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Net Neutrality - quo vadis?

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In April 2014, just before the elections, the European Parliament approved in first reading the draft Commission Regulation on the [Telecoms Single Market Regulation](#) (“TSM” or “Connected Continent”). One of the provisions covered net neutrality, shortening the list of “exceptional” cases in which ISPs could block or slow down on-line content. Moreover, such “traffic management measures” needed to be “transparent, non-discriminatory and proportionate” and “not be maintained longer than necessary”.

Since then, the EU legislative process has slowed down. Net neutrality is one of the sensitive points of the negotiations. In January 2015 the Latvian Presidency proposed a new text, in the hope of reaching a [compromise](#), but the prospects of breaking the logjam are not good.

While the EU Legislators debate, however, national regulators have enforced their own rules on net neutrality.

- In January 2015 the Authority for Consumers and Markets (“ACM”) [fined](#) two Dutch telecom companies, KPN and Vodafone, for infringing the network neutrality rules in Article 7.4a of the national Telecommunications Act (“[Telecommunicatiewet](#)”). According to the ACM, Article 7.4 of the Telecommunications Act prohibits ISPs from limiting consumer choice and the use of the internet, which includes adopting mechanisms that “steer” consumers towards using particular services on the internet. The ACM imposed a €250,000 penalty on KPN for blocking various online services, including internet calls on its free WiFi hotspots. Vodafone received a fine of €200,000 for influencing its subscribers’ behavior by not charging them for the Internet data used to watch certain pay-TV channels.
- While the KPN decision concerns data blocking, a practice typically associated with net neutrality issues, the Vodafone decision concerns a more novel and debated question, “zero-rating”, a type of positive price discrimination, resulting in operators *not* charging end-users for accessing data volume linked to specific applications or internet services.
- More precisely, the ACM found that by offering data-free access to a pay-tv application, Vodafone had infringed Paragraph 3 of Article 7.4a of the

Telecommunications Act, which prohibits ISPs from applying differentiated tariffs for accessing particular services on the internet. According to the ACM, users of that app would enjoy *de facto* lower data costs compared to other consumers.

- Similarly, in January 2015, the Slovenian NRA **enforced** the national net neutrality rules for the first time, claiming that two national carriers, Telekom Slovenije and Si.Mobil, had provided *free* data, when their subscribers accessed, respectively, certain music-streaming and cloud storage services.

These developments suggest that net neutrality in the EU needs some rethinking at a faster pace.

- First, it is at the very least debatable that punishing a company for offering free data access or lower prices is beneficial to consumers. Perhaps net neutrality should be better left to a type of antitrust/*ex post* control, focusing on companies for which there is an established finding of dominance and an accurate investigation finding that the behavior was abusive, i.e., for instance because it resulted in the foreclosure of rivals.
- Second, the lack of an EU instrument leaves operators exposed to regulatory inconsistency. The EU already has a procedure intended to avoid national regulatory measures which could hamper the attainment of the internal market (See: Article 7 of **Directive No. 2002/21/EC**). This rule essentially applies to the regulation of physical infrastructure. It seems hard to deny that the internet is a truly pan-European (in fact global) infrastructure, hence the rationale for internal market consistency should be even stronger.

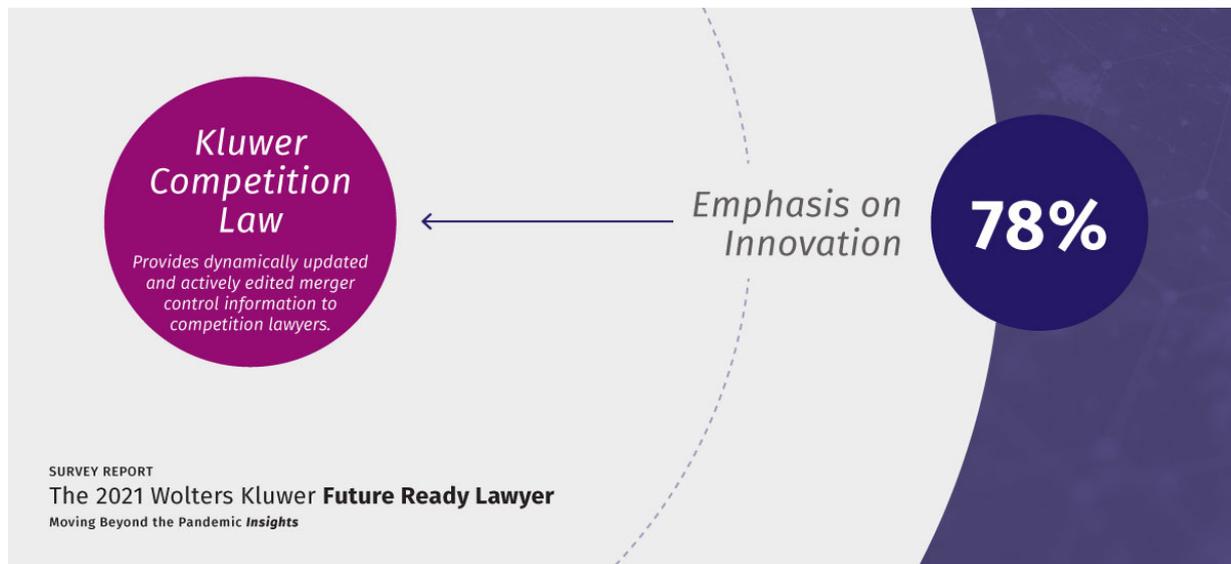
The Commission has often presented figures showing that an internal digital market could yield billions in **GDP growth** with the EU on the brink of recession, it is probably high time to overcome the net neutrality conundrum.

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