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Net neutrality in Europe: reconciling the irreconcilable

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The net neutrality debate in the EU over the past decade is characterised by a number of policy twists and turns, and there are strong signs that these twists and turns will continue to plague decision-makers for some time.

The concept of net neutrality initially developed in the US, and more recently embraced by the EU, is that any policy affecting the internet must respect citizens' fundamental democratic right to obtain unfettered access to the internet. In the US, net neutrality developed along almost quasi-constitutional lines, while in Europe a more pro-consumer orientation has been tempered by the fact that many market failure concerns can be addressed by the EU's Regulatory Framework for electronic communications. At its heart, the consumer imperative for non-discrimination, free from all forms of intermediate control, has staked a major claim to be central to any net neutrality concept adopted on either side of the Atlantic.

When Tim Berners-Lee developed the internet, he could not foresee the extent to which it would dominate all private and business communications around the world, nor the multi-faceted nature of those communications. Given



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the speed of its uptake, we have quickly lurched to concerns about traffic congestion over the internet, drip-fed by a 'cocktail' of policy principles which underpin the broadest concept of net neutrality, whether they relate to: the fragmentation of autonomously routed data packets (the 'end-to-end principle'); the commitment to provide the fastest speeds possible (the 'best-efforts principle'); and the principle of non-discrimination currently adopted by routers (the 'first-in-first-out principle'). These principles now seem somewhat dated, however, as technology can allow for deviations from a 'best-efforts' paradigm to traffic management, allowing Internet Service Providers (ISPs) to 'manage' the performance of a network in order to satisfy various quality of service criteria, provided that certain supporting systems are in place. Nevertheless, the internet remains a 'network of networks' and, while operators have complete control over their own network, that control is neutralised by a complete lack of control once data passes on to third party networks.

The term 'net neutrality' was coined by Tim Wu in response to the potential consequences of ISPs engaging in problematic traffic management techniques. According to Wu, three

distinct 'theories of harm' were arguably likely to arise from such practices:

First, the internet 'dirt road': ISPs might engage in service differentiation, resulting in premium services with premium pricing, arguably reducing the incentives for ISPs to invest in backbone infrastructure, thus degrading the quality of basic or 'entry' level services.

Second, stifling the 'man in the garage': As many of the internet's success stories have arisen from individuals and small tech start-ups, permitting ISPs to act as gatekeepers would result in closed systems which impose a 'tax on content', thereby chilling dynamic efficiency and stifling the 'man in the garage'.

Third, the empty highway. In contrast to the 'dirt road', ISPs would be allowed to differentiate between their offerings based on quality of service, thereby creating premium 'high-speed' lanes, but with content exclusion or differentiation, potentially resulting in 'autobahn' style internet roads, with 'Morris Minor' type traffic.

In reality, network management techniques are already implemented by ISPs (on their own networks), who face significant challenges to deliver the consistent quality of service demanded by end-users. Further, in

Europe, ISPs are tasked with realising the EU's Digital Agenda – a drive to upgrade infrastructure to next-generation capabilities (i.e., fixed fibre networks and 4G/LTE mobile infrastructure). Therefore, it is perhaps understandable that ISPs seek to use network management for commercial purposes. The net effect of such practices, however, might be to erode the revenue flow to OTT players, particularly those who provide similar services such as voice and messaging.

Show me the money

The dramatic shift in internet traffic volumes that has occurred over the past 20 years has also brought with it a rapid transformation of the internet value chain. This shift has effectively liberated the service layer from the network layer, and this dis-intermediation has in turn allowed a cadre of alternative service providers to provide services 'over the top' of the existing access lines. These 'over the top' (OTT) providers compete aggressively with more traditional services. The result is a potential shift in the role of ISPs to that of a 'gatekeeper'. These two drivers of internet traffic – one quantitative (traffic volume) and one qualitative (shifting value chain) – are currently the major drivers of the



net neutrality debate in Europe.

That debate has developed an extra dimension through the recent concern of many stakeholders that the bedrock of the internet – the physical access networks over which it is laid – is becoming alarmingly commoditised and losing its economic value. This preference in Europe for value to be extracted from services rather than access risks alienating the most likely source of future investment in the next generation access networks that are needed to carry the growing range of content-rich and bandwidth-hungry applications which fuel internet use. Different jurisdictions have adopted different approaches as to how best to manage such conflicting policy priorities.

It is the steering of an optimal net neutrality policy course for Europe while reconciling these very different policy orientations, which encapsulates what is one of the EU's greatest sector-specific policy challenges – namely, striking the right balance between an inclusive internet, on the one hand, and one which provides fertile ground for Europe's operators to invest in building better networks, on the other.

Different strokes

In the European Union, the current

regulatory norm adopted by the European Commission for the provision of internet access is that of 'best-efforts'. This diluted form of net neutrality does little more than refer to underlying governing principles such as 'transparency' and 'quality of service'. The EU's Pan-European Body of Regulators, BEREC, advocates that an approach be taken which sits somewhere between a light-touch approach, at one extreme, to one which seeks to eliminate market power, promote consumer awareness, increase transparency, and to lower switching costs for end-users, at the other.

However, the scope of the net neutrality principles under the EU's Regulatory Framework is likely to change with the advent of the proposed Single Market Regulation, currently being debated before European Parliament. This proposal contains net neutrality provisions which attempt to transform the EU's best-efforts principles into binding legal obligations. However, those pioneering the cause of a very broad application of net neutrality principles must be disappointed to know that the Single Market Regulation also contains provisions allowing for ISPs to segment certain 'specialised services',

and to provide premium internet connectivity, with superior quality of service, at premium prices.

Further, many observers believe that a wholesale product sitting outside the net neutrality chapter of the proposal is an indicator of the European Commission's intent. In the proposed Regulation, through the so-called Assured Service Quality (ASQ) product, which was ultimately withdrawn by legislators, the direction pursued by the Commission was originally intended to allow network management techniques that currently apply within networks for specialised services, to be applied more widely to third party networks within Europe.

The United States has already endorsed the principle of 'reasonable network management' and the FCC in its 2010 Report & Order adopted a net neutrality framework which, while appearing to encapsulate all the key traits of net neutrality, does in fact afford a significant margin of discretion to ISPs to manage their networks reasonably, and to differentiate between different types of content.

By contrast, countries such as Chile and the Netherlands have taken a hard-line approach and have barred ISPs from discriminating against certain services, or charging extra fees, in light

of several attempts by ISPs to block access to certain types of content. This should be compared to the approach adopted by another EU Member State, namely, France, whose National Regulatory Authority (ARCEP) has laid down 10 'soft law' recommendations the aim of which is to strike a balance between end-user expectations and the non-discriminatory treatment of content, while still allowing some leeway for ISPs to develop 'internet highways' in the form of so-called 'specialised services' (similar terminology that found its way into the original proposed Single Market Regulation).

The long and winding road

While the jury might still be out on whether ISPs face a significant threat to their revenues from OTTs, support among policymakers is gaining momentum that all relevant internet players should share the burden of investing in and upgrading those existing networks necessary to carry tomorrow's internet traffic. While ISPs will be unable to bear the cost of infrastructure investment without capitalising on the potential

revenue streams that are currently the playground of the OTTs, such a proposition will no doubt have its proponents, especially among the traditional infrastructure providers. That movement will be given great heart by recent developments in the United States, which suggest that the US is taking a long, hard view at the sort of industrial policy trade-offs that might be made if the principle of net neutrality is to continue. European operators will point to these changes as vindicating their cause.

Operators face the same choice as they did 20 years ago, namely, whether to expand existing capacity or to ration it. To date, the economics have always come down on the side of expansion, and in the absence of interventions such as the now removed ASQ product that distort those economics, that commercial imperative is unlikely to change.

What might ultimately emerge, though, is a bifurcated approach to the application of net neutrality. Thus, certain basic access rights for consumers will be preserved from which no derogations are foreseen. By the same token, sophisticated or

heavy users might increasingly find themselves paying more for secure supply in a world where capacity is not infinite but needs to be managed. While the need for traffic management is not something which can be dismissed lightly as a genuine concern of operators, policymakers will also be acutely aware of the fact that it need not hold the status of a 'scarce resource' if it is managed carefully. In such an environment, the policy trade-offs might well turn on the issue of whether the access provider is responsibly investing in the growth of capacity on its network. After all, such considerations are commonplace in the energy sector (and, after all, the industrial policy that drives the Digital Agenda has characteristics similar to the integrated policy planning of the energy sector). As the situation stands at present, the European Parliament appears to have decided the net neutrality provisions of the draft Single Market Proposal should be adopted in their current form. In traditional Marxist fashion, while this might mean that all content is equal, it may also be the case that some content might be more equal than others. ■