Marsden, Christopher T. "European Law and User Rights." *Net Neutrality: Towards a Co-regulatory Solution*. London: Bloomsbury Academic, 2010. 133–158. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781849662192.ch-005>>.

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CHAPTER FIVE

European Law and User Rights

On the question of network neutrality, so called, which I think has been vastly over-inflated in all of this debate, the Commission has quite rightly identified the fact that there is a potential – a potential – for operators to use differing QoS provision in a discriminatory way, for example, by giving a higher capacity or better service quality to their own services as opposed to those of competitors ... But the fact remains that any other service limitations which are anti-competitive, and they could certainly include restrictions on access to competitive services like VoIP, have and can be dealt with by the regulators under the existing framework of competition and access regulation. And that is clear. But what is fundamental is that customer needs to know if there are service limitations and customers may wish to buy a package with service limitations if it is cheaper.¹

Malcolm Harbour, Member of the European Parliament (MEP),
16 April 2009

In this chapter, I explore the recent legislative proposals at European level to address net neutrality, especially those in the reform of the 2002 Electronic Communications Package. At the time of writing, the entire package has been referred to mediation after it was voted down at Second Reading in the European Parliament in May 2009. You will therefore know the outcome of the Swedish Presidency negotiations with the European parliament and the new European Commission at the end of 2009, and can view this chapter with hindsight. Before I examine the state of the proposals, and the history of the negotiation of the reforms as they affect net neutrality, it is first necessary to place net neutrality within the wider goals of the European Commission, to develop the European Internet content industry, enhance productivity through ICT, defend and develop European culture, and defend fundamental rights (the subject of an Irish referendum due on 2 October 2009 to decide whether to ratify the Charter of Fundamental Rights within the Lisbon Treaty).

User-generated and distributed applications and services on the Internet are seen as crucial to development of the European broadband economy. Commissioner Reding stated:

We are now living through a new disruptive phase of the Information Society. Some people call it Web 2.0 or social networking. I can list some of the components: blogs, podcasts, wikis, social networking websites, search engines, auction websites, games, VoIP and P2P services. What is new about these uses of the Internet is that they exploit the Internet's connectivity to support people to network and to create content. This is a new paradigm in which users are co-producers of services.²

Web 2.0 makes user-generated and distributed content central to consumers' Internet experiences. This phenomenon has fundamental impacts on the value chain of affected industries.³ Notable European examples are VoIP software Skype and the P2P client Kazaa. User experience with digital games and multimedia suggests that they are likely to drive innovation and adoption of Web 2.0 and P2P services and markets. Ruthless competition in these markets results in highly volatile and snowballing investment decisions: for states seeking to attract such investment, there is more of a winner-takes-all pay-off from the entrepreneurial investment climate provided.⁴

If innovation is typically both user-distributed and user-driven, the implications are that innovation is encouraged by interoperability and open access: in general, ensuring that content can be freely shared between those users. This view is in some conflict with content and network owners' desire to be recompensed for provision of local loop upgrades and has led to an animated debate in the United States. Note that content providers pay for their traffic to be carried by backbone ISPs, on a best effort basis, and the argument is about ISPs wishing to increase those payments as a result of either enhancing or blocking service, on a mandatory or opt-in basis (clearly a mandatory blocking service for those refusing to pay an extra toll is the most capricious of these possibilities, as in Madison River). Lemley and Lessig claim that innovation at the edge of the network is opposed by traditional media and network businesses, as it makes business cases based on controlling distribution bottlenecks redundant: where there is peer sharing, there is less opportunity for traditional bottlenecks and therefore control of revenues. However, the inverse applies also: without some means

to secure revenues for the increased bandwidth necessary for Web 2.0 type applications to flourish, do network operators have an incentive to upgrade?

The European Commission and Member States monitor developments in this area closely, especially in view of content and innovation policies, under which the importance of content provision (as well as network deployment) for jobs and growth are emphasized.⁵ A goal of the European Commission is to encourage the development of European content providers to match the American success stories: 'The creation of an open and competitive single market for online content is one of the key aims of the European Union's i2010 initiative.'⁶ The European approach to 'Content Online' is laid out in a Communication from the European Commission, noting that the European user-generated content industry's future entry barriers and business model are at stake in this debate, a fact of which the Commission and Member States are aware and which needs to be fully considered in future policy discussions in order to take a holistic view of the problem. In particular, the role of start-up and small companies in content and service provision is likely to be a substantial engine for such growth. If this seems a long way from discussions of incumbent monopolies and user rights in Europe, then that is both the correct perception and the major policy problem in net neutrality: those that benefit from net neutrality are all outside the rooms in which most of the negotiation takes place, traditionally between incumbents and their competitors, all ISPs and in the main committed to trying to charge for access. As we will see, the disjuncture between telecoms law discussions and policy demands for user rights and participation took the entire 2009 review off the rails over the issues of filtering and net neutrality.

European Regulation and its Previous Net Neutrality Problems

The availability and design of a suitable regulatory response must reflect dynamism and also the responsiveness of regulators and market players to each other. Therefore, if any legislation is required (and we will see that new proposed legislation will impact national regulators in 2012 or so), it should be future proof and not overly prescriptive to avoid a premature response to the emerging environment. Can regulators equip themselves with the skills and evidence base to rapidly investigate potential problems of unjustified discrimination? The European legal basis for regulatory intervention, especially

the Access and Interconnection Directive, potentially provides for a wider and better variety of regulatory tools to intervene than the current US situation.⁷

Two specific issues in this watch list are: detection of any discrimination, and the standing of the content providers complaining of such discrimination. I deal with each in turn.

Should QoS be introduced, the types of harmful discrimination that can result may be undetectable, as we saw in the opening chapters. Blocking is relatively easy to spot. Throttling or choking bandwidth, even where unjustified, may be harder to spot and even harder to efficiently regulate. It is a moot point whether unjustified discrimination short of blocking is useful to an ISP, as discrimination against a particular content type may be overcome by sophisticated content providers via encryption in a technological ‘arms race’.⁸ Moreover, for discrimination to create a business case, it needs to be effective in creating substantial incentives for content providers to pay a premium. Though it may not be possible technically to identify all discrimination, the most egregious types of discrimination may provide only a marketing advantage if obvious enough for customers to identify the benefits.⁹ Paradigmatically, only clear discrimination may be really worthwhile for network operators, such that the cost–benefit is at least in theory obvious to content suppliers, network operators and end-users. A solution may be to require network operators to provide their service-level agreements on QoS to both content providers and more transparently to the end-user via a regulatory or co-regulatory reporting requirement, explored in the UK context in Chapter 6. European regulators expecting a ‘smoking gun’ to present itself as in *Madison River* should be advised that a more proactive approach to monitoring and researching non-neutral behaviours will make network operators more cognizant of their duties and obligations. To do so without incurring the interest of a concerned regulator may be hazardous. Regulators can monitor both commercial transactions and traffic shaping by ISPs to detect potentially abusive discrimination.

Under the current law, it may be difficult for content providers to raise disputes with third party network operators with whom they have no contractual relationship, as the 2002 European Framework anticipated disputes under contract law or interoperability disputes between network providers. Content and communications providers have little ability to enforce these obligations directly against network operators. NRAs are responsible for imposing obligations on network operators and ensuring

enforcement. Communications providers have stronger standing to lodge complaints with NRAs and have the direct rights to seek interconnection with network operators. Content providers lack strong rights to assert claims as they are users of communications services rather than providers of communications services seeking access. The question of legal standing for content providers under Directives is a technical legal question that is to be dealt with in 2009 amendments,¹⁰ and upon which there was discussion in the European Regulators Group (ERG) and elsewhere.¹¹ The EC has asked in the ERG ‘if discussion should not be dealing with net neutrality issues.’¹²

2002 Framework and Net Neutrality

Before I explain the controversial nature of the reforms in the European package, I will briefly detail the current 2002 Framework. The Framework is based on the notion of market analysis that reveals a dominant monopoly actor with SMP, generally the incumbent telco. The key to the Framework are five Directives: regulating access (2002/19/EC), the regulatory framework (2002/21/EC), authorization of networks and services (2002/20/EC), universal service and consumer protection requirements (2002/22/EC) and electronic privacy (2002/58/EC). NRAs can impose SMP remedies as follows:

Non-discrimination (Access Directive 2002/19/EC, Article 10): NRAs may impose obligations on the wholesale access provider to ensure that it provides others with services on the same conditions and of the same quality as it provides to its affiliates or to itself. Non-discrimination remedies will depend on the form of degradation:

- For non-affiliated content providers, degrading QoS for certain types of content will be discriminatory if similar content from the network operator’s affiliates or partners is not degraded.
- Where content type discrimination takes place (for instance blocking VoIP), degrading QoS for specific types of content (or communications) in all cases and regardless of its source may constitute discrimination against particular categories of content providers, but the position will depend on the circumstances.
- Degrading QoS for content that uses certain delivery mechanisms (e.g. P2P) may not be considered discriminatory, particularly if there are network management justifications for the degradation and the network operator’s affiliates do not receive a higher level of QoS using similar distribution techniques.

Transparency and disclosure of network information is implemented by Access Directive 2002/19/EC, Article 9:

- NRAs may require the wholesale access provider to disclose, among other things, network characteristics and the terms and conditions for the supply and use of the network by an ISP (through publication of a wholesale access ‘reference offer’). Disclosure of network QoS policies is not specifically mentioned, but ISPs would need to know about any QoS policies of the network operator in offering their own retail services.
- A National Regulatory Authority (NRA) could require a network operator to be more transparent about what content services are degraded on their network, which may encourage operators to only degrade QoS in more justifiable circumstances.

In addition to these SMP remedies, there could also be more general remedies imposed on all public communications networks, known as general access remedies. These include end-to-end connectivity, under the Access Directive 2002/19/EC, Article 5(1)(a): NRAs may impose obligations on ISPs as ‘undertakings that control access to end-users’ to ensure end-to-end connectivity. For example, NRAs are intended to have the power to secure interoperability ‘if network operators were to restrict unreasonably end-user choice for access to Internet portals and services’ (Access Directive 2002/19/EC, Recital 6). Providing lower QoS for communications providers that do not pay may be deemed to limit end-to-end connectivity if certain applications *will not function* without higher QoS. This is less likely to be imposed than SMP, however, because end-to-end connectivity is not defined in the Framework and may be read narrowly to require only interconnection for the purpose of voice call or Short Messaging Services (SMS) termination. QoS policies will likely need to be ‘unreasonable’ in order for an NRA to take action. Recital 6 suggests that ‘reasonable’ restrictions on end-user choice for access to Internet portals and services are acceptable. What is ‘reasonable’ is not specified and may be easier to justify due to capacity constraints, which is why much attention in drafting the 2009 amendments focused on this critical issue. In addition, the Framework does not directly address end-to-end connectivity for content providers although Recital 6 suggests that connectivity includes access to portals.

NRAs may intervene to secure the policy objectives of the Framework, such as ensuring end-to-end connectivity and that users derive the maximum benefit in terms of choice, price and quality. Communications providers may ask an

NRA to intervene (and the NRA can act at its own initiative) in a dispute with an ISP over the nature of its access to the ISP's subscribers. The legal basis for these powers is Access Directive 2002/19/EC, Article 5(4). In addition, network operators have the right to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services in order to ensure interoperability of services under the Access Directive 2002/19/EC, Article 4(1). Communications providers have the right to seek interconnection with an ISP, but terms are subject to commercial negotiation. Historically, these rights have been focused on interconnection for the purpose of call termination, as we saw in Chapter 1. An NRA may resolve a dispute with a network operator at the request of a party seeking access to the network, under Framework Directive 2002/21/EC, Article 20.

There is also a requirement on ISPs to provide QoS disclosure, under the Universal Service Directive 2002/22/EC, Articles 20(2) and Article 22, including details of services provided, service quality, tariffs and maintenance charges in contracts with consumers. NRAs have powers to extend these transparency obligations in two ways, by adding to the categories of information that must be disclosed, and to benefit end-users other than consumers. ISPs that do not disclose their QoS policies to consumers may not satisfy their general disclosure obligations (i.e. details of services provided), but the Directive does not explicitly require these disclosures.

Remedies could be imposed if access was provided on a discriminatory or exclusive basis, such as only to an affiliate or strategic partner of an ISP. It is less likely that access remedies may be imposed for content services (e.g. IPTV, subscription video services) because end-to-end connectivity traditionally has been regulated by NRAs for communications rather than content. Content providers are not clearly entitled to negotiate interconnection as it would not be for the purpose of providing a 'communications service'.

If content providers cannot formally make individual complaints to regulators until the implementation of the package reforms in 2011–12, it may be that an independent investigation into potential discrimination can be made on the regulator's own initiative, depending on its constitutional and formal powers. While this is appropriate for a converged regulator such as UK Ofcom, which regulates both content and carriage, it may not be the case in other European jurisdictions. Both the European Commission and ERG would be well-advised to consider the types of response that regulators could make to such complaints if standing is found to be lacking. No matter

what theoretical powers may exist, their use in practice and the issue of forensic gathering of evidence may ultimately be more important. An *ex ante* requirement to demonstrate internal network QoS metrics to content provider customers and consumers may therefore be a more practical solution.

I note that the danger of fragmentation and regulatory arbitrage are due to two reasons:

- a type of ‘regulatory holiday’ for ISPs in one country but not another is quite likely,¹³ and
- enforcement of net neutrality may be highly divergent even under the current 2002 framework.

First, however, I examine the proposed European laws which those NRAs would have to enforce.

2007 Proposals and the Failure of Liberalization to Date

Commissioner Reding indulged in some straight talking about government-owned (fully or partially) incumbents in Europe, in a 2008 Venice speech:¹⁴

I call on you, incumbents, and your association ETNO, to re-think your policy recommendations to national ministers. You have to take a decision: Do you want to be friends or foes of a single telecoms market in Europe? Do you really want to let, for short-term reasons, the single market slip away to your US competitors?

She was referring particularly to the apparent bargain between national incumbents not to intervene too vigorously in each others’ markets. There has only been a merger of two former monopolies in the eleven years of open competition in European telecoms, those of Finland and Sweden (to form TeliaSonera), though several Eastern European incumbents (e.g. Hungary, Poland) have substantial investment from FT and Deutsche Telekom (DT). In general, the EC ignores the lobbying by these companies and their national regulators in the Council of Ministers, assuming they are simply stooges for their masters in Paris and Bonn. Reding was therefore accusing incumbents of arranging cosy cooperation, a corporatist attitude far removed from Internet innovation.

For those reading for the first time about European Parliament procedures under co-decision, here is how it works. The College of Commissioners (the civil service) puts forward a legislative suggestion to the Council of Ministers, which debates amends or adopts it. It is then formally put to the European Parliament, which debates, amends and votes in a First Reading. Following that, the Council reconsiders the package with amendments, and puts a new package back to the Parliament. Throughout this process there is a continuous series of meetings between the Rapporteurs (chairs) of the relevant Parliamentary committees, the Commission officials responsible and the Council of Ministers as represented by their President (one of the 27 Member States takes a six-month revolving Presidency, a political compromise which makes the Commission as the permanent civil service much more powerful than in most Parliamentary systems).

The European Commission on 14 November 2007 issued a new proposed Universal Service and Consumer Rights Directive, explaining that:

In Article 21 ... NRAs are given powers to require from operators better tariff transparency (paragraph 4) as well as clear information on possible restrictions on access to all types of content and applications (paragraph 5). The possibility for the Commission to take implementing measures is intended to ensure, where appropriate, a minimum level of harmonization in this area (paragraph 6).

In Article 20(5): this provides for a transparency mechanism concerning possible restrictions on end-users' choice of lawful content and applications in order to empower end-users to make an informed choice of services, thus allowing them to reap the full benefits of technological developments in the Information Society.

In Article 22: this grants to the national regulatory authorities the power to prevent degradation of QoS by setting minimum quality levels for network transmission services for end-users. The possibility for the Commission to take implementing measures is intended to ensure, where appropriate, a minimum level of harmonization in this area (paragraph 3).¹⁵

As it explained in its accompanying Impact Assessment,¹⁶ the Commission favoured harmonization and the granting of updated rights to enforce

minimum standards to users, rather than leaving them (as currently) in the hands of regulators.

As it explained:¹⁷

[W]hile the ‘net freedoms’ are already embedded in the design of the framework, they are expressed as obligations on the undertakings and corresponding powers of the NRA, and not in relation to users’ rights to ensure connectivity. ... the current regulatory framework does not provide NRAs with the means to intervene where the QoS for transmission in an IP-based communications environment is to be degraded to unacceptably low levels, thereby frustrating the delivery of services from third parties. In such an event, end-users’ connectivity to services provided on the Internet (TV, telephony, Internet, etc.) could be at risk. The impact of prioritization or of systematic degradation of connectivity could be larger on services needing real-time communications (e.g. IPTV, VoIP, in which latency is critical) and ultimately affect end-user choice.

It cites OECD¹⁸ as authority and maintains that intervention is necessary:

This option would address ‘network neutrality’ and basic connectivity by establishing a safety net for quality of transmission: in case the elements of the basic connectivity would become seriously under threat, the NRAs could intervene by setting common minimum quality levels for network transmission services for end-users, based on standards agreed at EU level. This would guarantee minimal level of connectivity and greater choice for consumers ensuring the delivery of third party services at suitably high quality levels appropriate to their needs. Provisions in the area of ‘net freedoms’ would also be made more explicit.

Reding explained what is actually a proposal for ‘net neutrality lite’:¹⁹

The Commission’s vision of an open and competitive digital market does allow for traffic prioritization, especially for providing more innovative services or managing networks effectively ... Of course, abusive or anti-competitive behaviour limiting consumer choice is a serious risk:

through prioritization of traffic, in some situations, the Quality of Service of all operators could degrade to unacceptably low levels ... For the future, the Commission has proposed, in its review of the Telecoms package, to create the possibility of setting minimum quality levels for network transmission services based on technical standards identified at EU level.

Turning now to the need to guarantee the basic net freedoms, especially against the selective blocking of websites by [ISPs], I don't believe that restricting consumers' choice can ever be an appealing driver of more growth. I certainly don't believe that restricting access to the internet will attract many more innovative European internet companies. And I don't believe that restricted access to the internet is the right answer to a faster deployment of [NGAs].

The questions here regard the barriers to entry for European content providers. Would content-sharing sites develop if discriminatory content charging was the state of the world? Furthermore, the network effects required to make content successful may only be possible because content sites do not initially seek to monetize content: monetization is enabled because the network effect created a critical mass of contributors and consumers. The 'next YouTube' may face disincentives to achieve such growth. Reding is a natural sympathizer with auteurs and creators, as a skilled politician, as a former journalist and as the Commissioner responsible only for the media, not telecoms, prior to 2005 (media, culture, youth, education was the entire briefing: very much a cultural diversity policy orientation). Therefore her instinctive reaction to the net neutrality debate, to the annoyance and frustration of economist or technocrat advisors, was to favour net neutrality first, then work out finer details later. In this, she shared the political antennae of the majority grouping in the European Parliament.

2008: Net Neutrality Very Lite?

This political instinct towards net neutrality without detail is reflected in the rather obscure wording of the First Reading draft of the Universal Service Directive,²⁰ reflecting European Parliament First Reading amendments and Commission responses, of 27 November 2008:²¹

Recital 14a (new)

A competitive market should also ensure that users are able to have the QoS they require, but in particular cases it may be necessary to ensure that public communications networks attain minimum quality levels so as to prevent degradation of service, usage restrictions and/or limitations and the slowing of traffic. Where there is a lack of effective competition, national regulatory authorities should use the remedies available to them under the Directives establishing the regulatory framework for electronic communications networks and services to ensure that users' access to particular types of content or applications is not unreasonably restricted. It should also be possible for national regulatory authorities to set minimum QoS requirements under Directive 2002/22/EC with regard to the interests of users and all other relevant circumstances.

Recital 14d (new)

Since inconsistent remedies QoS requirements will significantly impair the achievement of the internal market, the Commission should assess any guidelines or other measures adopted by national regulatory authorities for possible regulatory intervention across the Community and, if necessary, adopt technical implementing measures in order to achieve consistent application throughout the Community.

As of 27 November 2008, the agreed text between the Council of Telecoms Ministers and the EC had incorporated some (but not all) of the European Parliament's amendments to the Universal Service Directive, so that the Article 22 as amended read:

Article 22: QoS

1. Member States shall ensure that national regulatory authorities are, after taking account of the views of interested parties, able to require undertakings that provide publicly available electronic communications services networks and/or services to publish comparable, adequate and up-to-date information for end-users on the quality of their services, including and on measures taken to ensure equivalent comparable access for disabled end-users. The information shall, on request, also be supplied to the national regulatory authority in advance of its publication.

2. National regulatory authorities may specify, *inter alia*, the QoS parameters to be measured, and the content, form and manner of information to be published, including possible quality certification mechanisms, in order to ensure that end-users have access to comprehensive, comparable, reliable and user-friendly information. Where appropriate, the parameters, definitions and measurement methods given in Annex III could be used.
3. In order to prevent degradation of service and hindering or slowing of traffic over networks, Member States shall ensure that national regulatory authorities are able to set minimum QoS requirements on undertakings providing public communications networks. The Commission may, having consulted the Authority, adopt technical implementing measures concerning minimum QoS requirements to be set by the national regulatory authority on undertakings providing public communications networks.

These measures designed to amend non-essential elements of this Directive by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 37(2). On imperative grounds of urgency, the Commission may use the urgency procedure referred to in Article 37(3).

A competitive market should ensure that users are able to have the QoS they require, but in particular cases it may be necessary to ensure that public communications networks attain minimum quality levels so as to prevent degradation of service, the blocking of access and the slowing of traffic over the networks. In particular, the Commission should be able to adopt implementing measures with a view to identifying the quality standards to be used by the national regulatory authorities.

This wording would be put to the vote of the Parliament on Second Reading in May 2009. However, the wording is particularly vague and leaves to Member States the entirety of interpretation of reporting requirements, even if the EC has some powers to require minimal QoS standards. This legislation, however amended, is the beginning of the problem, not the end. The accompanying press release explains in brief that '[NRAs] will be able to take action in order to secure minimum QoS for internet users in order to maintain, if necessary and appropriate, "net neutrality" in Europe'.²²

But note that it is the Commission which will have the coordinating role in setting technical standards, reflecting the patchwork of responses thus far at national level and therefore concerns about fragmentation of the single European market.

Commissioner Reding was at this point in negotiations still vague on her specific views on net neutrality, judging by her Internet freedom speech:

(...) we will only be able to reap the full social and economic benefits of a fast moving technological landscape if we manage to safeguard the openness of the Internet. Openness is one of the key ingredients that made the Internet so successful as an innovation place, and we have to make sure that it is not compromised ... Net Neutrality has to be guaranteed. New network management techniques allow traffic prioritization. These tools may be used to guarantee good QoS but could also be used for anti-competitive practices. The Commission has taken additional steps, through measures proposed to reform our telecom package, to better prevent such unfair abuse to the detriment of consumers.²³

Is Reding's view to be interpreted as meaning that net neutrality is only a competition issue, or also a consumer welfare issue more broadly? She left this deliberately vague. She lists the various US legal, technical, civil societies and Internet Governance Forum (IGF) moves that are afoot – then she has no solution, except to insist that security, privacy and freedom of expression should not be opposed to each other. They often are in reality, as we will see in the next chapter.

Lobbying Around Issues of User Rights

The critical timing for influencing the Council of Ministers, Commission and Parliament on net neutrality was the period between First and Second Readings in the European Parliament, the winter of 2008–9. The lobbying was apparently determined and professional even by Washington standards, much as it had been when the European Parliament tried to regulate Internet video in the 1997 revision to TVWF, as we saw in Chapter 4.

The lobbyists on behalf of the incumbents were out in force, commissioning studies and building coalitions such as 'Net Confidence'. Monica Horten²⁴ reports that AT&T led this effort, that the economists' studies predicting negative impacts of net neutrality was highlighted and that the rejected

First Reading amendments were reworked as ‘compromises’ for the Second Reading, placing responsibility on ISPs only to report (self-regulated) restrictions on service:

Recital 14 [...]

Given the increasing importance of electronic communications for consumers and businesses, users should be fully informed of [...] the traffic management policies [...] of any relevant restrictions and/or limitations imposed on the use of the electronic communications services by the service and/or network provider with which they conclude the contract. [...]. Where there is a lack of effective competition, the relevant national [...] authorities should use the remedies available to them in Directive 2002/19/EC to ensure that users’ access to particular types of content or applications is not unreasonably restricted.

Article 21(3)

Member States shall ensure that national regulatory authorities are able to oblige undertakings providing connection to a public electronic communications network and/or electronic communications services to *inter alia*:

(b) inform subscribers of any change to the provider’s traffic management policies [...]; restrictions imposed by the undertaking on their ability to access content or run applications and services of their choice.

The German regulator had commissioned a Wissenschaftliches Institut für Kommunikationsdienste GmbH (WIK) study, which identified net neutrality as a competition problem. The problem analysis is sound but obviously helpful for a client committed to regulatory holidays and masterly inaction. The rather cursory analysis of two-sided markets might have benefited from closer inspection of Economides’ work.²⁵ In early 2009, both Copenhagen Economics and the Centre for European Policy Studies published new papers – the former commissioned by the incumbents has a headline-grabbing enormous figure for what ‘it’ (‘it’ is presumably full enforced net neutrality) would cost Europe.²⁶ Ofcom was quite sensibly adopting the ‘lite’ strategy. Ed Richards, Ofcom chief executive, stated:

We don’t think we should bring it over from the US lock, stock and barrel. We have quite often got more competitors in Europe than in the US. The

key for us is transparency. Consumers must know whether there are different arrangements for different ISPs and network providers must have the freedom to make commercial decisions about how to run their networks and invest in new-generation networks.

ISPs: stop lying. Consumers: stop abusing. We will all be happier. This lobbying had an effect opposite to its intention: non-government lobbyists such as the Pirate Party in Sweden, members of the European Digital Rights Initiative (EDRI), La Quadrature du Net in France, the Open Rights Group in the United Kingdom and others lobbied the Parliamentarians very hard. Given that elections were held on 4–6 June for the next five-year Parliamentary term, the arguments of the massed civil society representatives, including Facebook and email campaigns, were taken much more seriously than it might have been taken earlier in the five-year fixed-term Parliament. This indicates a potential Parliamentary back down in 2010 as it is now significantly more pro-market after a socialist group loss in those 4–6 June 2009 elections.

Member States and French ‘HADOPI’ Law

The backdrop to the European Parliament debates was a series of laws aggressively aimed at individual Internet users and lobbied for by copyright holders, notably the music and film producers and distributors lobby. In Sweden, this included the sensational case in which the founders of Pirate Bay, a website that assisted file sharers, were successfully criminally prosecuted for aiding and abetting copyright infringement, a case which has been appealed in Sweden in autumn 2009. However, the greatest publicity and threat to Internet users’ rights was posed by a new French law that threatened to cut off users who had been three times informed by a tribunal that they were infringing copyright. This tribunal termed HADOPI would not be a court, but a body to exercise the rights of ISPs and particularly copyright holders. It was particularly controversial because, despite defeat in the French House of Deputies in spring 2009, it was reintroduced successfully by the Sarkozy government in May 2009. The lack of due judicial process contributed to the overall impression that this was part of an authoritarian attack on individual users’ rights to freedom of expression and privacy.

The anti-piracy law, the so-called HADOPI law, would introduce graduated response against illegal content downloading.²⁷ The law would enable the introduction of ‘three-strikes’ measures against file sharers. According to the

modified law voted by the Senate on 30 October 2008, if illegal downloading is reported by an authorized body (industry associations and professional bodies), three consecutive actions would take place:

1. HADOPI, the body created for this purpose, sends the infringer a warning email.
2. If the infringement is repeated within six months, a new email will be sent together with a warning by registered letter.
3. If the infringement is repeated within a year, the Internet user will be penalized according to the gravity of the act.
4. The sanction can be the denial of Internet access ranging from one month (duration decreased by the senators from three months as initially in the draft law) to a year during which time the Internet user must continue to pay the ISP subscription and is included on a black list that forbids her to subscribe to any other ISP.

The French National Assembly (the second chamber of the Parliament) voted in favour of the HADOPI law in April 2009, which put the French government at odds with European Parliament Amendment 138 on the Telecoms package, which explicitly states that only judicial authority can impose restrictions on citizens' fundamental rights and freedoms. The European Parliament's opinion called on the European Commission and all Member States to 'avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness, and dissuasiveness, such as the interruption of Internet access.'

The passage of the 'HADOPI law'²⁸ on 13 May 2009 was immediately referred by 60 members of the French parliament to the Constitutional Court, which on 10 June struck down the elements of the law which create a punishment prior to judicial instruction. The Court stated at Paragraph 12:²⁹

Whereas under Article 11 of the Declaration on the Rights of Man and Citizen of 1789: 'The free communication of thoughts and opinions is one of the most precious rights of man: every citizen may therefore speak, write and print freely, except to respond to the abuse of this freedom in cases determined by law' that the current means of communication and given the widespread development of communication services to the public line and the importance of these services for participation in democratic life and the expression of ideas and opinions, this right includes freedom to access these services ...

[Para. 15] freedom of expression and communication is all the more valuable that its exercise is a prerequisite for democracy and one of the guarantees of respect for other rights and freedoms and that attacks on the exercise of this freedom must be necessary, appropriate and proportionate to the aim pursued ...

[Para.17] Whereas, moreover, that under section 9 of the Declaration of 1789, every man is presumed innocent until proven guilty, it follows that in principle the legislature does not establish a presumption of guilt in criminal matters, however, in exceptional circumstances, such presumptions may be established.

Notably, the Court took a rights-based approach, as one would expect from a constitutional court. It is the same reasoning as that adopted by the European Parliament in the vote on Amendment 138 and reflects Reding's words that the Internet has become fundamental to freedom of expression, granting new constitutional rights to Internet users. Like it or not, this means that citizen access to Internet content is now a right of some sort, and we have definitively moved beyond an economic model for access. However, the Second Reading debate took place in the month between passage of the HADOPI law through the French Parliament (up to 13 May) and its striking down in part on 10 June.

European Parliament Second Reading: 6 May Vote

The European Parliament on 6 May 2009 decided to reject the compromised Rapporteur-Council amendment on the proposed User Rights Directive at Second Reading,³⁰ thereby invoking the Conciliation process.³¹ What happened is that the First Reading vote of the Parliament had decided that no provider could cut off a user's access without judicial approval. The Rapporteurs of the Committees (Malcolm Harbour was one, quoted at the top of the chapter) agreed to water down this amendment to the original Commission/Council proposal at a meeting the day before the Second Reading vote. The Parliament as a whole then voted down the political agreement by reinstating the amendment.

The Council of Ministers on 12 June refused to agree to the new Parliamentary amendment, and the entire E-Communications Package would be put to a Conciliation Committee of the Council of Ministers and Parliament. If that Committee could not reach an agreement in autumn

2009, the entire package would fail. Previous experience of such a Committee failing was until 2009 unprecedented, but the Working Time Directive did in fact fail to reach agreement in Conciliation in 2009, after a five-year legislative process.³²

Rapporteur Catherine Trautmann's report included the original Amendment 138/46 as adopted in the First Reading by the European Parliament. The initial text 'without a prior ruling of the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights' was replaced by 'and the right to a judgment by an independent and impartial tribunal established by law and acting in respect of due process in accordance with Article 6 of the ECHR.' Although the proposed French HADOPI authority established by the three-strikes French draft law, if passed, is not a 'tribunal established by Article 6 of ECHR', the text allowed vaguer legal interpretations by removing 'prior ruling', which the French government interpreted as permitting such an authority to disconnect a user's Internet access, with later court challenge possible to this decision. In order for Parliament to vote to reassert its will on user rights, MEP Rebecca Harms insisted on a change in the voting list to vote on Amendment 138 before the rest of the package. She was supported by MEP Alexander Alvaro and disagreed with by Rapporteur Trautmann. By European Parliament standards of multilingual discretion, this was a sensational and stormy vote.

The removal of Amendment 138 of the Telecoms package by the European Council and Rapporteurs Harbour and Trautmann was overturned. It appears Harbour and Trautmann, very practical conservative politicians, were reaching a compromise on the package in the interests of its wider adoption. The Harbour Report changed initial Net Neutrality Amendment 166 (adopted in the First Reading in 2008) to customer information through contracts. Many argue that consumer and competition law are inadequate by design to regulate fundamental rights. The compromise with the Council includes the text 'limitations on access to and/or use of services and applications' which is much vaguer than the Amendment 166 language of:

Member States shall ensure that any restrictions on the rights of users to access content, services and applications, if such restrictions are necessary, are implemented by appropriate measures, in accordance with the principles of proportionality, effectiveness and dissuasiveness.

Harbour described civil society lobby concerns over net neutrality as ‘pure fantasy ... There is absolutely nothing in this proposal that says anything about that.’³³ Harbour had in April admitted that there were service limitations in his own report, as cited in the quotation at the beginning of this chapter.

Except for Amendment 138, the other citizen rights amendments were rejected at Second Reading, adopting the Harbour report and rejecting the Trautmann report. The Parliament declared that it expects Conciliation without which the whole package will fall; the Commissioner asked the Council to accept this single amendment in the interests of the wider package, but the Czech Presidency of the Council responded extremely aggressively, on what was actually the Czech government’s last week in office.

The UK government position was that the amendment makes direct reference to the Charter of Fundamental Rights of the European Union within the text of the new Framework Directive, despite the fact that the Charter has no legal standing until it is ratified – a process directly linked to the ratification of the Lisbon Treaty. Additionally, government legal advisers have indicated that the Clause of the Charter referenced creates additional legal inconsistencies that would create a cumbersome and disproportionate process that would require further legal clarification through both national courts and, no doubt, the European Court of Justice. One option that has been muted is to agree the Citizens’ Rights directive and the new Regulation creating the European Body of Regulators (now known as [BEREC]) and limit the Conciliation process to issues relating to this amendment. The Swedish Presidency (July–December 2009) will have to settle the matter, in a country with very high awareness of digital rights issues thanks to the Pirate Party.

Horten explains that the intention of the Council was to weaken, if not to remove, Amendment 138/46: the change from the reference to the Charter of Fundamental Rights of the European Union (the ‘Nice Charter’) to the Convention for the Protection of Fundamental Rights and Freedoms, which is an instrument of the Council of Europe. First of all, the Nice Charter is non-binding – it would have been binding if the Constitutional Treaty had been ratified, and it will be when/if the Lisbon Treaty will be ratified by all Member States, which may occur if the Irish referendum produces a ‘Yes’ vote.

The watering down of rights language, and especially the HADOPI law permission for a tribunal rather than court to remove users’ Internet access, is of course extremely controversial and constitutionally outrageous. In the case of the original amendment 138/46, the Commission would have to take

France to court, as a part of an infringement procedure to assert that the establishment of HADOPI and the latter's enforcement of the three-strikes policy would be a violation of Community law. An alternative scenario might take place if a French court asks the European Court of Justice what would be the correct interpretation of the term 'judicial authority' and/or 'independent and impartial tribunal', possibly on the basis of a request by one of the parties of the case. This would be known as a preliminary ruling.³⁴

User Rights and the Amended Text: A 'Lite' Compromise?

The outcome of 6 May was, if not perfect, satisfactory for the Commission, with much greater focus on consumer rights and transparency than the Council of Ministers had initially wanted— but no prevention of QoS by providers if that is clearly notified to the consumer in advance. Note that dispute settlement procedures are included without prejudice to statutory rights,³⁵ and the text has encouragement of co- and self-regulation where appropriate. The texts are as follows³⁶ beginning with Recitals.

(22) End-users should be able to decide what content they want to send and receive, and which services, applications, hardware and software they want to use for such purposes, without prejudice to the need to preserve the integrity and security of networks and services. A competitive market will provide users with a wide choice of content, applications and services. NRAs should promote users' ability to access and distribute information and to run applications and services of their choice, as stated in Article 8 of Directive 2002/21/EC. Given the increasing importance of electronic communications for consumers and businesses, users should in any case be fully informed of any limiting conditions imposed on the use of electronic communications services by the service and/or network provider. Such information should, at the option of the provider, specify the type of content, application or service concerned, individual applications or services, or both. Depending on the technology used and the type of limitation, such limitations may require user consent under Directive 2002/58/EC.

The FCC's Four Internet Freedoms are listed to begin the Recital. First, note that competition 'will' solve the problem, but then also note the information transparency requirements laid on top of this, though 'at the option of the

provider', which suggests self-regulation. Then note that the Recital goes on to constrain both ISPs and national governments' abilities to intrude inside user traffic.

(22a) Directive 2002/22/EC neither mandates nor prohibits conditions imposed by providers, in accordance with national law, limiting users' access to and/or use of services and applications but does provide for information regarding such conditions. Member States wishing to implement measures regarding users' access to and/or use of services and applications must respect the fundamental rights of citizens, including in relation to privacy and due process, and any such measures should take full account of policy goals adopted at Community level, such as furthering the development of the Community information society.

(22b) Directive 2002/22/EC does not require providers to monitor information transmitted over their networks or to bring legal proceedings against their customers on grounds of such information, nor does it make providers liable for that information. Responsibility for punitive action or criminal prosecution is a matter for national law, respecting fundamental rights and freedoms including the right to due process.

The European Commission introduced some last-minute drafting in a new Recital 26 to the Universal Services Directive 2002/22/EC to make clear their position. Recital 26 passed at Second Reading by the European Parliament reads as follows:

A competitive market should ensure that users enjoy the QoS they require, but in particular cases it may be necessary to ensure that public communications networks attain minimum quality levels so as to prevent degradation of service, the blocking of access and the slowing of traffic over networks.

In order to meet QoS requirements, operators may: use procedures to measure and shape traffic on a network link so as to avoid filling the link to capacity or overfilling the link, which would result in network congestion and poor performance.

These procedures are subject to scrutiny by NRAs acting in accordance with the provisions of the Framework Directive and the Specific Directives

to ensure they do not restrict competition, in particular by addressing discriminatory behaviour.

If appropriate, NRAs may also impose minimum QoS requirements on undertakings providing public communications networks to ensure that services and applications dependent on the network are delivered to a minimum quality standard, subject to examination by the Commission.

NRAs are empowered to take action to address degradation of service, including the hindering or slowing down of traffic, to the detriment of consumers.

However, since inconsistent remedies can impair the achievement of the internal market, the Commission should assess any requirements intended to be set by NRAs for possible regulatory intervention across the Community and, if necessary, issue comments or recommendations in order to achieve consistent application.

Note that this begins by discussing anti-competitive activities, but then goes on to discuss common carrier-type requirements to protect consumers. It is definitely 'lite', referring only to degradation of service. The vital first point to note is that this is net neutrality 'lite': the formula is to 'prevent degradation of service, the blocking of access and the slowing of traffic over networks'. That allows NRAs to intervene where service slows, from its current level. It includes safeguards for the Commission to set standards where national regulators may diverge. Should these proposals become legislation in 2010 at the European level and therefore 2012 at national level, they may go some way towards satisfying the concerns of consumers for transparency and for ISPs with flexible regulatory responses. However, if a week is a long time in politics, three years is an eternity in broadband content development.

The Directive itself includes text that explains the ISPs' duty to inform subscribers of their traffic management policies in Article 20(1):

Article 20: Contracts

1. Member States shall ensure that, when subscribing to services providing connection to a public communications network and/or publicly available electronic communications services, consumers, and other end-users so requesting, have a right to a contract with an undertaking or undertakings providing such connection and/

or services. The contract shall specify in a clear, comprehensive and easily accessible form at least:

- (b) the services provided, including in particular ...
 - information on *any other conditions limiting access to and/or use of services and applications, where such conditions are allowed under national law in accordance with Community law*
 - the minimum service quality levels offered, namely the time for the initial connection and, where appropriate, other QoS parameters, as defined by the NRAs,
 - *information on any procedures put in place by the undertaking to measure and shape traffic so as to avoid filling or overfilling a network link and on how those procedures could impact on service quality,*
 - the types of maintenance service offered and customer support services provided, as well as the means of contacting these services,
 - any restrictions imposed by the provider on the use of terminal equipment supplied.

It then explains in Article 21(3) that such measures may be self- or co-regulatory:

Article 21(3):

Member States shall ensure that NRAs are able to oblige undertakings providing *public electronic communications networks and/or publicly available electronic communications services* to inter alia:

... (b) inform subscribers of any change to *conditions limiting access to and/or use of services and applications, where such conditions are allowed under national law in accordance with Community law;*

(ba) *provide information on any procedures put in place by the provider in order to measure and shape traffic so as to avoid filling or overfilling a network link, and on how those procedures may impact on service quality; ...*

If deemed appropriate, NRAs may promote self- or co-regulatory measures prior to imposing any obligation.

In Article 22(3) it explains that NRAs must be informed by ISPs and must inform the Commission before taking further action:

In order to prevent the degradation of service and the hindering or slowing down of traffic over networks, Member States shall ensure that NRAs are able to set minimum QoS requirements on an undertaking or undertakings providing public communications networks.

NRAs shall provide the Commission, in good time before setting any such requirements, with a summary of the grounds for action, the envisaged requirements and the proposed course of action. This information shall also be made available to BEREC. The Commission may, having examined such information, make comments or recommendations thereupon, in particular to ensure that the requirements do not adversely affect the functioning of the internal market. NRAs shall take the utmost account of the Commission's comments or recommendations when deciding on the requirements.

Within the limits of legislative wording, and given that any law will then be implemented in the 27 Member States with harmonization needed between their NRAs, this language appears to offer those NRAs who wish to become more active on net neutrality and consumer rights the opportunity to do so. It is not clear how much enthusiasm such NRAs will have when this finally becomes national law, perhaps in 2012.

Events of 12 June – Towards User Rights for European Internet Users?

The Czech Presidency effectively delayed the response to the Parliament vote in the Telecoms Council of 11 June, not formally discussing the issue: 'the Council cannot take any formal position at present, since the Parliament has still not officially informed the Member States about its Second Reading position.'³⁷ It thus washed its hands of its sorry European Presidency, a Presidency in which its economy had continued to fail and its government had been forced to resign. It will be for the Swedish Presidency in autumn 2009 to pick up the issue, with the newly elected European Parliament elected on 6 June for the period 2009–14. A Trialogue (Commission, Presidency, Parliament) is scheduled for late September and a formal vote on 15 December 2009. As you read this, you will know whether the Council will accept Amendment 138 in order to get the package agreed, or whether the Parliament will back down. MEP Malcolm Harbour was re-elected so it may still be his brief, with the interested two new Pirate Party members of the Parliament! These are tumultuous times for European digital rights.

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