

Openforum Academy

Round Table Discussion:

Exploring the economic aspects of Net Neutrality in Europe



Report

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Foreword

In September 2013 the European Commission unveiled its proposals for a new Telecoms package, including the draft Regulation coined as Connected Continent. One of its key components is a new set of rules intended to safeguard net neutrality. While such action has been long-awaited by many stakeholders, the current proposal is not without criticism. At a time when business models on the Internet are evolving and many European countries are already taking action to ensure a fair and balanced framework the time is now for the EU to take action.

In line with its mission to spur insight and innovative thinking into the issues which impact the openness of technology, OpenForum Academy together with MEP Marietje Schaake organised a European Parliament Round Table. The discussion was dedicated to the economic aspects of net neutrality, and in particular the proposed provisions regarding so-called “specialised services”. How will this impact the different economic actors in the value-chain, and how would such services affect the open, non-discriminatory character of the Internet?

Speakers:

Peter Eberl Deputy Head of Unit for Regulatory Coordination & Users, Directorate for Electronic Communications Networks & Services, DG CONNECT

Ana Olmos Researcher, OpenForum Academy

Christoph Steck Director Public Policy and Internet, Telefónica

Jean-Jacques Sahel Director EMEA Policy and International Organisations, Microsoft

Host:

Marietje Schaake Member of the European Parliament, ALDE

Moderator:

Graham Taylor Chief Executive, OpenForum Academy

Rapporteur:

Jorge Castro Policy Analyst, OpenForum Academy

Interventions

Graham Taylor opened the event by thanking MEP Marietje Schaake for hosting the round table. He also explained the mission of OpenForum Europe for an open competitive IT market and its dedication and campaigning against lock-in in all of its forms and throughout the ICT field. He continued by explaining OpenForum Academy, a think tank of expert Fellows set to bridge academia and industry in order to spring fresh ideas in favour of openness in the IT market. He then introduced the topic of net neutrality by quoting Vint Cerf, one of the Internet's fathers, at a past OFE event : "If it's not open, it's not the Internet". Graham Taylor stressed the success of the Internet, being a life changer for many organizations and many individuals, but behind that every organization wants to maximise its economic value. He ended his introduction by reminding all that the format of the discussion was meant to be open such that everyone in the room was encouraged to participate.

Marietje Schaake reminded the audience that she had been pushing for legal safeguards for net neutrality for a long time. She stressed the importance of the single market for telecoms for Europe, not only important today, but also for the future. Besides of recognising the technological value of the Internet and safeguarding competition to enable innovation, she also stressed the importance of the public value of the Internet by protecting the individual user, not only as a consumer, but more broadly.

Ana Olmos introduced her research, which was conducted in the context of the Google Policy Fellowship and OpenForum Academy, with Dr. Alea Fairchild and Glyn Moody as mentors. The objectives of her research were to examine the regulatory alternatives dealing with net neutrality in the European context and to provide some insight as to which are the consequences of setting up (or not) net neutrality policies in Europe. Her approach to these objectives was to identify which are the regulatory alternatives and assess how they reshape the ecosystem (market dynamics, users' rights and infrastructure development). An overview and classification of the different trends and identification of variables in the regulatory approaches has led to the definition of a set of policy scenarios. A PESTLE analysis tool was used to identify and focus issues that affect the market players in the policy scenarios and be identified as forces that drive the market evolution.

For each one of the five different policy scenarios identified she presented her conclusions.

- Scenario 1: Market
- Scenario 2: Code of Conduct
- Scenario 3: Law
- Scenario 4: Guarantee
- Scenario 5: Open

Scenario 1: Market

In this policy scenario players evolve under conditions of transparency and market competition. There is no code of conduct or voluntary adherence to a non-discrimination principle; specialised services can be developed and capacity allocation can be freely managed by telecommunication operators.

There are incentives to explore the provision of specialised services, bundling and vertical integration, data caps and other strategies as business models. Although there are policy and legal constraints, an advantageous solution to all stakeholders requires that the users, “voting with their feet”, are the ones setting the limits for the private companies. This puts a lot of weight on transparency, in making sure that the service offers are clear, understandable and accurate, and equally requires that users are able to switch providers with ease.

Some of the business models that may arise will probably be linked to creating a lock-in effect and raising entry barriers for competitors. There are no legal guarantees that the basic internet access will continue to co-exist (together with specialised services) or maintain a minimum quality, although there are economic incentives for ISPs to continue to offer this service, as it will likely be cheaper and because of a long tradition of broadband as the killer application of the internet. It would be equivalent to a two-tiered (or multi-tiered) internet, with a fast (or higher quality) lane and a slower one.

The technological aspects weigh heavily in the evolution of this scenario, as well. In this scenario, ISPs are free to deal (and will likely do so) with excessive bandwidth usage on behalf of particular applications, to manage high-volume, not delay-sensitive services and to develop and deliver new services and applications with higher quality of service (QoS) and/or quality of experience (QoE).

The ISPs and big, established CAPs would reinforce their position in the market. ISPs could also foster growth of medium-sized over-the-top players, becoming an ally to them through special offers and vertical agreements. However, this type of alliance could become a requisite and an effective entry barrier for start-ups (“permission to innovate”).

The basic internet access that will likely co-exist with newer, higher-quality service will probably include data caps and could even exclude some widespread services (some even considered basic by some stakeholders, such as VoIP).

Current legal framework applies but all control is necessarily ex-post.

Scenario 2: Code of Conduct

This scenario considers the case of market players voluntarily signing a code of conduct or industry agreement not to perform traffic discrimination. No specific legal framework requires this of the telecommunication operators

and specialised services can be developed and capacity allocation can be freely managed by telecommunication operators.

As in “market”, business and technological factors act as main driving forces; the mitigation effect of a having an industry voluntary agreement need to be put into perspective: the fact that it is not enforceable and companies’ adherence is optional could create some uncertainty as to how trustworthy the non-discrimination practices really are.

As in the previous case, there are business incentives to explore business models and, in doing so, to look for lock-in effect and raising entry barriers for competitors. The main deterrent for the industry continues to be customer choice (thus the importance of transparency and competition) and it is likely to develop into a two-tiered internet, just like in the previous case.

However, the non-discrimination agreement leads to a smaller set of technological measures that can be applied; this leaves more room for a wider range of CAPs and more innovation.

Like in the “market” scenario, the basic internet access that will likely co-exist with newer, higher-quality service will probably include data caps, but in this scenario it would not exclude any (basic or not) services, since that would entail traffic discrimination.

Scenario 3: Law

The third scenario is different from the previous scenario (“code of conduct”) in that non-discrimination is a legal requirement imposed to the ISPs. The positive effect for innovation is now reinforced because of the certainty associated with the legal requirement and the predictability that the rules of the game are not changing unexpectedly.

Political, economic, technological and legal factors all contribute in a balanced manner as drivers for scenario development. The need for political harmonization and the moderate approach of this scenario make it a politically attractive approach.

Economic incentives still call for new business models, although there are limits to what techniques can be employed (and they are enforceable), so that availability of a wide range of CAPs and a more favourable context for innovation are present.

Like in the “market” scenario, the basic internet access that will likely co-exist with newer, higher-quality service will probably include data caps; no service can be excluded due to traffic discrimination, although the more bandwidth-hungry over-the-top applications may find it hard to compete with vertically integrated services.

Scenario 4: Guarantee

This scenario adds to the previous scenario the requirement that a minimum capacity always be allocated for the open internet access service, in case the business models around specialised services incite a progressive disappearance of basic internet access service.

The social dimension plays a bigger role in this case: it is the idea that the basic, open, mostly best-effort, non-discriminative internet should continue to exist and to maintain a minimum level of service that leads to establishing said QoS by law. The direct effect is that the two-tiered Internet cannot develop into a “dirt road”, a risk that in previous scenarios is only mitigated by economic incentives (through customer choice).

This guaranteed levels of service in the open, basic internet access has a positive effect on innovation: the true spirit that there is “no permission to innovate” in the internet: no need to become an ally of ISPs in order to offer vertically integrated services and no fear that the ISPs (and their competing services) will find economic incentives and technological means to maintain users away from innovative services and applications offered through the open internet.

Scenario 5: Open

The last scenario bans traffic discrimination and specialised services, forcing all services to be open, mostly best-effort and non-discriminative.

There is a strong case on the social dimension for this policy scenario and activists have been demanding this approach from their political representatives. The drivers for infrastructure deployment come necessarily from bandwidth demand and there is a strong need to provide QoE with the technological means of best-effort traffic. It can be hard to trigger the virtuous cycle of bandwidth demand: users will pay for more bandwidth only after the services and applications they desire to access need it; at the same time, over-the-top services and applications need to reach a wide audience and will try to be moderate in their bandwidth consumption, thus slowing down the process of infrastructure deployment. At the same time, a different virtuous cycle has been taking place in the open internet, one by which new services and applications require new technology, and then that new technology is pushed to the limit by yet more apps, launching an advancement in technology.

Innovation continues to enjoy the “no permission to innovate” framework. There is no room for a two-tiered internet.

Peter Eberl congratulated Ana Olmos on her research. He reminded the audience of BEREC's findings which showed that at least 36% of Internet users were affected by blocking or throttling. He also mentioned the risk of fragmentation of the Single Market as one of the main reasons why a Regulation was proposed. As examples, he

mentioned the Dutch law which corresponds to Scenario 3 ("Law") under Ana's research, and which introduces non-discrimination by law and allows specialised services. He also talked about the UK's solution, which is a code of conduct, corresponding to Scenario 2 ("Code of Conduct"). According to him, the Commission's proposal would be best described as Scenario 4 ("Guarantee") since it is a balanced approach based in three pillars.

The first one is ensuring the open Internet, by introducing clear EU-wide rules for traffic management. No blocking, no throttling, no degrading and no discrimination against specific content or services. An Internet that is open for innovation with safeguards to guarantee the high quality of the open Internet. Reasonable traffic management techniques should be transparent, proportionate and non-discriminatory and can be applied only in a limited number of clearly defined categories. This approach allows for product differentiation based on volume and speed, so if you consume more, you pay more. Such price differences would reflect differences in the usage of the infrastructure and are common in most industries.

The second pillar is openness for innovation, i.e. allowing for "specialised services" under specific conditions. Services like VPN, IPTV or certain eHealth applications require a minimum of Quality of Service (QoS). "Specialised services" should provide a better quality than the open Internet, but never substitute it. Operators could not just degrade the quality of the Internet in order to make their customers pay more for "specialised services" and as a general rule, operators should not impair the general quality of the Internet.

The third pillar is safeguards. The Regulation assures the primacy of the best effort Internet and in order to enforce this regulators are entitled to monitor and report any risks by looking at the impact of "specialised services" and to intervene by imposing minimum QoS requirements in case they find any risk of degradation.

These provisions related to net neutrality are complemented by increased transparency measures and by facilitating the switching of providers under the draft Regulation.

Christoph Steck wanted to stress that Regulation needs to anticipate and leave room also for the development of future innovative business models. This means that policy makers need to regulate this space in a way which leaves room for innovation and is flexible in the sense that communication and broadband markets are evolving rapidly. Broadband markets are not the same as they used to be five years ago because the competitive situation has improved : a user has a wide set of different options to access the Internet, for example copper and fiber networks, mobile networks, cable and satellite. The choices for consumers to access the Internet have improved a lot and are much more diverse than they used to be in the past. This is why he thinks the Commission has taken a sensible approach; once again he stressed the importance of being open to innovation. Referring to OFE's

motto “Open, Competitive choice for IT users”, he argued that regulators should first and foremost ensure open and competitive choices for Internet users. The crucial issues are innovation and competition giving them transparent choices; these need to be guaranteed in a digital economy. Transparency and the possibility to switch and choose between broadband access providers are the key concepts for assuring Open access to the Internet. The telecommunication market is one of the most regulated industry sectors; at national and European levels various regulatory and competition authorities monitor it constantly, so that any anticompetitive behavior would not go unnoticed and could be dealt with on a case-by-case basis by regulators. He finished his intervention by saying that Telefónica does not believe that blocking specific Internet services would be the right thing to do and that due to competition in broadband markets a consistent and enduring market failure is not happening in Europe.

Jean-Jacques Sahel wanted to give a somewhat “philosophical” approach for an open and competitive Internet market. According to him, the need for a law on net neutrality should not be something that should be in question because it is the premise for the Internet. Deviations from the end-to-end principle should be extremely limited. Improving transparency and switching in IT market is something that regulators have been trying to improve in the last ten years, but that is not sufficient, because restrictions are something that diminishes the overall value - social and economic - of the Internet. For him, net neutrality is about three key ideas:

- Protecting end-users rights to access content and applications of their choice, subject to reasonable traffic management based on a non-discrimination principle.
- Clarify the reasons for traffic management: legal, security and/or technical. According to the French regulator, those measures should always be relevant, proportionate, non-discriminatory, transparent and respectful of the laws on data protection.
- “Specialised services” are fine as long as they are not developed in ways that is detrimental to the performance or quality of the Internet and as long they respect the above mentioned principles.

For him it was really necessary to strengthen the definition of “specialised services” given by the Commission so potential loopholes can be avoided. In his opinion we were not far from achieving this goal and setting up a long-awaited regulatory framework for such services.

Open discussion (questions taken from the audience)

Question: In Poland some mobile providers are starting to sell services with social platforms priority. If this had been the case with Myspace, probably Facebook would have found it more difficult to enter into the market. The member of the audience found this very dangerous.

Christoph Steck answered the question. Access to the whole Internet is ideal and by far the main and most important business offer by broadband providers. Nevertheless the issue is that some people might just be interested in accessing Facebook or a single type of Internet services like e-mail, and not being able to afford access to the full (open) Internet. As long as there is a transparent choice they should be able to do so. Even as little as 8 to 12 euros per month for mobile broadband Internet access can be too expensive for some. Therefore he believed it was not necessarily bad if customers are granted access to the Internet services of their choice for a low amount, say 3 euros, as long as there is another offer that provides access to the whole Internet for a reasonable price. However, in many cases cooperation between providers and Internet companies like Facebook are pure marketing cooperation which are intended to give a specific service for free to attract customers. He did not know about the specific offers in Poland but believed that such offers could also have positive impact on getting digital services to everyone.

Graham Taylor asked whether there would be a danger of restricting users to services that Telefónica finds more attractive commercially.

Christoph Steck did not see that risk. Telefónica's business model and commercial interest is and is expected to remain principally providing its customers with high quality access to the full Internet. The amount of customers who would be interested in having access only to social media or particular applications or services would be limited. Nevertheless, providing a small group of customers with such services, as long as they can also get access to the full Internet, would not be a problem from a competition point of view, but just serve their needs and specific market demands.

Question: A potential loophole could be identified where a content provider is allowed to pay for priority over the open Internet and where no other service in particular is being throttled, blocked or discriminated against, but someone is being prioritised rather than someone being prioritised against. You are not disadvantaging anybody in particular, but everybody else suffers a little bit. Does the Commission capture this situation?

Peter Eberl answered that if the Parliament and the Council share the view that there are loopholes in the text of the proposal, they are in a position to fix them during the legislative process.

Question: The telecom industry continues to defend their business model and the ways in which it has always operated, which includes a strong vendor lock-in element. That is different from what the IT industry has been doing during the last years, which is becoming more open. Do you see Telefónica having a different view? Do you see some players in the telecoms industry moving to these views?

Christoph Steck replied by saying that according to a BEREC's study, out of 115 mobile operators, 88 do not restrict VoIP on any tariff, 26% restrict on some tariffs and only four operators in the whole European Union restrict VoIP services for all their users. This means that the vast majority of EU mobile operators actually do not restrict VoIP on any tariff or for any customers.

Peter Eberl mentioned that it is not always that black and white. Contractual blocking is as dangerous as technical blocking, because customers and content providers never know, when the ISP would enforce the rules set out in a contract. If you are an end-user there is a possibility for you operator to interfere with your connection in this way.

Question: The draft Regulation tackles discrimination based on content but not on price. Many operators do not see price differentiation as discrimination. What is the opinion of the panel?

Jean-Jacques Sahel mentioned that when he read the sentence about the criteria by which traffic management should be judged (relevant, proportional and non-discriminatory), he immediately thought of the definition provided by the French regulator ARCEP of what they mean by management measures. He agreed that discrimination should not be only focused on network management, since there are other ways to discriminate. You could have an offer which is completely open for 200€ per month and another one which is only 30€ per month but is restrictive. Users would definitely choose the cheapest one, although it means to contract a restrictive Internet access connection.

Peter Eberl explained that the Commission took ARCEP's proposal as an inspiration. The example mentioned (i.e. to subscribe to a restricted Internet access offer) is not possible under the draft Regulation, because that would be against the principles set out in the Regulation.

Question: The Commission's proposal calls on regulators to monitor what is happening on the market on an ongoing basis, which means that there will be better data to properly address discrimination problems. Is this something that Telefónica or any of its peers welcome?

Christoph Steck said that is legitimate for regulators to monitor the market, and that the BEREC study and others would show that regulatory authorities at the European and national levels are in fact already closely monitoring communication and broadband markets. In his opinion all anti-competitive behaviors would be unacceptable and authorities should tackle them on a case-by-case basis. He

believed that generally broadband markets in Europe would be competitive enough since users have the option to switch broadband provider and there are many choices of Internet access available for them.

Graham Taylor mentioned the possibility of users to switch, but he stressed the lock-in factors in other part of the Internet value chain. People will follow what they have always been doing so switching will sometimes be difficult.

Christoph Steck confirmed that these kinds of situations were happening. Regarding an open and interconnected Internet experience, the problem would not lie in the access to the Internet, but rather at the content and Internet service level. For example using services cross-border would often not be possible due to intellectual property rights. The debate around the open Internet should therefore no always be focused on the access network, but also on other issues limiting Internet users' experience and choice.

Jean-Jacques Sahel added that sometimes not giving access to sufficient applications is not enough to entice switching.

Marietje Schaake mentioned the Dutch case as one that exemplified the market failure which showed that transparency and switching was not enough, which is why the Dutch Parliament pushed for legislation. She stressed the need to anticipate what the future would look like. The focus is made on Internet access providers because they are crucial players giving access to knowledge, information and culture. The debate should focus on whether we should promote the public value of the open Internet rather on the business-to-business deals that could play to the detriment of smaller players when trying to access the market. She saw some potential risks if the necessary guarantees are not provided. Lower or higher connection speeds are a consumer decision, but what she felt was worrying are business-to-business deals.

Question: According to an attendee, a mobile operator in Belgium introduced data caps in its offers for a specific price, but that same operator excluded traffic of a particular social media in that cap. For him it was not clear if that was something problematic as it was a commercial initiative that could potentially provide value to consumers. He asked the panel whether these kinds of offers were a problem, since in his view that was also a kind of innovation.

Ana Olmos recognised the important role of innovation in her research. When trying to identify which were the needs of small players facing big players, she noticed that the most common entry barrier was the lack of access to resources. Being forced to become an ally to a big operator can certainly constitute an entry barrier in the same way that trying to reach a large user base with no ability to charge the users. However, given the trends in business models for online services, it must be noted that most innovative projects need a wide user base in order to be successful; reaching this large amount of people is difficult enough and demands more

resources than it is often portrayed. The “free” culture on the Internet also pushes for creative ways and alternative business models. This was something that happened in all the scenarios.

Graham Taylor asked how the proposal will address these types of behaviours and whether the current vocabulary adequately distinguishes these different strategies.

Peter Eberl clarified that, if there is no agreement, this could be seen as a marketing offer; however, if there is an agreement between the players it should fall under a different category.

Graham Taylor asked Peter Eberl how to police these behaviours, since it is a common practice that leads to lock-in.

Peter Eberl replied that the wording in the proposal admits further work so as to make those distinctions clear.

Christoph Steck asked to put such practices in context. According to Telefónica’s experience with Wayra, its start-up accelerator, young entrepreneurs developing new digital services care most about barriers to market their services. They need to get into Android’s or Apple’s application stores and what these innovators most care about is getting their product to the top of the apps list in these proprietary platforms. Otherwise, their service will never be downloaded or reach a sufficient target audience. This can create a much more worrisome entry barrier for new services than the theoretic possibility of their services being blocked by a network operator.

In the opinion of Jean-Jacques Sahel a good quality and affordable open Internet should be maintained so any newcomer could compete with enough and decent quality. A right balance with an open Internet alongside “specialised services” is what will make the future online ecosystem safe and healthy. Net neutrality is not about regulating the Internet, but protecting it by opening up the bottleneck. If the definition of “specialised services” is made right, then we will have made a good step forward.

Question: Having heard the description of each scenario, there might be some interest in analysing the driving forces specifically for each of the scenarios and not in general terms. On a different note, the fact that broadband deployment was referenced in scenario 5 raises the question of how this would factor in the other scenarios, if at all.

Ana Olmos explained that each of the driving forces is described in the paper independently. The different ways to foster network deployment are considered in each of the scenarios. The possibility to develop “specialised services” and to innovate via those “specialised services” can be of course a big factor in helping the deployment of the network which could provide additional income, different business models, address different tiers, target different charges for users. These are very efficient ways to foster deployment. Another issue about broadband

deployment is the argument that all stakeholders should contribute to the financing of the infrastructure deployment. Is not only about technological innovation but also about commercial innovation in the sense of offering bundled services or enter into alliances. This could mean that all players could enter into agreements that in effect could contribute to the financing of the network. Therefore, the provision of “specialised services” that need specific requirements in terms of bandwidth demand may drive the development of the network.

Question: Will the Regulation enable highly innovative, “maverick”-type newcomers to push out Telefónica or Microsoft out of the market?

Peter Eberl mentioned that the approach is to ensure a best effort Internet of high quality and that everybody has the possibility to access the best-effort Internet. The idea behind the Regulation is to ensure that the best effort Internet remains at a very good quality level and that everybody can use it without having to pay for “specialised services”. The Regulation is not only designed to protect end-users, but also to enable content providers to compete.

Question: If the definition of “specialised services” needs to be tightened up, and taking into account the two-sided market model, which telecom players would try to push for a scenario where “specialised services” are allowed and what would this imply for market competition?

Jean-Jacques Sahel recognised the need to keep up with innovation, and that net neutrality should absolutely allow for disruptive innovation to take place.

Question: Graham Taylor decided to give an end to the discussion by asking the panel what they thought the Regulation was missing.

In the opinion of Jean-Jacques Sahel the wording on “specialised services” had to be improved to avoid any situation that could lead to undermining the open Internet. He did not want loopholes which companies could use to name certain services as “specialised services” while restricting the Internet.

Christoph Steck's opinion was that a future proof and forward looking regulation was really crucial and that network operators should be allowed to innovate and come up with new businesses models. In this regard he thought that a clear definition for traffic management and “specialised services” could improve market confidence and future innovation.

Question: Graham Taylor asked Peter Eberl whether he had picked up something new.

Peter Eberl recognised that during the discussion he had picked up new ideas and comments. When drafting the proposal for a Regulation the Commission did not intend to provide loopholes for “specialised services” that could restrict the open Internet. Additionally he mentioned that innovation does not only come from content providers, but also from network operators that look for new business models that enable them to keep competing on the market.

Final Remarks

Graham Taylor thanked the panel for their presentations and contributions, and noted the level of consensus that was achieved during the discussion.

To close the round table, Marietje Schaake pointed out that she had found the discussion very helpful and interesting, but in her opinion more thought had to be put in addressing various other aspects. In her opinion the public interest overrides economic and specific other interests that need to be taken into account. Her priorities now that the Regulation will be revised within the European Parliament are to look carefully to those services which could be difficult to categorise as “specialised services”, to ensure a future-proof Regulation. She does not see the Regulation as a way of protecting one business model or another, but rather a tool to provide safeguards against those who not provide trustworthy services.

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