

Learning From the German Experience of Promoting and Protecting the Open Internet: The Cases of Network Neutrality and the Fight Against Illicit Online Content

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In the various arenas of the Internet governance debate, one of the points frequently highlighted is the need to maintain the 'open Internet'. Despite being commonplace in the discourse, this concept can assume different meanings to the diverse stakeholder groups in these discussions, depending on which fora the discussion is taking place. For example, 'open Internet' can be synonymous with net neutrality, which means the Internet applies a non-discriminatory approach to Internet traffic, with data being transmitted over the network regardless of its content, origin, or destination. Another possibility of understanding the term has to do with the non-liability of network intermediaries, which basically stresses that the fight against illicit activities on the network must reach the party finally responsible for those acts, rather than those providing the means of accessing and transporting data, such as the network infrastructure (like the transmission technologies, the DNS system, IP blocks, among others).

My research aims to open a dialogue between Germany and Brazil, viewing the open Internet as a value (i.e. a common good), and focusing on the regulatory aspects of it. Some questions guide this reflection: How has the open Internet as a value shaped regulations in Brazil and Germany, as well as the subsequent processes of legislation enforcement? Could Brazil

and Germany learn from each other in order to maintain the open Internet? What risks can be anticipated through the debates that are taking place in Germany, and more generally in Europe, so that Brazil does not fall into the same traps when it comes to enforcing the open Internet both as value and from a regulatory point of view? Are there cases in which the regulations or their enforcement are a challenge to maintaining the open Internet as a value?

Reflecting on the Brazilian scenario, it is possible to see that the open Internet discourse influenced regulatory action. In 2009, when there was no Internet-specific legislation in the country, the [Brazilian Internet Steering Committee](#) (CGI.br) published the '[Principles for the governance and use of the Internet](#)', which, despite not directly referring the term 'open Internet', mentions net neutrality and the non-liability of network intermediaries as two of the ten principles. CGI.br's principles brought a set of values for the Internet in Brazil, which ended up influencing the regulation, as several were adopted into the [Marco Civil Law of the Internet in Brazil](#), ratified in 2014. For example, the legislation ensures net neutrality and also adopts a special regime where Internet intermediaries can only be liable for damages resulting from content generated by third parties if, after a specific court order, they do not take appropriate actions to

make content unavailable. Following this legislation, the issue of net neutrality was heavily regulated by [Decree 8771](#), which mentions that the National Telecommunications Agency (Anatel) is responsible for carrying out inspections and investigations of infractions regarding the technical requirements set out in the Decree, and taking into account the guidelines established by the CGI.br. In addition, the National Consumer Secretariat would monitor and investigate infringements that harm consumers, and the Brazilian Competition Defense System would be in charge of investigating economic infractions. Essentially, these entities have to work collaboratively in order to enforce net neutrality.

Despite this pioneering approach, observed in processes such as the publication of CGI.br's principles, the approval of the Marco Civil Law and Brazil acting as host for the [Internet Governance Forum \(IGF\)](#) on two occasions, the country has been losing ground as an international leader in Internet Governance arenas in recent years. Conversely, Germany stands out in this scenario, mainly after hosting the last in-person IGF in 2019, despite having a distinct trajectory in the open Internet debate. One of the first developments in this area was related to the liability of Internet intermediaries. The European Union was one of the first regions to be concerned with rules for digital spaces, especially related to electronic commerce, and published the [E-commerce Directive](#) as early as 2000. One of the effects of this regulation was the definition of three cases of exemptions for Internet intermediaries: mere conduit, caching, and hosting. Although this directive has been in place for more than 20 years, the European Commission launched a legislative initiative in late 2020 called the [Digital Services Act \(DSA\)](#), which aims to update the rules governing digital services. Therefore, it is possible that the intermediaries liability regime will be modified.

In the first decade of the 2000s, there was a discussion in Germany regarding net neutrality – soon abandoned in favor of a wider European debate on the subject – which led to the approval of the [Open Internet Regulation](#) in 2015. Among other things, the regulation established roles for the [Body of European Regulators for Electronic Communications \(BEREC\)](#) and the National Regulatory Authorities (NRAs). After consulting stakeholders, the BEREC published [guidelines](#) for the implementation of the NRAs' obligations in 2016. In this context, the NRAs, ([Bundesnetzagentur](#) in the case of Germany) have to monitor, promote and enforce the continued availability of non-discriminatory Internet access services at levels of quality that reflect advances in technology. Moreover, the NRAs have to publish reports on an annual basis re-

garding their monitoring and findings. In 2019, the European Commission published an [evaluation](#) of the implementation of the Open Internet Regulation. The main conclusion was that the Regulation's principles are appropriate and effective in protecting the rights of end-users and promoting the Internet as an engine of innovation. No amendments were found to be necessary at this stage. As a consequence of this evaluation, the BEREC guidelines were [updated](#) to reflect the experience of the NRAs and of the European Commission during the last 4 years, providing clarity on commercial offers with differentiated pricing (like zero-rating offers), or differentiated quality. Some adjustments were also made to better fit to 5G use cases.

Concerning the preliminary findings of the research, it is possible to assert that the open Internet as a value influenced the processes of construction and enactment of regulations in both countries, but in different ways. In Brazil, the focus was on the creation of a principle-oriented legislation in relation to the Internet, with a focus on users' rights and safeguards. In the European Union, there are specific regulations dealing with particular aspects, followed in some cases by guidelines for standardizing enforcement by different countries. One of the gaps observed in Brazil is precisely the lack of concrete enforcement guidelines in similar cases related to the open Internet, which could be a lesson to be learned from Germany. Furthermore, there is a lack of transparency in relation to the open Internet complaints received and how they are dealt with (for example, being published in an annual report, as is done in Germany). One risk to the open Internet that could be anticipated from the current German debate is the issue of combating copyright infringements through blocking at the DNS level, through an [agreement](#) directly between ISPs and copyright industry associations, but without an express court order.

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