

**THE CONCEPT OF NETWORK NEUTRALITY
IN THE EU DIMENSION:
SHOULD EUROPE TRUST IN ANTITRUST?**

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I. NETWORK NEUTRALITY IN THE EUROPEAN CONTEXT

I. Introduction

Ontologically, 'network neutrality' is a political and not a legal term. It has been introduced in the legal literature by US antitrust scholars and is by now well established and consensually used. It constitutes the premise of original destiny of the telecommunications infrastructure as a conduit of all relevant data with (virtually) no interference of incumbent into this process. Because of its political roots, it does not convey the literal meaning of neutrality. Most actors on both sides of the debate agree that not every data has to be transmitted without any prioritisation. For instance, the succession of e-mail, banking and security services is always prioritised over other internet applications.

After two decades of the Community liberalisation policy in the telecommunications area, the domestic European markets have become relatively integrated and disclosed. This gives the chance for the world wide leaders of the electronic communications industry to enter into the regulatory homogenous and rapidly growing European telecommunications environment without needing to comply with the twenty-seven different administrative regimes of the EU member states. The opening of the European telecommunications industry is a long-term process, which has to be seen along its three dimensions; that is, incumbents *versus* new entrants, domestic telcos *versus* their European *vis-à-vis*, and European telcos *versus* foreign competitors. The history of the interactions between these three groups of telecommunications actors shows many examples of their fierce contest in, and mostly for, the markets. Every telco strives to promote its own commercial interests, often simultaneously supporting different, even controversial, theoretical approaches in the different markets: from preserving strong regulation to complete de-regulation; from maintaining a monopoly position to fostering competition; from hard protectionism to libertarian market disclosure. The position of the companies depends on their status in each relevant market: as incumbents or as new entrants; domestic or European; European or foreign. However, there is an area in which they reach practically unconditional consent: they are unanimous in relation to network neutrality. Among the companies which represent the opposite side of this theoretical debate, the situation

is similar as well.

Until the moment of rapid growth of internet technologies, which provides high speed traffic over the new FTTx networks -and, consequently, the transmission of large-sized files and applications-, the discussion on network neutrality had only a theoretical dimension. With the fast development of Voice over Internet Protocol (VoIP) technologies, Internet Protocol Television (IPTV), video-on-demand and movie-downloading services (otherwise large-sized files and applications), the amount of traffic over the network has been growing exponentially. Concurrent to this process, there has been a substantial development of the infrastructure, which can now be managed gradually by Internet Service Providers (ISP). In practice, this means that ISPs, who are often at the same time the owners and administrators of the networks, can 'range' the traffic speed of different internet applications.

Because of digital convergence and systematic elimination of the frontiers between infrastructure, platform and content of the internet, many ISP are beginning to consider launching for their users the provision of different kinds of content services under different traffic speed (two-tier Internet). Concurrently, some big internet companies are launching their own wired and wireless networks, like Google in San Francisco.

As soon as ISP acquired the technical abilities to 'range' the traffic of different applications and, most importantly, of different content providers, they started to consider the possibility of providing high-speed premium services for content operators interested in instantaneous delivery of their services. This option is particularly important for such time-sensitive applications as broadcasting of live sports events, video conferences and some other communication services. Under such conditions, internet speed became a *killer application* for attracting new clients and gaining substantially higher revenues. There are two hypothetical models of applying this premium speed services: on one hand, assigning such extra-speed capacity to other content-providers for additional fee and, on the other hand, vertical integration of ISP with certain content-provider and offering content services on its own.

The merely technical capability of ISP to charge their clients -to be understood as charging on both sides of traffic, that is download or consumers and upload or content providers- brought on commercially justifiable apprehensions in the content-providing internet industries. Services which content providers have traditionally received by simply paying for upload speed and data capacity at the upstream level may now only be obtained by these companies for additional payments at the

download level, depending on the real amount of users. This scenario appears to be only hypothetical, since nobody is allowed to *degrade* the speed of some particular content or application. Besides, it would never be possible from the political or *freedom of speech* and commercial or *cannibalisation* of existing business model points of view. However, the growing popularity of premium speed services would indirectly leave in the cold those content-providing companies who will continue to rely upon merely average 'non-discriminatory' speed of data transmission.

So, does prioritisation actually mean discrimination? The answer to this rather philosophical question definitely depends on the initial position of the inquirer. As it always happens with debates in the area of competition law and regulatory policy, each party tries to obtain the *cheval de bataille* of its rectitude; namely, benefits for consumers and improvement of the general economic welfare.

This situation impelled content providers to launch a wide-ranging political campaign on network neutrality, with the intent to preserve the existing *status quo*, by means of introducing broad public discussions and implementing the relevant legislative framework. The epicenter of these debates was initially situated in the United States, where this topic received tremendous public coverage and scientific conceptualisation. However, nowadays, the network neutrality concept is becoming increasingly more popular in other jurisdictions, particularly in the European Union and Japan, where these debates are still in their infancy.

Leaving aside such controversial issues as the level of censorship, privacy, and copyrights protection of the transmitted content, local internet service providers are apparently aware of their customers needs, at least as much as world-wide content providers are. Therefore, they will never jeopardise the services of high-speed data delivery by blocking or slowing down certain applications. However, one must recognise that, with some minor exceptions, providers of broadband internet services are usually monopolists in the local markets and their dependence upon content-creating companies is significantly less than *vice versa*. Does this mean that their business practices need to be regulated by sector specific instruments, such as compulsory access or neutral traffic requirement, or are the traditional mechanisms of *ex post* competition law reasonable and sufficient in the present context? What is the legal difference between the American and European approaches to network neutrality and where exactly is it situated? These are two central questions that this paper will attempt to tackle.

2. *Jurisdictional concerns, quo warranto*

Telecommunications law was not originally supposed to have a European Community dimension. The founding fathers of European integration laid down *prima facie* explicit clauses in the legal foundation of the European Community, reserving telecommunications to the national regulatory regimes. Indeed, at the time, the social and political status of telecommunications was considered as one of the strategic domains of internal affairs.

Thus, Article 86 of the Treaty Establishing the European Community stipulates:

In the case of public undertakings and undertakings to which member states grant special or exclusive rights, member states shall neither enact nor maintain in force any measure contrary to the rules contained in this treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

The Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to member states.

Neither literal nor historical interpretation of these provisions gives us a ground for questioning the original intentions of the member states. The initial political will consisted in reserving the telecommunications policy for domestic regulation.

Nevertheless, in the course of time, the interpretation of Article 86 has been hermeneutically moved towards substantial an expansion of the Community's competences in the present domain. Accordingly, teleological and systemic modes of interpretation provide a clear picture of the 'genuine mission' of the treaty and classify telecommunications as one of the most important *European* policy. The European Commission has been one of the most active proponents of such a shift of paradigm in the evaluation of the status of telecommunications policy in the economic

constellation of the EC. This pro-European approach was ultimately legitimised by the judicial opinions of the Community's courts, *videlicet* in the relevant case law.

Technically, the self-contradictory provisions of Article 86 might be interpreted in different ways, both in favour and against of the parties to the present dispute. Under these circumstances, the decisive factor is to be found in the general purpose of European integration, which is based on striving to complete the single internal market; that is, on Articles 15, 26, 47 § 2, 49, 80, 93 and 95. This aim serves as a common denominator for the arguments of both parties. Not surprisingly, the reference to the overall value of market integration sorted all things out and ended up presenting the telecommunications policy as genuinely European.

3. *Liberalisation! Harmonisation! Concurrence!*

The European telecommunications policy was supposed to be governed by three major principles: *liberalisation*, *harmonisation* and *competition*. These three maxims directly correspond to the three core European meta-tasks; namely, completing the internal market, setting out Community-wide uniform social and economic regulatory system, and fine-tuning the optimal competitive institutional environment.

It is noteworthy that, although these three objectives all constitute important elements of European economic welfare, they also quite often contradict themselves. The main problem lies in their ontology and methodology. Traditional *ex post* competition rules and antitrust law are graduate and predictable. They provide for incumbents substantial amount of legal certainty. In contrast, the *ad hoc* nature of regulations, which constitute the main instruments of liberalisation and harmonisation, are rather based upon the rationale *exitus acta probat*.

There are philosophical doubts as well about the correctness of the term *liberalisation*, which in this particular context would actually mean "*liberalisation through regulation*" and not "*liberalisation from regulation*". From the perspective of negative freedom, such a formula constitutes a *contradictio in terminis*. This being said, proponents of a positive conception of freedom consider volitional interference and *creativity* as an indispensable component of any genuine form of freedom. In the context of the European telecommunications regulatory regime, *liberalisation* consequently means an aim, whereas the methods of reaching this aim are far from liberal and include, for instance, limitation of profitability, common carriage obligations or compulsory access.

The ontological legacy of European telecommunications based upon original state ownership provides an additional, although rather rhetorical, argument for regulatory interference by the Commission. In the course of the privatisation of most European telecommunications giants, the permanent implicit emphasis has been put on the fact that the entire network infrastructure has been built by the sweat of nation's brow; a consideration, which can be euphemistically interpreted along the lines that the industry will continue to be regulated at least for a while.

This is particularly important since, under the current European regulatory regime, even telecommunications companies without significant market power -as opposed to the rules defining the dominant position in *ex post* competition legislation- may be obliged to provide in certain cases for their competitors adequate access to infrastructure and services. The Commission recognises the exceptional character of such compulsory remedies, but proposes to preserve this practice in the new regulatory framework for telecommunications. Furthermore, in order to ensure the consistent application of this condition and to avoid the imposition of inconsistent obligations without a market analysis, it is proposed to harmonise this procedure on the Community level. Supposedly, this would prevent the risk of over-regulation and a fragmentation of the internal market through the imposition of inconsistent obligations. The procedure of cooperation between Commission and NRA is provided by Article 7 of the Directive on a common regulatory framework (2002/21/EC). It requires NRA to conduct a national and Community consultation on the relevant regulatory measures they intend to take. The Commission may issue comments and, under certain circumstances, block the proposed regulations.

4. *European policy of limited profitability*

On the road to privatisation of previously state-owned telecommunication companies in Europe, the most popular form of regulation was the limitation of the investment rate. This basically implied post-selling state's control over incumbent's tariff policy by means of requirements to restrict the scope of its returns and aggregate profitability. According to these conditions, commercial incentives for telecommunication companies and their subsidiaries should be limited by general revenue caps. This presupposes the possibility to gain solely a 'proportional' margin of profits, which should take into account the interests of direct, potential and (maybe) even hypothetical competitors.

Limitation of profitability ratios is a rather objectionable and controversial instrument of telecommunications policy. From a theoretical perspective,

it raises substantial doubts about the appropriate functioning of the free market, by not only restricting the genuine intention of service providers to render access to facility at the highest possible price but also confining the inherent business intentions of the incumbents to innovate and improve the quality of the telecommunications services.

Since the policy of limited profitability applies for the most part uniformly to the whole industry, often without appropriate differentiations between the various segments of telecommunications businesses, the sporadic benefits of such regulatory interventions are considerably degraded by economic damages, which are raised from unnecessary market limitations in other allied areas of the industry. Furthermore, these restrictions are quite often applied to markets where the incumbent neither abuses nor even holds the dominant position or where the competition functions well and there is no rational necessity whatsoever for regulatory intervention by public authorities.

Because of the complexity and the rapid changes that occur when offering different services inside the telecommunications industry, it would be unrealistic to predict the existence of a well-differentiated ranging system of regulation, which fully takes into account the specificity of the various markets and submarkets; thereby, providing mobile and efficient operational regime.

In addition, the limited profitability policy of telecommunication companies does not bring any substantial benefit to the consumers. These interventionist regulatory mechanisms may serve only for reaching short-term and fairly marginal advantages, because in the long and middle-term perspective the lack of incumbent incentives to innovate together with their intentions to structurally optimise existing formats of business in order to adjust to regulatory pressure cannot lead either to establishing of workable competition model within internal market or to improving services. Under the present system, a large amount of incumbent efforts are re-directed to a sophisticated parcelling into different entities or affiliated enterprises in order to comply with legal requirements,¹ virtually sharing gained profits between different pockets of the same jacket.

Another important disadvantage of limited profitability rules in the

¹ This remark does not intend to contest or otherwise cast doubts on the probable existence of some genuine competition between companies owned by the same person (*e.g.*, by accounting separation). On the contrary, there are sufficient evidences to believe that, in some industries, ownership does not play decisive role with regard to competition (*e.g.*, rivalry for audience among TV-channels, which legally belong to one media holding).

telecommunications sector is that they deform the fundamental notion of regulatory policy, impelling beliefs upon dependent companies about the constant character of such well-disposed regulatory climate on the relevant market. The legacy of regulatory over-protection decreases abilities of dependent companies to compete under the conditions of workable competition. In return, it incites them to lobby the legislation and support the general political atmosphere in favour of the conservation of the current state of affair in the industry. One can easily find persuasive arguments for regulatory protection, especially if the success or even mere existence of the dependent companies is at stake. In this situation, there is direct evidence that, by definition, the provisional character of each *ex ante* regulatory interference slowly but surely transforms into a permanent state of play for the whole telecommunications industry.

For all intents and purposes, regulation plays the part of first violin in many domains of public community affairs, including those related to the economy. It is indispensable *inter alia* in the relations of establishment and registration, fiscal and financial control, as well as in a range of other inspecting and administrative matters. Furthermore, it is inevitable in securing performance of common carriage through the provision of universal services. However, the primary task of regulatory policy in the area of market fine-tuning is to establish, improve or modify competition in the relevant market(s) and, in no circumstances, to substitute it by nearly command-and-control practices, such as the policy of limited profitability.

The references of the proponents of the limited profitability policy are based to a large extent on the fact that newly established competitive markets of telecommunication services are dependant upon regulatory interference, as they would otherwise be unbearably pressured by the incumbents and forced to abandon the market. This presumption is increasingly gaining the status of an axiom in the industry. Another reasonable argument is based upon the widespread -although rather deductive- experience of abusive monopolistic behaviour of the incumbent in the presumably unregulated environment. In an ideally modulated world, competition in the network industries is a rather temporal issue, considering that monopolisation of the market is almost indispensable in the end. As the common adage goes, the winner gets all. Under these circumstances, the successful incumbent would be motivated to operate according to the paradigmatic winner-gets-all formula. This is precisely the reason why both *ex post* (competition laws) and *ex ante* (sector specific regulations) regulatory policies are called upon.

As a general rule, the most important instrument for public regulation of

the market economy appears to be competition law. Because of its existential universality and legal conformity, this tool is precisely considered as a commonly acceptable *raison d'être* of moderate and predictable market regulation. Competition law has its well-elaborated jurisprudence; it is based upon judicial principles and case-law. In legal reasoning, there is much more about law here, then about competition. Hence, competition law is an instrument, which provides a substantial amount of legal certainty and refers to principles of law or at least does accept them as a value.

The *ex ante* regulatory instruments of market regulation are not characterised by predictability and legal continuity. They are fully tied to the political context and they are adopted by executive authorities as rules rather than as principles. *Ex ante* instruments are much more flexible and easy to change. Their mission as regulators of competition lies in establishing short-term contextual tasks in accordance with everyday political necessity. The legal nature of *ex ante* regulation is *consequentialist* concerning the results achieved in the market. Its algorithm consists in the claim that sector specific regulations are temporal tools for matching market failures, which cannot be fixed by *ex post* regulation. In course of time of their legal validity, they may directly contradict competition law as *ex post* regulation. Yet, they would still apply in spite of this formal discrepancy with competition law and even the plausible higher place occupied by the latter in the formal legal hierarchy.

5. *Local loop unbundling*

The European policy in the area of network neutrality has to be seen in close connection to the approach of the Commission towards the issue of local loop unbundling. The regulatory regime of the latter may be transposed in the future to the former, since both are directly related to the regulation of the appropriate managing of networks and both eventually provide very high obligations for the incumbents.

Local loops constitute physical wired intermediary between telephone exchange central offices and end-users telecommunications lines. The essence of local loop unbundling policy is based on granting to incumbent competitors the fair and non-discriminatory use of the facility of monopolist. The technical characteristics of local loops do not permit their duplication under economically reasonable terms. Naturally, the opinions of the main industry players are divided, depending on the factual power in the markets of networks interconnections. As a result, companies that possess local loops -virtually, always monopolistically- are insisting upon their genuine property rights to operate their own facilities, whereas

new entrants and companies who do not have well-developed network infrastructure refer to their right to compete and ask for the permission to use local loops under the same conditions as incumbent affiliated companies do.

Another more radical variant of local loop unbundling consists in *bit stream access*, which essentially is an entrance to the market of electronic communications made by a company which possesses no infrastructure equipment at all. Neither the current nor the reformed European telecommunications regulatory framework does explicitly maintain compulsory provision of bit stream access. However, according to the Directive on access and interconnection (2002/19/EC), incumbents are obliged to provide different forms of access under transparent and non-discriminatory terms and conditions. Hence, a proactive interpretation of this provision may lead to compulsory access to the network by competitors, if such access has been made for at least one of them. According to Article 1 § 3 of Regulation (EC) No 2887/2000 on unbundled access to the local loop, “this regulation shall apply without prejudice to the obligations for notified operators² to comply with the principle of non-discrimination, when using the fixed public telephone network in order to provide high speed access and transmission services to third parties in the same manner as they provide for their own services or to their associated companies, in accordance with Community provisions”.

The practice of the Commission demonstrates its willingness to foster innovations in the bit stream markets, in particular outside of densely populated metropolitan areas. National regulatory authorities are required to notify their market analysis with regard to several pre-defined markets to the Commission and one of these markets is the market of bit stream access.³

One of the most appropriate solutions for this dilemma may be provided by the market itself; in particular, rapidly growing wireless technologies. In the predictable future, wireless connection may become an appropriate platform for high-speed transmission of data. This is already the case in the most technologically developed local communities around the globe. The economic potential of wireless communications is enormous. According to the Commission, the total value of services that depend already today on use of the radio spectrum in the EU exceeds €200 billion.

² Notified operators are those operators that hold significant market power.

³ In 2006, the Commission approved the decision of the German regulator *Bundesnetzagentur* to open up broadband markets, including very high-speed internet access (VDSL) with regards to Deutsche Telekom.

Wireless has been a strong driver of economic growth of Europe.⁴

Wireless technologies constitute an effective substitute to more traditional electronic communications. Their intensive usage would help solving existing bottleneck problems in the area of local loop interoperability. There are reasonable market premises to believe that, instead of strict compulsion to open the access for the local loops, the regulator could re-direct its efforts to promoting wireless technologies, fostering new entrants to adopt new business strategies, which would not only establish competition in the markets, but also promote innovations for the benefits of consumers. This approach would be particularly appropriate in the light of the Commission efforts to liberalise the spectrum policy and to bring its regulation at the Community level.

Since the Commission proposal for review of the European electronic communications framework is focused on empowering market players and giving them the necessary legal certainty to exercise their role of innovators, it would be both effective and consistent to provide them with the regulatory prerequisites for such incentives; namely, to restrict the commonly used practice of local loop unbundling and impel new entrants to look for their way to success *via* new wireless technologies rather than by free riding on existing facilities.

II. EUROPEAN LAW OF ELECTRONIC COMMUNICATIONS

I. *Present-day regulatory regime*

The legislative failure to include network neutrality provisions into the Communications Opportunity, Promotion and Enhancement Act of 2006 gives a glimpse of the preliminary state of affairs in the United States. This is not the case for Europe. Indeed, the network neutrality issue is neither settled nor properly articulated in the European context. The debates over telecommunications in the EU take place under another methodological apparatus, with different priorities and somewhat shifted accents. Then again, it resembles the US situation in the clear-cut definition of the European opponents and adherents to network neutrality. The former contains most of ISPs, regardless of their legal property relation to the networks. The latter are united around the most powerful and ambitious content suppliers.

⁴ See: V. REDING, *The Review 2006 of EU Telecom Rules: Strengthening Competition and Completing the Internal Market*, Annual Meeting of BITKOM, Brussels, Bibliothèque Solvay, 27 June 2006; which expresses the views of a member of the European Commission responsible for the information society and the media.

Despite the strong commitment of the main European regulatory player - that is, the Commission- to proactive telecommunications policy, the opponents of network neutrality are in a more advantageous position, since they have to merely need to advocate preserving the *status quo*; namely, the application to presumably discriminatory conduct of ISPs of *ex post* antitrust rules. Conversely, the proponents of network neutrality are called upon to persuade the European legislator of the necessity to adopt explicit *ex ante* regulatory measures. However, taking into consideration the power of public opinion upon the European decision-making process, the perspectives of network neutrality legislation appear to be quite likely. Under these circumstances, consumer welfare constitutes an *ultima ratio* for future network neutrality debates in Europe.

Innovations and investments have another 'golden share' in this discussion. One of the best ways to attract new investors into the telecommunications market is to demonstrate its profitability, regulatory benevolence and potential for future evolvment. Over the last years in the case of the EU, and decades in the case of the US, the reference to efficiency often became the decisive factor during administrative scrutiny and judicial hearing. The post-Chicago approach to the analysis of monopolist economic behaviour and its consequences for the market is currently applied upon an almost consensual agreement of all stakeholders. Which regulatory model -liberal or proactive- will create favourable preconditions for long term investments into the new technologies? The convincing answer to this question predetermines the attitude of regulatory authorities to network neutrality.

Antitrust law is the most appropriate *ex post* regulatory watchdog for European telecommunications -particularly in the area of content / application gradation- because competition in the markets of internet services provisions is already secured and created by other EU regulatory tools; namely, the European regulatory framework for electronic communications and European audiovisual policy. These instruments provide a sufficient basis for opening markets and the additional network neutrality clauses will bring *de facto* regulatory duplication. If the aim of *ex ante* regulations is to establish a competitive environment in the markets and not to protect competitors, the network neutrality rule is unnecessary. Indeed, it does not guarantee horizontal competition between the ISPs, but only impose on them non-discrimination duties in relation to their vertical relations with content providers. The only *ex ante* regulatory tool which is really essential for establishing some competition between ISPs is the current European policy of local loop unbundling and bit stream access. However, these measures significantly infringe upon essential property rights of the network incumbents. Then again, since they are

already established, one might as well take into account their positive aspects for the European economy. The legal and economic evaluation of these premises constitutes an important aspect of the present contribution.

At the present stage of evolution of the telecommunications market, the networks represent the biggest 'bottleneck' for content distribution. Therefore, the attraction of investments into their deployment has to be seen as a major regulatory priority. Following the liberal postulate according to which softer regulation is a stronger regulation, the possibility to gain vast revenues from a 'gatekeeper' position is a substantial stimulus for new investors. The widespread argument of inefficiency of the networks duplication still plays an important, but no longer decisive, role in the modern telecommunications economy, especially taking into account the vigorous potential of the next generation wireless networks. This contribution demonstrates how exactly market failures can be effectively solved by antitrust procedures in the relevant areas.

As a result of fast technological evolution and a growing juxtaposition in a number of communication areas, a draft of the new telecommunications framework has been launched at the beginning of 2000. Because of a rapid convergence among the three previously almost not at all interconnected sectors that are telecommunications, information technology and the media, the decision has been made to cover all of them through a single regulatory regime. This new framework included the regulation of both telecommunications and broadcasting aspects of communications, which previously had been regulated separately. However, the new regulatory regime of communications did not include either content services providing editorial control or information society services, which do not mainly consist in the transmission of signals on electronic communications networks. Apart from the explicit exclusion of audiovisual services, the new electronic communications proposal provided no coverage for the regulation of telecommunications equipment.

The new regulatory framework came into force on 25 July 2003. Initially, this new package consisted of five directives: the Directive on a common regulatory framework (2002/21/EC), which lays out the main aims and procedures for an EU regulatory policy in the area of the provision of telecommunications services and networks; the Directive on access and interconnection (2002/19/EC), which regulates the access to and interconnection of networks on operators with significant market power; the Directive on the authorisation of Electronic Communications Networks and Services (2002/20/EC), a mechanism to establish a new system of general authorisation, under the provisions of which directive

national regulatory authorities can no longer issue licenses but only establish a general authorisation for all telecommunications services; the Directive on universal service and user rights related to electronic communications networks and services (2002/22/EC), which provides a minimum level of telecommunications services to European consumers; and, finally, the Directive on privacy and electronic communications (2002/58/EC), stipulating the rules for protection of personal data and privacy.

One of the main reasons to propose the framework was to harmonise the communications legislation. In addition to this packages, the Directive on competition in the markets for electronic communications services (2002/77/EC), the Decision on a regulatory framework for radio spectrum policy (678/2002/EC), the Decision on the minimum set of leased lines with harmonised characteristics and associated standards (2004/641/EC), the Decision establishing the European Regulators Group for Electronic Communications Networks and Services (2002/627/EC) and the Recommendation on relevant markets (C (2003) 497) have added latter on. This paper does not review all the provisions of the relevant Regulatory Framework directives; instead, it focuses on specific aspects of the directives, which are related to network neutrality.

At the current stage of the EC telecommunications development, one needs to acknowledge the general political will to move towards greater application of antitrust *ex post* European principles. This gesture is still far from the consensual recognition of the competition law rationale's dominant position in the area of telecommunications. On the other hand, it might be interpreted as a manifestation of the completion of the first proactive regulatory stage in the infrastructural liberalisation.

2. *Compulsory infrastructure access*

In accordance with the current European regulatory model, compulsory access to the network infrastructure can be justified as a means to increase competition. The Directive on access and interconnection (2002/19/EC) obliges network operators with significant market power to meet reasonable requests for access to and use of networks elements and associated facilities, stipulating that such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity. In cases where access is refused, the aggrieved party may submit the case to the dispute resolutions procedure referred to in Articles 20 and 21 of the Framework Directive (2002/21/EC). However, national regulatory authorities are required to find a proper balance between the short-term interests of the new entrants and their incentives

to invest in alternative facilities that will secure more competition in the long-term.

Price control constitutes one of the most important regulatory instruments of compulsory access. In the markets where the competition is not well-developed, the incumbents are prohibited from imposing excessive prices and using price squeeze tools for eliminating competition. The Directive on access and interconnection gives to the national regulatory authorities the necessary rights for appropriate price control, such as cost accounting systems and undertaking an annual audit to ensure compliance with that procedure.

It is noteworthy that the national regulatory authorities are not limited in their imposition of compulsory access provisions (exclusively) to situations where a company dominates the market.⁵ Such obligations go far beyond the *ex post* competition principles and along with liberalisation bring disincentives for incumbents to innovate and expand their networks.

The new phase of telecommunications policy illustrates the Commission's willingness to reassess the existing electronic communications regulatory framework. The main impetus for a reform came from the fast-changing nature of the telecommunications structure, from the deep convergence of various interrelated services -namely, the operation and deployment of the network infrastructure, access services, entertainment and content provision- and from the multilevel interdependence between them.

During public consultations, many incumbent operators and some national authorities considered that the regulatory framework should foster more investment and they called for a major reform. Nevertheless, some have pleaded for either withdrawal of sector-specific regulation or regulatory holidays for major investments that made significant financial injections into structural renovation of their networks.

The Proposal covers the area of common carriage services provision. In the Commission's opinion, because of the fact that the fast technological progress significantly changed the conditions under which common carriage service rules operate, and keeping in mind a deep infrastructure deployment and establishment of alternative networks, these services need

⁵ Article 3 § 2 of the Directive on access and interconnection stipulates that "where, as a result of [...] market analysis, a national regulatory authority finds that one or more operators do not have significant market power on the relevant market, it may amend or withdraw the conditions with respect to those operators, in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework Directive)".

substantially less regulation from the member states. Conversely, in order to apply common European standards to such services, it is proposed that the common carriage services obligations of the incumbents must be as proportionate and transparent as possible. The document proposes to introduce a deadline for reviewing national common carriage rules and give a spur to liberalise the national markets and introduce competition within newly opened segments of the telecommunications market.

One of the most important and controversial proposals of the Commission is related to the provision of a universal service. The current EC regulations on universal services are based on the 'classic' model under which telecommunications companies may often provide both access to the network and voice communication services. In the Commission's opinion, such a vertical integration model where the incumbent provides services of access to network and voice communications may harm -or, to put it in more appropriate terms, "not foster"- the competition within the internal market. As a result, it offers to introduce separate obligations on providers of access infrastructure and on providers of services. One of the main reasons for this legal transformation lies in the fact that the Commission foresees a rapidly growing interconnection of the different services and, consequently, some potential harm for the internal market as competition *for the market* would prevail over competition *in the market*.

According to Article 3 of the Directive on competition in the markets for electronic communications services (2002/77/EC), "member states shall ensure that vertically integrated public undertakings which provide electronic communications networks and which are in a dominant position do not discriminate in favour of their own activities". The Directive on access and interconnection (2002/19/EC) stipulates that telecommunications companies with significant market power are obliged to operate in accordance with the principle of non-discrimination and ensure that undertakings with market power do not distort competition, especially where there are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets.

Hypothetically, the attempt of the Commission to regulate the telecommunications industry in such interventionist fashion might be justified by the goal to reach some efficiency gains for the European market. However, this policy may also lead to a decrement of the general level of legal certainty in the business environment and negatively reflect upon the intentions to invest into the future development of the infrastructure. As of today, it is still hard to predict the kind and methods of regulatory measures, which may be applied in order to impel the

incumbents to give up certain part of their business. This appears even less likely if one keeps in mind that the control over the network allows them to carry on a wide range of legitimate economic leverages.

The spirit of this proposal is not consistent with the broad economic studies in the area of *ex post* competition law, because the political, industrial and academic discourses in the antitrust domain reached almost unanimous consent upon economic efficiency of the vertically integrated business. The possible remedy for vertically integrated companies in competition law may be applied solely in the course of a merger's approval. Vertically integrated companies may undergo an additional responsibility for abuse of their dominant position, but such a responsibility may not concern compulsory separation of the incumbent, since it is the consequence of *behaviour* but not the mere *status* of the company *per se*.

3. *Network neutrality in the new regulatory framework*

Another domain which the reformed regulatory framework proposes to cover is that of network neutrality. The term has been created in the US public debates by proponents of the current model of relations between telecommunications companies and providers of internet content. The rationale behind network neutrality is based upon a prohibition of 'double charge' for providing internet content to the end-users. The idea of launching the network neutrality movement is based upon the eventual threat for internet companies that aroused from the intentions of internet providers to establish prioritised services for users or companies who are willing to pay more for a substantial speed increment of data transmission.

The Commission's regulatory proposal maintains a quite ambivalent position in this regard and states that, "in Europe, the regulatory framework allows operators to offer different services to different customer groups, but does not allow those who are in a dominant position to *discriminate* between customers in similar circumstances". The effective consequences of the distinction enshrined in this formula will, in all likelihood, be established exclusively on a case-by-case basis. The Proposal contains an important clause which empowers NRA to establish minimum quality levels for transmission of data *via* networks, particularly to avoid a situation of degradation of the quality of the service to an unacceptably low level. The Commission considers that any dispute raised among parties concerning the different interpretation of network neutrality principles should be resolved in accordance with the rules of *good faith* and refers to Article 5 § 1 of the Access Directive; according to which, "in an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements

between themselves, in particular on cross-border agreements subject to the competition rules of the treaty”.

The possibility of application of the provisions of non-discrimination in the context of network neutrality will depend on an infinitude of eventual interpretations of Article 10 § 2 of the Directive on access and interconnection (2002/19/EC); which stipulates that “obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners”.

The proponents of network neutrality interpret these provisions as a prohibition to prioritise the transmission of different services and applications, emphasising that in case of vertical integration of the infrastructure and content providers the conditions for premium traffic speed should be automatically transferred to other content providers. However, the incumbents would reasonably refer to the non-discriminatory character of premium speed services, since each company can receive access to such facilities under equivalent conditions. Hence, the abovementioned provisions of the Directive on access and interconnection regulate the relationship of network operators and the new entrants, electronic communications companies, who strive to operate within the same infrastructure.

Even taking into account the highly growing convergence of technologies and applications, these conditions can apparently not be directly applied to the relations of network operators with content providers. The evolution and development of the concept of network neutrality, its ontological essence and legislative regulation, both in the US and EU, will be scrutinised below.

The Commission analyses three potential scenarios for the development of the telecommunications regulatory framework: the removal or restriction of sector-specific regulation; the adoption of an ‘open access’ model for new network structure; and, lastly, no change to the regulatory framework.

The first or ‘free market’ model is characterised by its eventual advantages for the current incumbents and a substantial increase in the level of economic predictability and legal certainty. Besides, the removal or restricted application of *ex ante* regulation may provide an incentive for long-term investment and make European markets more attractive to trans-national capital. This option envisages the application in the

telecommunications area of *ex post* competition policy rules without considerable sector specific measures.

The biggest disadvantage of this regulatory approach lies in its disintegrative character. The removal of the uniform European regulation would authorise *status quo* in the European telecommunications, currently characterised not only by different levels of technical and structural development but also by diverse approaches with respect to liberalisation, often benefiting from a privileged (quasi-)national legal status granted by member states.

In addition, the removal of *ex ante* regulation in a market where the incumbent operator benefits from a dominant position is likely to slow down the level of effective competition and to disadvantage consumers. The rapid growing importance of the communications area in digitally-oriented economies demonstrates that predictable long-term dominance does not constitute the exclusive condition for extensive investments in the new generation networks.

The second option is diametrically opposed to the removal or restriction of sector-specific regulations. It consists in the compulsory opening of access to the incumbent networks to all potential competitors, provided that they meet a certain number of established criteria. One version of this option envisages the structural separation, which the Commission foresees could in principle be imposed under competition law instruments. Until very recently, the most radical intervention of a regulatory authority in the commercial practice has been the institution of a compulsory licensing for dominant companies under Article 82 EC; that is, the essential facilities doctrine.

There are many advocates and critics of this regulatory measure, both in governmental and industrial circles. In the scholarly literature, there is a virtually consensus upon the fact that the essential facility doctrine constitutes the ultimate frontier of the regulatory interference into the 'societal sanctity' of the private property domain. The most radical version of this institute provides the possibility of compulsory opening access to a piece of private property, which constitutes an industrial bottleneck, but only under the principle of limited and shared access. It is almost impossible to imagine how the tools of *ex post* regulation may be used to impel the incumbents to refuse to operate on the market of communications services, leaving them merely the possibility of technically servicing the networks. The only possible way to implement this idea is through *ex ante* regulatory requirements, obliging member states to grant the NRA the necessary competences to guarantee that network operator

open access to all competitors by separating their infrastructure services from the provision of internet access. In all likelihood, the Commission considers this approach as merely theoretical and uses its argumentation for the purely methodological purposes of comprehension and analysis. For the sake of discussion, however, it is possible to simulate a situation similar to the famous rationale of the European courts with regard to parallel trading in intellectual property; namely, “the possession of property does not necessary correspond to its usage, which might have been restricted”. By analogy, holding the network does not entail an unreserved right to provide electronic communications services. Hence, technically speaking, certain requirements of registration or establishing and accounting separation of the incumbents might be launched by the Commission.

The Commission is absolutely right in saying that the ‘open access’ model for new infrastructure investment works well in a *tabula rasa* situation, where there is no pre-existing network or Commission initiate proactive initiatives, using structural funds. This situation may be fully justified only under free-will but not under compulsory regulatory initiatives. The offered model has many advantages *per se*. Yet, because of the impossibility of separating the present-day infrastructure owners from the communications services, which often constitute the major part of their revenues, this idea remains mostly hypothetical.

The third option considered by the Commission is the absence of any change to the regulatory framework. The current model is characterised by a high degree of predictability and harmonisation and its capability to successfully regulate the European telecommunications area has been proved in practice. For this reason, it would be appropriate to concentrate efforts on the adaptation of the regulatory framework to rapid technological changes and direct them on the coverage of new-arising domains, rather than propose radical conceptual changes. The Commission considers that this model is the most appropriate option and has thus proposed it in its associated Communication.

III. EUROPEAN AUDIOVISUAL POLICY

I. *Network neutrality context*

In regulatory terms, the concept of network neutrality is in-between. Its substance relates equally to infrastructure and content. The fundamental essence of network neutrality is based upon the principle of fair treatment of content by network operators. Unlike traditional broadcasting, data over IP streaming has no technical borders and can potentially cover a worldwide audience. Since the issues of content management relating to

network neutrality may occur predominantly in the downstream market - namely, content destination, places of consumption of the content by customers-, the attention has to be paid to European regulatory instruments of content management.

Regulation of audiovisual contents represents a substantial segment of the European communications policy. The main legislative document in this area is the Directive on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities; "Television without Frontiers Directive" or TVWFD (89/552/EEC), from 1989. This document has been substantially updated in 1997. After some lengthy public debates and consultations, the Commission issued in 2005 and further amended in 2007 its proposal for Audiovisual Media Services Directive; AVMSD or Audiovisual Media Services Directive being a new title for TVWFD.⁶

The original objective of TVWFD is the creation of appropriate conditions for the free movement of television transmission within the EC. Its primary scope included all forms of public broadcasting, except electronic communications services providing information services on on-demand basis.

2. *Single European TV market*

In terms of the *liberation-integration-competition* paradigm, the main aim of this document has definitely been the second one. By opposition to the US context, the broadcasting industry in Europe is characterised by strong public elements. The state inheritance is either directly or at least implicitly present in all major European broadcasters and the whole consumer media culture in Europe. A genuine liberalisation of the broadcasting industry has never been on the European agenda. For this reason, TVWFD does not appear to concentrate any efforts on the liberalisation of the TV markets. Instead, it strives to integrate the different national regulatory environments into a single European model.

In order to pursue this important mission, the Commission tries to eliminate any regulatory borders between the different member states. Hence, one of the key ideas of the TVWFD has been the prohibition for the member states to conduct any measures, which can restrict reception or retransmission of broadcast signal from other member states, apart from public safety, the promotion of culture and similar exceptional

⁶ Directive of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services.

national needs.

However, there are not enough political, economic and cultural preconditions for establishing a free market model for the TV industry in Europe. As is the case with the European regulation of the telecommunications infrastructure, the main efforts of the Commission are directed towards regulatory unification within the European internal market. The essence of *harmonisation* of the TV markets is based upon the subordination of national regulatory regimes to a pan-European one. Since the meta-task of European integration is based on the elimination of regulatory differences and economic borders between the member states, but by no means on erasing obstacles to an internal free market -as the internal market is not a free market-, the European audiovisual policy develops in parallel with the general objectives of the European integration. These regulatory roots of the European model of TV industry play a role in the present-day situation in relation to the production and distribution of European TV content. Without unnecessary oversimplifications, and fully taking into account all cultural, linguistic, behavioural and esthetical particularities of Europeans, there are enough evidences to conclude that there exists a direct relation between the strong regulatory character of the European TV industry and its poor commercial performance both in the world at large and the domestic markets.

TVWFD covers a broad range of issues, related to the production, transmission and reception of content in the EC. Its adoption has been originally stimulated by fast technological developments in the TV industry. In combination with the firm intention to establish a single European market, these prerequisites became decisive for the initiation of this legislative measure. Initially adopted in 1989, it has been amended in 1997 because of the further development of the audiovisual sector; in particular, in the area of satellite TV, marketing-oriented business models, interactive technologies and future deployment of cable infrastructure.

In 2007, EU is still revising TVWFD. Under the new title of Audiovisual Media Services Directive, it is called for providing an effective regulatory tool for content production and distribution in the new digital age.

Since the adoption of TVWFD in 1989 and its substantial amendment in 1997, electronic technologies have substantially expanded, leading the Commission to initiate in 2002 a legislative review of TVWFD. It has been officially launched by launching a proposal for the elaboration of a program for the modernisation of rules on audiovisual services and a timetable for future actions. The Commission organised an extensive public consultation campaign. As a result of this hearing, many research

and analytical programs and seminars have been organised by the Commission from 2003 until 2007. Finally, in 2005, the Commission officially adopted a legislative proposal for the revision of TVWFD, with some relevant amendments in 2007.

This document stresses the importance of the European audiovisual environment, based on principles of pluralism, cultural diversity and consumer protection. The Commission offers in this proposal to guarantee the independence of national regulators in the media sector; which essentially means to strive to provide the necessary tools for stronger regulatory powers.

IV. CONCLUSIONS AND OPENINGS FOR FURTHER RESEARCH

The aim of this contribution has been to give to a descriptive presentation of the current European regulatory framework in the areas of electronic communications and audiovisual policy. By analysing the relevant EC directives, it strived to put the existing model of *ex ante* regulation into the context of the network neutrality debates; with the general objective to provide a clear-cut overview of the European state of affairs in the areas related to network neutrality. The purpose of the overall project is not to present the mono-semantic meaning of this multidimensional problem, but rather to explore the nodular issues of the academic debates over network neutrality in the United States, to correct mistakes and afterwards to offer effective, theoretically adjusted solutions for the existing and new telecommunications operators in the European markets. The nature of argumentation is mainly legal and, to a lesser extent, economic or societal.

Departing from a conception favouring *ex post* regulation of network neutrality, one can demonstrate why exactly Europe does not deserve an explicit mention in the *ex ante* telecommunications framework. It goes without saying that any sort of instrumentalisation of explored arguments should be rejected and all pros and cons analysed without any partiality. This paper opens the path to the provision of an alternative approach to the network neutrality dilemma in the European context. One can expect *a priori* to give a positive answer to the question submitted in the title of the present proposal; that is, whether Europe should trust in antitrust.

From an academic perspective, network neutrality is an interdisciplinary phenomenon. It can be explored under its economic, legal, societal, technical and political dimensions. By applying political philosophy's argumentation and reasoning, one can attempt to prove that content *prioritisation* is, by far, not the same as content *discrimination*. In addition,

when exploring the existing US and EU case-law related to telecommunications, intellectual property and antitrust areas, one can provide economic, societal and (most importantly) legal argumentation for ISPs to content / application prioritisation and emphasise the relevancy of the *ex post* antitrust instruments for the companies which abuse or misuse their 'natural' right to prioritise the content.

The history of public debates in the United States showed a big potential for the network neutrality proponents to attract consumers. Their vivid rhetoric together with constant reference to fundamental freedoms manages to create a powerful public tool for the promotion of this idea. It is, therefore, important to explore and evaluate the most successful techniques, applied by the proponents of network neutrality. At this point, one can only foresee that the existence of extra-speed possibility for premium internet services is not likely to degrade the other applications and that higher data-speed option gives to consumers an opportunity to benefit from the great variety of internet services, particularly from those related to live-streaming. The rest is the object of a much wider project.