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http://dx.doi.org/10.1386/jdtv.7.3.331_1

Title	Intervention, net neutrality and European Union media policy
Authors	Simpson, S
Publication title	International Journal of Digital Television
Publisher	Intellect
Type	Article
USIR URL	This version is available at: http://usir.salford.ac.uk/id/eprint/39029/
Published Date	2016

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Pre-Publication Version: Version Accepted for Publication in the *International Journal of Digital Television* (18 May 2016)

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Abstract

Net Neutrality was once in Europe thought to be a technically arcane subject with little policy relevance beyond the USA. However, its dominant articulation as the idea that Internet Service Providers should treat equally communication traffic of a broadly similar kind has emerged as a growing site for policy debate and contestation. Academic understanding of Net Neutrality is still in relative infancy and work on the subject from a European media policy – and specifically an EU - perspective is in particular need of development. This article argues that current dominant Net Neutrality perspectives and their policy complexities, whilst valuable, do not provide a comprehensive enough policy context within which to consider the future governance of electronic communication networks and services in a context of network convergence around the Internet. This is because debates on the idea of intervention, which sits at the core of Net Neutrality, have been under-addressed and narrowly focused. This is illustrated in the case of EU policy on Net Neutrality which the article finds has been tentative, often blandly rhetorical and, for the most part, focused on a narrow range of techno-economic matters.

Key words: Internet neutrality, media, policy, EU, governance

Introduction

Net Neutrality was once in Europe thought to be a technically arcane subject with little policy relevance beyond the USA. However, its dominant articulation as the idea that Internet Service Providers should treat equally communication traffic of a broadly similar kind has emerged as a growing site for policy debate and contestation. Academic understanding of Net Neutrality is still in relative infancy and work on the subject from a European media policy – and specifically an EU - perspective is in particular need of development.

There are two core elements of inquiry in this article. The first concerns the different – sometimes paradoxical - aspects of Net Neutrality as a concept and set of practices related to the idea of intervention or otherwise in the communication sector. The second concerns an analysis of the EU's Net Neutrality policy to date and the scope for an expanded articulation of it through a focus on the idea of the pursuit of 'neutrality' through intervention. The backdrop for this analysis are developments in media convergence and, specifically, the growth and future potential of the Internet as an infrastructure for broadcasting, as well as the other well established forms of communicative exchange which currently take place through it.

An exploration of the EU's treatment of Net Neutrality is important for the following reasons. First, the EU has developed over a long period of time, pre-dating in part the mass usage of the Internet, a particularly detailed regulatory framework in electronic communications whose parameters directly address a number of the core aspects of the Net Neutrality debate as currently defined. Second, the EU is noteworthy in that despite its detailed policy history of involvement in the electronic communications and broadcasting sector at the national and EU level, research suggests that, compared to the US, Net Neutrality has been relatively

under-addressed (see Powell and Cooper, 2011). In the latter, the debate has been particularly prominent. Here, Timm (2015: 1) argues that 'what was both a polarizing and a back-bench issue just a year ago is now a galvanizing force even for those who don't pay close attention to politics'. A 2014 Federal Communications Consultation document on Net Neutrality received as many as four million comments (Ruiz and Lohr, 2015). Subsequent to this, in a landmark decision, in Feb 2015, the Federal Communications Commission decided to reclassify high speed broadband service as a telecommunication service treating its providers as public utilities which could be closely regulated by the FCC (Ruiz and Lohr, 2015).

Third, despite the lower profile of Net Neutrality in Europe, the EU has a noteworthy history of debating the extent to which, and how, policy intervention in the communication sector should take place. It therefore possesses, in theory, the deliberative capacity to explore a number of issues germane to Net Neutrality, not least whether the concept as currently defined and expressed in policy actions should be more extensively envisioned. The article's analysis of the EU's policy on Net Neutrality to date finds that it has been (perhaps understandably) tentative, often blandly rhetorical and, for the most part, focused on a narrow range of techno-economic matters. The EU Net Neutrality debate also displays some signs of the classic industrial policy-public policy tensions which have been evident elsewhere in the history of EU policy on electronic communication, not least between the European Parliament and the European Council.

More broadly, the article argues that current dominant Net Neutrality perspectives and their policy complexities, whilst valuable, do not provide a comprehensive enough policy context within which to consider the future governance of electronic communication networks and services in a context of network convergence around the Internet. This is because debates on

the idea of intervention, which sits at the core of Net Neutrality, have been too narrowly focused and often dogmatic. Until now, the Internet's governance agenda has been characterised, on the one hand, by the market-liberal IT and telecommunications sectors' vision of the information environment and, in counterpoint, the historic Internet civil society's goals of non-interference. Both these perspectives have entailed in them legitimate claims about the way online communication should be structured and conducted. The debate on Net Neutrality has, thus, for the most part, been a mix of exhortations of free market liberalism, on the one hand, and communications libertarianism on the other. These have tended to hold particular versions of the idea of intervention to deliver visions of neutrality.

In practice, Net Neutrality analyses have tended to focus, understandably, on the behaviour of Internet Service Providers. However, this is now a limitation of Net Neutrality, as well as a strength. It is necessary to envision Net Neutrality issues much more broadly, as media convergence deepens and the interest of media content providers from the broadcasting realm in the Internet intensifies. Over the course of the next 10-20 years, as high speed fibre networks are more extensively rolled out and become yet more capacious, broadcasting will gravitate significantly towards online platforms. Such a move adds to the perspective of Net Neutrality as a policy goal rather than a currently existing state of affairs in need of protection, whose attainment requires sustained intervention of various kinds. This has the potential to lead to a less defensive and narrow, and more progressive, media policy environment. For the EU, given that Net Neutrality is currently in a temporarily open and contestable state, an important policy opportunity presents itself which, however, it shows little sign of grasping to this point.

The arcane debate on net neutrality: regulation versus non-interference

Debates on Net Neutrality have tended to polarise around different perspectives on issues of 'freedom' on the one hand, and 'intervention', on the other. This is important to consider, since, as Lentz (2013: 574) points out, 'understanding neutrality's linguistic past is necessary to (re)shape the *meaning* of its semantic future'. Specific articulations of Net Neutrality stretch back to the early part of the last decade where Tim Wu, widely recognised as having coined the term, envisoned the Internet as an open public communication infrastructure across which the running of applications would not be subject to discrimination (Wu, 2003). The essence of Net Neutrality from this public space perspective was minimalist: Internet Service Providers should treat equally traffic of a broadly similar kind and should not engage in blocking of applications without the approval of the consumer. Very importantly, this view was strongly analogous with the historic US telecommunications service principle of common carriage.

To date, therefore, Net Neutrality has been dominated by techno-economic matters. Despite this, issues of intervention and freedom are strongly in evidence in the consideration of the relationship between telecommunications network operators that provide Internet access, and content and application service providers and Internet users (Belli, 2013). The historic 'end to end' architectural principle of the Internet meant that discrimination between types of content did not occur. Routing on the Internet occurred in a non-discriminatory way. Similarly, users could create new services, applications, protocols and devices without any consultation with network operators. Network operators all had the opportunity to interconnect with each other (Center for Democracy and Technology, 2006).

These origins aside, it is important to note that 'non-neutral' behaviour has been strong in evidence generating considerable controversy in the process. In one context, this has involved intervention in network traffic proceeding through the Internet by entities with enough control over the infrastructure to do so. On the other hand, intervention on Net Neutrality grounds can involve the putting in place of regulatory specifications that aim to limit or eradicate this kind of conduct. The basis of this is that ISPs hold a privileged position between content producers and consumers in so-called two sided markets characteristic of the Internet. In economic terms, the ISP is potentially able to exploit its knowledge of both application and content providers and consumers to extract maximum economic rents from them, but particularly the latter which are in a relatively weak bargaining position, even in a competitive ISP market (due to lack of knowledge about what is a technically complex service offering).

In a legal-economic analysis of Net Neutrality, Marsden (2011) considers Net Neutrality to possess two core contrasting elements, each of which is characterised by intervention. The first 'positive' element concerns whether differential charging for better quality communication services in a future Next Generation Network environment should occur. Here provision of higher quality services to users (for a higher rate than standard services) on fair, reasonable and non-discriminatory (FRAND) terms, might be viewed as a kind of common carriage (Brown and Marsden, 2013) but for many creates concerns over equality of opportunity in communication. Relatedly, focus has occurred on what is termed access tiering, where access providers give 'priority, at a price independent from Internet access fees to applications, service and content providers that are willing to pay for quality of services' (DLA Piper 2009: 12).

The second, rather different, 'negative' element is intervention through technical means and refers to actions by ISPs which degrade or 'throttle' the service provided to certain customers, often Peer-2-Peer users, in cases where these customers are considered to be extracting maximum advantage from applications utilised over their Internet connections (Marsden 2010: 29). In extremis, blocking is a tactic that can be achieved through increasing the difficulty of access - or the complete blocking of access - to certain online services or websites. Aside from taking the decision to reduce the quality of service to perceived network misusers, throttling a certain kind of traffic can be undertaken as intervention to manage the system more efficiently and minimise congestion at key times. However, such behaviour can also be done in an anti-competitive fashion to degrade services provided by a competitor, something likely to be viewed widely as undesirable. Beyond techno-economic matters, the idea of providing equal access to a service of minimum un-degraded quality is a kind of universal service argument. The evidently highly regulable nature of online communication puts into context earlier contentions of the Internet as an uncontrollable space of free communication (see Mueller 2002).

A key issue in the Net Neutrality debate is the emergence of Deep Packet Inspection technologies (DPI). Brown and Marsden (2013) cite examples where filtering and censoring by file type and content provider can occur. Intervention to inspect 'packets' of information that traverse the Internet is technically complex but also deeply laden with public policy issues. Each packet contains a data section which holds the data to be sent as well as a header section which provides information related to the source and destination of the packet. In the process of routing of packets, the header section is inspected to complete the task. This kind of inspection can also be used to filter content and can manifest as giving higher or lower priority to data from a particular source or even the outright blocking of data destined for a

particular source. Beyond this, Deep Packet Inspection (DPI) allows inspection of the data section of the packet. This process can be used for interventions aimed at protecting the security and integrity of the network by tackling viruses and spam and other illegal material. It can also be utilised to undertake highly detailed traffic monitoring and shaping and data gathering about network usage down to the level of the individual subscriber (DLA Piper 2009: 6).

In this vein, the technical achievements of DPI can come into conflict with the protection of privacy and the promotion of individual and public civil liberties. ISPs, in inspecting data, for example, may be in breach of Article 8 of the European Convention for the Protection of Human Rights and fundamental Freedoms (ECHR) and Articles 7 and 8 of the Charter of Fundamental Rights of the EU (MacDonald, Cannella and Ben-Avie, 2013: 51). Key issues are freedom of expression and the unfettered availability and transmission of digital products and services, as well as the ideas and communications which arise from their usage (Belli, 2013). According to McDiarmid and Shears (2013), the Internet's development has contributed to two international free expression standards: borderlessness and choice (McDiarmid and Shears 2013: 29). Such issues have been given important airing at the global institutional level in recent years at the World Trade Organization in respect of the exchange of content online as digital goods and services and, by contrast, at UNESCO where the idea of Internet universality has been articulated through the so-called R.O.A.M principles. The latter declare that the Internet should be based on human rights; should be open and accessible; and should be developed through a multi-stakeholder participative process.

Finally, consideration of the existence of potentially exclusionary behaviour also draws in content and applications providers related to the creation of so-called 'walled gardens' and

their often uneasy relationship with network operators. This is particularly relevant in the wireless broadband services context where Blackberry's Chief Executive has recently been critical of the behaviour of companies such as Netflix, Apple and Google. However, regulatory intervention on Net Neutrality grounds is controversial (Hern, 2015). It has been argued, for example that 'the reason people are willing to pay for internet access is so they can access Internet content and applications. For consumers, Internet access is a means to an end. Network providers are dependent on this demand to monetize their substantial investments' (Williamson, Black and Punton 2011: 11).

These different understandings of Net Neutrality have developed through a period of time in which the Internet became an increasingly significant platform for the delivery of media services bearing the character of IT, telecommunication, broadcasting and publishing, as well as hybridised versions of each. This migration and convergence has thrown open, and continues to sustain, a debate on the purpose and nature of media policy, which opens up the prospects for more expansive notions of Net Neutrality to be considered. One of the thorniest issues of the debate on convergence in Europe for many years has been how, if at all, to address the governance of media content delivered through new online networks, platforms and services. A significant and understandable tendency in this process in Europe - particularly evident in the debate on convergence of the late 1990s (Levy, 1997) and carried forward into the subsequent decade - has been for interests in broadcasting to re-trench somewhat conservatively within the 'traditional' structures and practices of the sector in order to protect long standing public service and cultural interests articulated principally at the national level. This 'defensive mode' can be explained by the telecommunications and IT sector dominated agendas of convergence (European Commission, 1996), the latter having taken shape most extensively through the Internet.

Such a policy history is all the more significant since the direction of travel for the delivery and consumption of real time and alinear audiovisual content appears to be very significantly towards the Internet. Debates over the use of spectrum currently used for digital terrestrial television, for example, point in the direction of a search for alternative technological infrastructures for the delivery of televisual content (Rashid and Simpson, 2016). In the future, Internet Protocol is likely to be one of the main ways – possibly the predominant way - of providing such content. In the UK, the BBC's decision to move its youth oriented channel, BBC3, online, though economically motivated in significant part, is also suggestive of future consumption patterns of this generation of its viewers. The BBC's Director of Future Media has talked of 're-imagining BBC3 into an online channel' in the context of an 'Internet first' (Rivera, 2015) strategic re-orientation of the corporation. The policy drive internationally towards the creation of so-called Next Generation Networks (Michalis, 2016) with very large capacity further underlines the scope for transmission and consumption of broadcast content through Internet based networks. The growth of online content providers, such as Netflix, offering essentially 'flat rate' film on demand provides further evidence of a re-working of the idea of a broadcast channel. The prominence of Youtube channels provides another example of the genesis online of 'broadcast like' activity. The gravitation of broadcasting increasingly towards the Internet is likely to hold profound implications for public service aspects of media. Its future sustainability in financial terms (though far from a new issue), content, organisation and means of delivery are now open to intense scrutiny.

The emergence of broadcasting to prominence in consideration of the future development of the Internet bears implications for Net Neutrality and, specifically, the kinds of intervention which might be seen as appropriate to realise an expanded articulation of it. Ideas of equality

and the pursuit of equality of opportunity and experience are interesting to consider here. Powell and Cooper (2011: 316), for example, have noted the significance of the 'egalitarian connotations' of 'the core concept of "neutrality"'. Musiani and Loeblich (2013) also reflect on the possible conceptualisation of Net Neutrality in terms of policy making to pursue the kind of balance analogous to certain kinds of journalistic reporting. More fundamentally, what Des Freedman (2008) defines as the core principles of media policy - freedom of information and expression, the public interest, plurality and diversity - are likely to become more prominent as the values and practices of broadcasting enter further the Net Neutrality equation. This has the potential to present opportunities for creating a new social imaginary - 'widely shared understandings that have achieved general legitimacy' (Mansell, 2012: 32) for Net Neutrality.

The EU and Net Neutrality

With its international character and policy history of intervention in communications, what has been the shape of the EU's policy on Net Neutrality to date? In the EU, the Electronic Communications Regulatory Framework (ECRF) sets the parameters for the functioning of communications market. However, the ECRF possesses a distinctly narrow character and reflects strongly a techno-economic treatment of Net Neutrality in a number of ways. The ECRF covers the regulation of all electronic communications infrastructures across the EU where policing and development of competitive market behaviour and provision is prominent. Article 8 of the EU's Framework Directive in communications charges national regulatory authorities (NRAs) with the task of facilitating users to 'access and distribute information or run applications and services of their choice' (European Commission 2009: article 8(4)). Regulators must intervene to ensure that the integrity and security of public communications networks are maintained, in particular, to allow interoperability and end to

end connectivity. It is also the obligation of regulators to take a long term view of the development of communications networks to deliver the most efficacious technical and commercial environments.

Second, the Framework contains a key legislative provision on universal service. Here, article 21 of the Universal Service Directive requires that consumers be informed fully of any restrictions on access to, or use of, services and any traffic management measures utilised by a service provider and their potential effects on service quality (European Parliament and Council 2009b: article 21). The directive also makes provision for the right of consumers to switch between providers, and allows national regulatory authorities (NRAs) to set minimum quality of service parameters for network transmission services. Third, the framework contains key directives on data protection (European Parliament and Council 1995) and privacy (European Parliament and Council 2001) which hold significant implications for the development of policy and regulation in respect of Net Neutrality, in the particular respect of any traffic management or blocking activity that might infringe an individual's right to protection of data and privacy. A key development in Europe occurred around the acceptance of what is known as the essential facilities doctrine i.e. network infrastructure that could not be reasonably be replicated by a competitor because of economic cost non-viability. Here, EC law allows intervention to ensure that action is taken against any monopoly operator who restricts access to competitors. Such intervention should result in access being offered to competitors to the incumbent on Fair, Reasonable and Non-Discriminatory (FRAND) terms. Interestingly, this principle is one according to which public service broadcasters, such as the BBC, operate.

Net Neutrality first emerged as a high profile issue in negotiations that led to the revision of the EU's ECRF, begun in 2006. The European Parliament threatened to de-rail the process until conciliations were offered to it on Net Neutrality manifest in the Commission's Declaration on Net Neutrality which became an appendix of the 2009 Better Regulation Directive (European Parliament and Council 2009 – 2009/140/EC). In the revised EU framework, Member States can act against direct and indirect attempts to discriminate against content, which applies equally to all ISPs regardless of their market position (Marsden 2013). The Declaration notes the importance of Net Neutrality as a 'policy objective and regulatory principle'. Member States agreed to promote transparency and the prevention of traffic slowing and degradation. The Commission committed to monitor member states' performance in these respects and to report on them in its annual implementation reports on the ECRF. Finally, it was noted that the Commission would monitor the impact of developments in technology and the market in respect of Net Neutrality in the EU and would use its competition law powers as necessary to deal with anti-competitive practices that might be deemed to be infringing it.

A key subsequent development in the debate on occurred with the launch by the European Commission in June 2010 of a consultation on Net Neutrality. According to Brown and Marsden (2013), the consultation produced around 300 submissions, which showed a split between the communications industry, which advocated intervention, and users, which were broadly against. Subsequent hearings held by the European Parliament and the Commission were, in their view, industry dominated. Further to this, in April 2011, the European Commission issued a policy communication on Net Neutrality (European Commission 2011). It argued, rather narrowly, that the debate tended to centre on the nature and extent of traffic management by broadband infrastructure providers and network operators, with particular

emphasis on the degree to which blocking and degradation of traffic was occurring in any particular instance and the reasoning behind this.

As might be expected, the Commission placed particular emphasis on the role which effectively functioning competition would play in delivering a 'neutral' – essentially a free market - environment for online services. Highlighted here was the provision of full information to consumers, the ability to churn readily between service providers and the availability of an acceptable number of alternative service providers for consumers to choose from. These provisions are directly related to a telecommunication dominated, techno-economic policy agenda around media convergence at EU level apparent since at least the late 1990s. Interestingly, the Commission argued that 'the significance of the types of problems arising in the net neutrality debate is therefore correlated to the degree of competition existing in the market' (European Commission 2011: 4). This holds open the possibility of examining Net Neutrality through a critique of competition, though its inference is that a lack of market competition thwarts the realisation of Net Neutrality. The Commission has subsequently placed emphasis on regulatory measures in the ECRF to ensure wholesale access for competitors to incumbent networks as well as spectrum allocation using market parameters. Alongside the regulatory framework, EU competition law was available to deal with problems arising from market dominance. The Commission noted with satisfaction that, in the EU, Internet access was not subject to specific regulation given the breadth and variety of service provision.

The Commission also addressed the issue of traffic management and Net Neutrality acknowledging the existence of a debate on the extent to which this should be allowed to occur, and in what form. It reported that its consultation had provided a broad indication that

there was acceptance of the utility and even the necessity of some kind of data traffic management in the interests of network and services efficacy. The Commission concluded that across the EU 'there was broad consensus that operators and ISPs should be allowed to determine their own business models and commercial arrangements' (European Commission 2011: 7) as long as they stayed within the law. Giving a flavour of the evolutionary and somewhat tentative nature of much of the debate on Net Neutrality, the Commission indicated that it would essentially maintain a watching brief in respect of traffic management in conjunction with the work of the pan-EU communications regulator, the Body of European Regulators in Electronic Communications (BEREC). One argument is that traffic management can be reasonably deployed for tasks such as blocking spam, viruses and denial of service attacks, to minimise problems of congestion by treating the same type of traffic equally (though not different types of traffic). However for MacDonald, Cannella and Ben-Avie, (2013: 50), 'allowing ISPs to offer guaranteed quality of service exclusively to one or more applications within a class of applications… should be prohibited'. The Commission made its position clear that the provision of full and accurate information to consumers was a key aspect of Internet neutrality. Here, it specifically referred to the high profile issue of discrepancy between published and actual download speeds encountered by consumers. It pointed towards the role which regulation at the national level and EU level, the latter through the offices of BEREC, should play in the future assurance of appropriate quality of service provision, all achievable under the aegis of article 22 of the Universal Service Directive.

Marsden (2010) argues that since the 2006 review of the ECRF, the direction of regulatory travel in Europe has been toward restricting the development of the Internet with public safety reasons in mind. Whilst this may be delivered, it must be acknowledged that its pursuit

has, in his view, serious implications for freedom of speech and expression, as well as the development of free market competition. Musiani and Loeblich (2013) argue that, in the EU, the must carry regime might be usefully applied to the online environment to ensure that essential public services are provided appropriately, that is, that they are accessible and then receivable at a reasonable speed (Musiani and Loeblich 2013).

In 2013, the Commission released an important proposal for a Regulation on the single market in electronic communication, part of which addressed Net Neutrality. However, the content of the proposal was ambiguous, if not contradictory, in nature, not to mention narrow in approach. Whilst Article 23 prohibits access providers from blocking, slowing down and discriminating against specific services, content or applications, at the same time access providers would be sanctioned to enter agreements with large content providers to prioritise content. Access providers could also impose data caps in contracts and grant priority to their own services, like Deutsche Telekom did with its T-Entertain service (MacDonald, Cannella and Ben-Avie, 2013: 53). The politics of this proposed regulation internally in the Commission hinted at its controversial nature. A leaked internal document highlighted concerns from DGs Justice, Enterprise and Industry and EU Commissioners (EDRi 2013). Marsden (2013) argued that the proposed regulation 'enforces Net Neutrality 'lite''. In March 2014, the European Parliament considered the Commission's proposals and moved to close off the possibility of discriminatory provision through an amendment which declared that 'the principle of "net neutrality" means that traffic should be treated equally, without discrimination, restriction or interference, independent of the sender, receiver, type, content, device, service or application' (European Parliament 2014, cited in Solon 2014). However, in early 2015 the ongoing debate on Net Neutrality took another turn. A leaked document from the European Council reportedly outlined a proposal to allow ISPs to offer Internet

access services at different speeds both to individual and corporate customers, with the caveat that, in so doing, the wider efficacious functioning of the Internet could not be undermined (Thomas and Crow, 2015). This move was in contrast to the 2015 decision of the US FCC to re-classify broadband providers as public utilities. The Net Neutrality debate in the US that preceded the FCC decision was characterised by a remarkable mobilisation of public support alongside side a commercial lobby of new media companies. These interests argued that the FCC should intervene where necessary to ensure that all content travelling through the Internet was treated on an equal basis and that commercial strategies in the area of paid priority for services should be ruled against. Weisman (2015) argues that the debate 'pitted new media against old and may well have revolutionized notions of corporate social responsibility and activism'.

By contrast, the EU's move was seen as evidence of the power of Europe's large traditional telecommunications operators which reportedly wrote to the EU arguing for rules that would allow flexible traffic management to satisfy different customer needs (Reuters, 2015). In a different way, this episode arguably illustrates the EU's less favourable stance on major Internet applications and platform providers, such as Google (Thomas and Crow, 2015). The matter is likely to have considerations of EU-US commercial competitivity as an underpinning, something with long-standing origins in telecommunications, but is also influenced by the view that issues of Net Neutrality should concern not just market power exercisable by access providers but also powerful platform and applications companies. In October 2015, the European Parliament voted in favour of new Net Neutrality regulations (European Parliament and Council, 2015). Whilst trumpeted by the EU as a move which enshrines strong measures to deliver Net Neutrality across the EU, Belli and Marsden (2015) argue that 'rather than unequivocally affirming the three pillars of net neutrality, *i.e.* no

blocking, no throttling and no paid prioritisation, the EU policymakers enshrined only the first two components in the regulation, thus tempering neutrality into a less principled vague "open internet"'. Concerns exist in respect of paid prioritisation where the Regulation will permit so-called guaranteed-quality services, other than Internet access services, but only when there is sufficient network capacity to do so. Clearly, the determination of the latter will place great responsibility in the hands of national regulatory authorities and is it an open question as to whether this aspect of the Regulation will serve as a loophole to provide services differentiated on the ability to pay. The fact that this issue has proven the fulcrum of the debate on Net Neutrality further underlines how narrow the confines of its consideration have been to date.

The tentative approach taken by the EU is also to a considerable extent reflected in the work of BEREC. Yet, ironically, given its market regulatory remit, BEREC has shown considerable interest in engaging with the idea of an expanded notion of Net Neutrality. In an important policy statement on competition issues in the debate on Net Neutrality, BEREC promoted Net Neutrality in terms of the idea of a 'best efforts' Internet. This idea is based on the assumption that service providers treat all Internet traffic on the same terms irrespective of its content, application, service, device, sender and receiver (BEREC 2012: 4). BEREC noted clear trends away from this approach in respect of a number of key practices, such as premium priced access offers, blocking or thwarting the development of new services on the Internet by technical means, collusion between content and applications providers vertically integrated with ISPs to block new applications and services entrants (so-called 'walled garden' approaches), and collusion through bilateral agreements between ISPs and content and applications providers to ensure prioritisation of the latter's content over other content and applications providers (ibid).

However, in contrast to the Commission, despite its market regulatory remit, BEREC has noted that whilst strict definition of Net Neutrality might focus on the degree to which identical treatment of content might be pursued through intervention in regulatory terms into the future, it was also the case that deviations from Net Neutrality could 'cause concern for competition and society…[where]…NRAs will need to consider a wider set of principles and regulatory objectives' (ibid: 4-5). This is an important statement and offers some hope for the development of a wider treatment of the concept of Net Neutrality, though such deviation would not necessarily involve a reduction in intervention. BEREC has also hinted that NRAs, and by extension BEREC itself, should in the future recognise the connections between market regulation and more social public interest aspects of media regulation related to Net Neutrality. This assertion was justified through citation of the EU Framework Directive (recital 5) which specifically points to recognition of such connections in order to address fundamental matters of communications regulation such as media pluralism, cultural diversity and protection of consumer rights (ibid: p5). BEREC made the important point that there is evidence that Internet growth rates and costs per unit of capacity provision are declining thereby casting doubt on the argument that discrimination must occur between users to ensure the provision of highly bandwidth consumptive applications (BEREC 2012: 61). This is, of course likely to be contingent on the roll out of high speed network infrastructure across the EU, for which there are key targets as part of the Digital Agenda for Europe. BEREC (2012b) made what could in the future turn out to be a key touchstone reference allowing future regulatory policies for Net Neutrality to be developed at EU level with common effect to be taken across Member States. Specifically, in the relation to the debate on the degree to which the ECRF allows regulators to take action in respect of communications content, BEREC quoted the Framework directive to the effect that

'separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection' (European Parliament and Council, 2002: recital 6) noting that 'as content is being made available through networks, there is the inevitable link…between the regulation of transmission and the regulation of content' (BEREC 2012b: 10).

Conclusion

The current state of the debate on Net Neutrality is absent a detailed stock-taking and rationalisation of the relationship between - and potential - of intervention and neutrality. Here, it is fundamentally important to move beyond a view of neutrality as something which sanctions passivity, remoteness and hands-off behaviour. Doing so, at first base, allows clarification that interventions of various kinds in the flow of Internet traffic have occurred historically by commercial and state actors. This recognition can open a way forward to distinguish between interventionist behaviour whose objective is to restrict and interventionism aimed to promote and enable certain kinds of behaviour. This more nuanced understanding of neutrality provides a context for moving beyond a binary understanding of neutrality as intervention/non-intervention which can promote ideas of equality of access and opportunity delivered through clear interventions to liberate. A frank acknowledgement of the idea of intervention as a necessary element to pursue neutrality as a policy objective provides a context to debate further what might be the best set of policies for the online era. Interventions going beyond the techno-economic and into the social aspects of the public interest at the European level can promote parity of treatment and equality of access, opportunity and experience. This can become a context for flourishing diversity, rather than a move towards uniformity, restriction and conformity. Acceptance of the multi-faceted nature

of intervention allows the possibility to put in place policies that recognise its value but also to understand clearly where its limits lie.

To date, European Union policy on Net Neutrality has adopted a narrow understanding of the topic which restricts the scope of developing its potential. Europeans should be able to provide a collective view at the global level on issues related to an expanded version of net neutrality. The falling behind of European industry in web based network and service environments, as well as mobile communications, provides a case for some kind of coordinated policy response that can have techno-economic as well as public interest dimensions. The alternative is to leave the issue to different approaches at the national level.

This policy territory is undoubtedly difficult, but arguably essential to inhabit, and would mark a qualitative step forward in thinking holistically about the Internet's development beyond liberal market, on the one hand, and out-and-out social libertarian perspectives, on the other. Future media research and scholarship on Net Neutrality in Europe can assist in this process given that it has barely begun to be mobilised as yet. It will be important to monitor and critique the performance of the EU's 2015 Net Neutrality Regulation once it takes effect. However, an equally significant task is to consider the extent to which currently existing EU policies on media content can be developed and applied to Internet communication within the sphere of Net Neutrality. Here, policy issues around media market concentration, pluralism and public service need to be unpacked and their relevance to Internet based media policy in Europe illuminated.

The necessary policy change to develop Net Neutrality, though undoubtedly significant, is not paradigmatic in proportion and will become more urgent. It does amount, however, to

significant adaptation and would not be created quickly. Realising it could in Mansell's (2012: 184) terms ensure, 'the means of encouraging a new social imaginary with more diverse choices involving neither the excesses of hegemonic governance from above with its neoliberal ideology of the market nor naïve trust in the generative power of dispersed online communities, as a means of governance from below'. The debate on Net Neutrality provides a gateway to protect and even extend a number of public interest regulatory values and practices into the consumption of online services and associated content, especially with the continued gravitation of broadcasting towards the Internet. The Net Neutrality debate is already well established on techno-economic grounds, though is still open. The risk is co-option and absorption: the opportunity is to develop at least some public interest parameters for the Internet in the future.

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