Statement by European academics on the inappropriateness of imposing increased internet regulation in the EU.

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The European institutions are currently debating the desirability of imposing restrictions on the way in which internet service providers (ISPs) in the EU can manage their networks and develop their offerings. This is closely related to the 'net neutrality' controversy which has been raging for several years in the United States. We find, however, that it is counterproductive to argue around 'net neutrality'. They key issue is whether internet service providers should be prevented from introducing differentiated quality of service levels on the Internet. Right now, information circulating over the Internet is generally carried under a 'best-efforts' model: ISPs try their best to convey all the information they handle to its destination. This simple model has served Internet users well so far; according to some scenarios, however, it could become impracticable if Internet traffic grows explosively with the rise of video-based applications, services and content. For instance, for most ISPs today, a small fraction of their users (usually less than 10%) account for most of the use of their networks (usually around 80%). This imbalance is not reflected in the subscription rates, even though that small fraction of users does affect the quality of service provided to other users. One way for ISPs to deal with this issue is to introduce different levels of quality of service, so that users (including application, service and content providers) can decide how much quality of service (priority, etc.) they want to purchase.

The ability of ISPs to charge appropriately for services is also crucial to the very large programme of investment under way in Europe to take fibre closer to the home and to provide business and residential customers with the high-speed broadband services which are essential to fulfil Europe's ambitions in the field of creating a knowledge economy. Unnecessary restrictions on quality of service levels will delay the investments necessary to build such networks.

From an economics perspective, we can say that tailoring quality of service provided in a competitive environment more closely to the needs of each user is likely to improve welfare, and should also improve the incentives of ISPs to invest to meet customer demand. At the same time, moving away from the current best-efforts model could change the pattern of innovation on and around the Internet, in ways which are hard to predict. For now, we are concerned that proposed legislation would pre-empt the market by telling ISPs how to carry on their business before we know what the risks are. In other words, at such an early stage, legislative intervention should be limited to clear and identifiable risks which are not otherwise addressed by current laws and regulations.

We are aware that if an ISP associated with an incumbent network operator got into a dominant market position, it could overcharge just about everyone, and in particular

charge more to customers with no rival supplier, like a cable operator. Alternatively, it could privilege certain content, application or service providers over others. EC competition law can deter or punish courses of conduct which are abusive. In addition, we have a fairly reliable mechanism in place since 2003 – the SMP regime under electronic communications regulation – which identifies dominance and guards against abuses by means, for example, of processes for making dominant operators open up their networks to rivals. A second concern is that ISPs could go as far as to block completely the ability of users to access content, applications and services of their choice on the Internet. If such restrictions become too prevalent, the Internet becomes 'patchy' and its ability to deliver benefits to society becomes impaired. Yet any intervention on this point needs to be finely tuned: introducing differentiated quality of service to improve network management implies that some users will choose not to purchase the top level of service, without them being in any way blocked from accessing what they want to. Any measure which denies this informed choice is likely to damage consumers. Consumer protection legislation can and should ensure that people know what they are signing up for. Unfortunately, some ISPs have cut corners over transparency, and we agree that there are good reasons for preventing this happening in the future.

In 2007, in its proposals for a review of electronic communications legislation, the Commission introduced a general principle that 'end-users should be able to access and distribute any lawful content and use any lawful applications and/or services of their choice'[1] and required ISPs to inform their users of any limitations imposed on that right.[2] It also reserved for itself the right to develop minimum quality of service requirements to be imposed on ISPs, if necessary.[3] In first reading, the European Parliament brought these proposals much further by framing the issue as a matter of fundamental rights[4] and entrusting national regulators (the ARCEPs, OPTAs and Ofcoms of this world) with the ability to introduce minimum quality of service requirements.[5] In contrast, on the basis of the political agreement, it seems that the common position of the Council will make no reference to any principle that users should have access to content, applications and services of their choice[6]. The Council would require ISPs to inform users of traffic management policies and quality of service levels.[7] Finally, it would follow the EP in empowering national regulators to introduce minimum quality of service requirements.[8]

In our view, the only legislative intervention which is necessary at this point in time is the one where all institutions agree in substance, namely the provision of information to users

[1] Commission proposal - Addition of Article 8(4)(g) to the Framework Directive (2002/21).
[2] Commission proposal - Rewording of Article 20(5) of the Universal Service Directive (2002/22).
[3] Commission proposal - Addition of Article 22(3) to the Universal Service Directive (2002/22).
[4] EP 1st reading – Addition of Article 8(4)(ga) to the Framework Directive (2002/21) (Amendment 138). See also the proposed Recitals 14 and 14a to the Universal Service Directive (2002/22)
[5] EP 1st reading – Amendment to the proposed new Article 22(3) of the Universal Service Directive (2002/22).
[6] Council political agreement – Refusal to add Article 8(4)(g) to the Framework Directive (2002/21).
[7] Council political agreement – Rewording of Article 20(2) of the Universal Service Directive (2002/22). See also the proposed Article 21(3)(b) on the requirement to inform users of changes in traffic management policies.
[8] Council political agreement – Addition of Article 22(3) to the Universal Service Directive (2002/22).

so that they have complete knowledge of the policy of their respective ISP as regards traffic management and quality of service. Beyond that, we seriously doubt that, at this point in time, new legislation can have any added value over and above existing legislation. For instance, the general principle introduced by the Commission and quoted above could be misinterpreted to go beyond outright blocking and also affect differentiated quality of service and legitimate network management measures. In the absence of experience on formulating a distinction between outright blocking and legitimate measures, it is preferrable to abstain from intervention now and accumulate experience on a case-by-case basis. Similarly, if consumers are well informed and competition works effectively, minimum quality requirements should not be necessary. In any event, if they are introduced, the Commission proposal should be followed: the Commission should have the initiative and should fix the framework for such requirements. Leaving this entirely to national regulators risks creating a patchwork of diverse national requirements and breaking down the transborder nature of the Internet.

Thus so far, net neutrality in Europe is a solution looking for a problem which either does not exist or can be solved by mandating clearer customer information and using existing tools to deal with market power. The need for the legislation is unproven, and the unintended consequences on restricting variety, competition and innovation are too big for comfort.

The European institutions will shortly be embarking on the 2nd reading of the telecommunications package. As stated above, we believe some EP and Council amendments are premature and will prove detrimental to long term end user interests in the EU, and urge that they be not adopted. As far as network neutrality is concerned, the only reasonable course for now is to strengthen transparency towards end-users and for the rest rely on existing legislation for the time being.

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