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# The EU approach to net neutrality: Network operators and over-the-top players, friends or foes?

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## ABSTRACT

### Keywords:

Net neutrality  
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Over-the-top communications

This paper will mainly focus on the EU approach to net neutrality, notably the adequacy of existing and future EU rules to tackle the issue and the ongoing policy debate. It will also consider whether the market has effectively worked around the regulatory lacunae by looking into the relationships between the telecoms industry, as a regulated sector, and the over-the-top (OTT) players. In this regard, it will explore to what extent there is a real battle between telcos and OTTs or if both parties are already finding their own ways to overcome their (apparent) disputes.

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## 1. Introduction

At a time when the EU institutions are negotiating proposals from the European Commission<sup>1</sup> for new rules on net neutrality, the author hopes that this paper will provide a timely analysis of the state of play of the debate at EU level.

The concept of neutrality is not new in EU telecommunications law. EU law requires Member States (in particular in the field of radio spectrum) to make regulation technologically neutral in a way that does not discriminate against a particular technology or a particular service.

Traditionally, the debate on neutrality of the net has also addressed the problem of discrimination, in particular broadband discrimination<sup>2</sup> and to what extent Internet

Service Providers (ISPs) should be allowed to limit, filter or block Internet traffic on the basis of the so-called “end-to-end principle” according to which Internet data flows should be transmitted without prioritisation (and that “all bits are equal”). At the heart of the debate is also the use (and abuse) of traffic management by ISPs which, in some cases, may be necessary to cope with peaks in traffic and to avoid network congestion. This may include legitimate practices such as defining fair use policies, limiting the line speed of clients at certain times, or defining caps on the volume of downloaded and/or uploaded data. However, some specific practices such as throttling or traffic prioritisation may be problematic for consumers, particularly if they discriminate against certain types of services. Linked to this is the question of what implications the provision of ‘managed’ services (i.e. with a guaranteed quality of service)

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, Brussels, 11.9.2013 COM(2013) 627 final, 2013/0309 (COD), mainly, articles 23 and 24.

<sup>2</sup> See, Wu, Tim, *Network Neutrality, Broadband Discrimination*. Journal of Telecommunications and High Technology Law, Vol. 2, p. 141, 2003. Available at SSRN: <http://ssrn.com/abstract=388863> or <http://dx.doi.org/10.2139/ssrn.388863>. See also, Chirico, Filomena, van der Haar, Ilse, Larouche, Pierre, *Network Neutrality in the EU*, TILEC Discussion Paper DP 2007-030, September 2007. <http://dx.doi.org/10.1016/j.clsr.2014.07.009>

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could have for standard ‘best effort’ Internet services, as the latter are an integral part of internet architecture as we know it.

In the EU, the first attempt to address net neutrality took place in 2007 when the European Commission presented proposals to review the EU electronic communications framework. At the time, the EU executive was under the influence of the debate on the telecommunications reform in the US. It considered<sup>3</sup> that the problem mainly concerned barriers for competition (in broadband access services) which should be effectively addressed in Europe under the existing rules.<sup>4</sup> Nevertheless, as we are going to see in detail below, the European Commission aimed to strengthen the EU rules on users’ rights and consumer protection allowing national regulatory authorities (NRAs) to set minimum quality levels for transmission services to end-users in order to ensure ‘basic connectivity’ (i.e. to prevent the quality of transmission services in IP-based communications from being ‘degraded to unacceptably low levels’).

As a general remark, it can be said that due to the practical implications for consumers, the issue of net neutrality has led to the transformation of what was originally a technical debate into a sensitive political discussion. Numerous articles have been written on different aspects of net neutrality, including fundamental rights issues, traffic management, traffic prioritisation, and consumer rights, to give a few examples. Although the substance of the discussions has not evolved a great deal during the course of this debate, it is the author’s view that the broadband market is expanding so rapidly that the policy debate is struggling to keep up.

This paper considers whether indeed the market has effectively worked around the regulatory lacunae. This evaluation will focus mainly on the EU policy approach to net neutrality, notably the adequacy of existing and future rules aimed at tackling the issue and the underlying policy debate. It will then examine recent market developments and, in particular, look into the relationships between the telecoms industry, as a regulated sector, and the increasingly powerful over-the-top (OTT) players which deliver services over telecoms networks and which are often portrayed as free-riding

<sup>3</sup> Commission Staff Working Document, Impact Assessment, Accompanying document to the Commission proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 2002/21/EC Commission proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC Commission proposal for a Regulation of the European Parliament and the Council establishing the European Electronic Communications Markets Authority {COM(2007)697, COM(2007)698, COM(2007)699, SEC(2007)1473}, 2007 at 91–92.

<sup>4</sup> The Commission also considered that product differentiation is generally beneficial for the market (particularly in industries with large fixed and sunk costs) as long as users can access the transmission capabilities and the services they want. “The current EU rules allow operators to offer different services to different customer groups (and price such services accordingly), but do not allow those who are in a dominant position to discriminate in an anti-competitive manner between customers in similar circumstances”. See, *cit supra* 3, at 91.

on infrastructure providers.<sup>5</sup> In this regard, it will explore to what extent there is a real battle between telcos and OTTs, or if both parties are already finding their own ways to overcome their (apparent) disputes.

## 2. The EU regulatory framework for electronic communications

As the following consideration of the current EU framework demonstrates explains, EU decision-making bodies have demonstrated a relaxed approach to net neutrality with no attempt, until recently, to regulate the issue in detail. At the time of writing, the EU legislators are considering a European Commission proposal for a draft regulation that would introduce the net neutrality principle as a direct obligation on national authorities and operators.<sup>6</sup>

Before considering whether new rules are necessary, an examination of the existing provisions with bearing on network neutrality and broadband markets is appropriate. These provisions are contained in the EU legal framework for electronic communications, the so-called ‘Telecommunications Package’. Although these provisions do not explicitly refer to net neutrality, they are useful as a means to ensure transparency and a minimum quality of service to end-users. Furthermore, we must analyse to what extent the significant market power (SMP) regime, as applied to the electronic communications sector, could tackle these issues at *ex-ante* level. Finally, this section suggests an analogy between net neutrality and the rules on must-carry (content retransmission).

### 2.1. The Universal Service Directive

The Universal Service Directive<sup>7</sup> (in its 2009 version, which followed the review launched in 2007) mainly addresses transparency and information issues in the relationship between operators and consumers. As such, it does not address all of the potential issues surrounding net neutrality, such as the relationships between network operators and content providers, or between competing network operators.

The directive, in addition to specifying a mandated minimum ‘set’ of service delivery that all EU residents are entitled to have provided (i.e. the ‘universal service’ requirement), contains rules addressing what might be called consumer protection issues. In this regard, it lays down contractual requirements, obligations governing transparency and also

<sup>5</sup> As put by Telecom Italia’s former CEO: “when national regulatory authorities and competition authorities engage in market power assessments, instead of looking at the broader picture, they still focus on the traditional definition of telecommunications markets”. Bernabè, Franco, Telecommunications and Media Forum, International Institute of Communications, June 22, 2011 available at <http://www.telecomitalia.com/content/dam/telecomitalia/en/archive/documents/media/speeches/2011/TelecommunicationsMediaForum-Bernabe-22.06.11-2.pdf>.

<sup>6</sup> Note 1, *supra*.

<sup>7</sup> Directive 2009/136/EC of November 25, 2009 (O.J. 18.12. 2009, L337/11) amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services (2009/136/EC). See in particular articles 20–22.

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