whether to, when to, how to, and why to block content exclusively to the access provider. Because "criminally relevant" content is the subject of the blocking, this in effect results in a privatisation of jurisdiction and enforcement of the law. Since providers are not obligated to block, but the blocking of content remains a voluntary part of the access provider's product design, access providers can price products with a narrower or wider range of blocked content differently. There would be no obligation on the access provider to provide a product encompassing the complete, uncensored Internet or not to market such a product as the most expensive.
- Because of the phrasing "such as damage of data," etc. it is clear that content blocking is not limited to the types of offences listed. Content blocking could become a preventative measure in all cases of criminally relevant actions, such as defamation (§297 StGB) or vilification of the state or its symbols (§248 StGB).

1 https://parlament.gv.at/PAKT/VHG/XXV/ME/ME_00326/index.shtml

- This type of content blocking undermines the fundamental rights to free speech and freedom of information. It is a disproportionate measure that bears significant risks of abuse. The decision of whether to manipulate a data stream or which content can be accessed should not be made by a private entity. Such an arrangement would upend the EU regulation on net neutrality.
- It is highly questionable whether the legislative proposal is compatible with the EU regulation on net neutrality in the first place. The regulation does allow access providers to block content in order to comply with EU or national legislative acts or court orders; however this exception only holds "as necessary, and only for as long as necessary" (Article 3 (3), third subparagraph of Regulation (EU) 2015/2120). While Austria could in principle place an obligation on access providers to block content, it cannot place this decision into the providers' hands, as the legislative proposal does. A unilateral change of the EU net neutrality provisions, which Austria seeks to enact with this proposal, contradicts the basic principles of the EU's single market and is in violation of EU law.
- Content blocking is supposed to "prevent criminally relevant actions". However, the assessment of whether an action is criminal or not is not in the purview of access providers but of courts of law. Outsourcing such powers to private entities is in contradiction with the rule of law. Moreover, most access providers are ordinary SMEs and don't employ legal staff.
- Content blocking is not a suitable measure to confront problems arising from the transmission of pornography or media glorifying violence, or from criminally relevant copyright violations via the Internet. The societal benefit of such measures is therefore highly doubtful. The explanatory notes of the proposal do not even attempt to justify the necessity or adequacy of such measures. Furthermore, network-side content blocking can be easily circumvented on a given device (such as by moving from a filtered mobile link to an unfiltered WiFi network).
- The explanatory notes mention a discrimination of access providers vis-a-vis pure service providers (providers of anti-virus or content filtering services). However, this discrimination is not actually real. Access providers are not currently prevented from providing client-side anti-virus or content filtering services; the proposal seeks to legalise network-side content blocking which is of an entirely different nature. In fact, such network-side filters result in a distortion of the market as access providers do not offer to integrate filtering products of all providers of anti-virus or content filtering services into their networks, but enter exclusive partnerships.
- No public debate has taken place, nor has there even been an announcement of any such measures in the government's working programme. This is surprising considering that there were meetings of a Ministry of Justice working group on filtering material violating copyright, the results of which have not found entry into this legislative proposal.

We suspect certain very large Austrian access providers to be the main backers of this proposal, who currently suffer financial costs because of court proceedings resulting in blocking orders due to criminally relevant copyright violations. We suspect a well-connected Austrian provider of network-side anti-virus and content filtering services to be another backer of the respective provisions in the proposal.

Legislative proposal

Amendment of § 17 TKG

"(1a) Anbieter von Internetzugangsdiensten können Verkehrsmanagementmaßnahmen im Sinn von Art. 3 der Verordnung (EU) 2015/2120 zur Vermeidung von strafrechtlich relevanten Handlungen, wie etwa Datenbeschädigung durch Viren, Computerkriminalität, Verbreitung von pornografischen oder gewaltverherrlichenden Darstellungen im Sinn der Jugendschutzgesetze an Minderjährige oder strafrechtlich relevante Urheberrechtsverletzungen, anbieten."

"(1a) Providers of Internet Access Services can offer traffic management measures according to Article 3 of Regulation (EU) 2015/2120 in order to prevent criminally relevant actions, such as damage of data, computer crimes, distribution of pornographic media or media glorifying violence according to the laws for the protection of the youth, or criminally relevant copyright violations."

Explanatory notes of the legislative proposal:

"Um eine nicht zu rechtfertigende Benachteiligung österreichischer Accessprovider zu verhindern und um die Kompetenzen österreichischer Provider u.a. in den Bereich Jugendschutz und Datensicherheit zu stärken, sollen diese ohne Verstoß gegen die Netzneutralität die gleichen Services anbieten können, die sonst nur reine Serviceprovider anbieten können."

"In order to prevent an unjustifiable discrimination of Austrian access providers and in order to strengthen expertise of Austrian providers in areas such as protection of the youth and data security, access providers should be able to provide the same services which otherwise only pure service providers could provide without violating net neutrality provisions."