

# EU COMPETITION LAW AND THE TELECOMS SINGLE MARKET: NETWORK NEUTRALITY IN THE AFTERMATH OF THE TSM REGULATION

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## Abstract

Since the early 1990s, a sharp increase in the Internet traffic has been experienced. Technology, once again, has proven to be able to develop faster than regulation. In this endlessly evolving scenario, operators in the technology markets, as well as end-users, often find themselves under-protected. Therefore, it comes as a major concern the need to regulate those technological markets and, more specifically, the use –or abuse– of Internet.

All Internet traffic should be treated equally and that is, precisely, what network neutrality aims at. Consequently, network operators may not take advantage of their position in the market to affect competition in related markets. All in all, network neutrality is crucial to achieve the highest degree of competition. In the absence of network neutrality, the Internet would find itself unable to qualify as a market merely driven by innovation, and it would unfailingly turn into one ruled by deal making. Competition law claims that the higher the neutrality is – i.e., the more equal the treatment is, the better it is for the consumer. If network operating companies create an exploitative business model, they might be able to block competitors' websites and services; in other words, it may facilitate adoption of anticompetitive practices – namely, the abuse of their dominant position.

Transcending all the arguments raised against network neutrality –such as the prevention of an overuse of bandwidth–, we will demonstrate that it must be deemed essential from a Competition law perspective. In addition, we will argue, the imperative necessity of leaving the market under the tough scrutiny of competition authorities, which are best placed to assess the anticompetitive character of the practices brought about by market operators.

**Keywords:** EU Competition law, network neutrality, Telecommunications Single Market, TSM Regulation, European integration.

## 1. Introduction

The use of the Internet has experienced an outstanding growth, due both to its worldwide development as a means of communication and to its validation as an engine of economic progress<sup>1</sup>. Such increasingly important role played by the Internet has raised the awareness of competition authorities over the risk that operators of the network may succumb to the temptation of distorting the competitive dynamics of the market, unduly favoring the network traffic of some content providers over the applications or information of others<sup>2</sup>. Ultimately, not only the Internet, but also all the telecommunication networks, have been placed in the spotlight of competition authorities<sup>3</sup>. All in all, it is of major importance guaranteeing that all traffic is treated equally – i.e., network operators may not

take advantage of the structure of the market –of their commercial bonds *vis-à-vis* downstream operators– to affect competition either in the market of reference or in related market. Affiliated content providers should not wilfully benefit from a preferential treatment when it comes to traffic management. That is, precisely, what network neutrality aims at: the more neutral the network is, the better for users, as it may enable them to enjoy a wider scope for choice.

With regard to the European Union (EU), the importance of the electronic communication networks is likewise unremitting: they bring along several benefits that range from a potential increase in innovation, through a widening of access to information, to a facilitation of the interaction of content providers and end-users, who utilize the

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<sup>1</sup> Ben Scott, Mark Cooper and Jeannine Kenney, "Why Consumers Demand Internet Freedom Network Neutrality: Fact vs. Fiction", in *Free Press* (2006), accessed 3 February, 2016 [http://www.freepress.net/sites/default/files/fp-legacy/nn\\_fact\\_v\\_fiction\\_final.pdf](http://www.freepress.net/sites/default/files/fp-legacy/nn_fact_v_fiction_final.pdf), 7.

<sup>2</sup> Directorate General for Internal Policies, *Network Neutrality Revisited: Challenges and Responses in the EU and in the US*, Study for the IMCO Commission (2014), 11.

<sup>3</sup> Some authors underline that it is not until 15 years ago that competition authorities have begun to monitor the internet sectors more carefully. *Vide* Rolf H. Weber, "Competition Law Issues in the Online World", in *20th St. Gallen International Competition Law Forum ICF* (2013), accessed 3 February, 2016, <http://ssrn.com/abstract=2341978>, 1. In this research paper we will make reference to "network" to refer, primarily, to the Internet, but the fast development of electronic networks, such as the ones used for mobile communication, forces us to include all those other networks that may also be captured by their provider.

platform to telecommunicate<sup>4</sup>. However, the EU, instead of irrevocably opening up the Telecomms market to competition, has opted for regulating it more intensely<sup>5</sup>.

In this study we will challenge the decision of the EU institutions of adopting a Regulation. We intend to identify what is the hurdle that has impeded the development of the Telecoms Single Market so far. We will conclude that, albeit the adequacy of a regulation to ensure harmonization, the mere existence of the Telecoms Single Market is dependent on the preservation and ensurance of the network neutrality principle. Further, we will demonstrate that it is high time to de-regulate the market and to open it to the scrutiny of competition authorities, which are best placed to assess, on a case by case basis, whether the practices carried out by network operators do actually harm the competition dynamics.

## 2. The Telecoms Single Market, a chimera in the EU agenda?

To date, the EU has experienced a low level of network neutrality incidents, but there is a consensus on the fact that network providers do have incentives to anticompetitively discriminate against unaffiliated providers of complementary products with a view of excluding them from their network<sup>6</sup>. Further, the debate over the desirability of protecting the neutrality of telecommunication networks was not due to a worry about the Internet; instead, the English *Law of common carriage* did include an obligation for communication and transport network providers to render the service without unduly discriminating among their users<sup>7</sup>.

In this scenario, the EU is determined to take the necessary measures to establish a Telecoms Single Market that works under conditions of vigorous competition and enables thus the creation of a legal environment that guarantees access of all European content providers to the network<sup>8</sup>. In short, it aims at achieving a connected continent<sup>9</sup>.

### 2.1. Electronic communication networks: Internet as the paradigm of modern telecommunication networks

When it comes to the telecommunications sphere, EU regulatory philosophy is technologically neutral<sup>10</sup>. This implies that no difference will be made regarding the diverse technology platforms – i.e., the considerations made with regard to a specific platform – e.g., the Internet – may be equally valid for the other electronic communication networks<sup>11</sup>. In this research paper, when clarity requires a greater exemplification, we will consistently resort to the Internet as an example of a network, but the conclusions drawn may be extensively applied to any other type of electronic network.

The Internet is a platform that enables the communication between two distinct groups of actors, who provide each other with benefits: on one side, content providers, who make use of the network to upload information or applications; and, on the other side, end-users, who access the network to download such information or applications<sup>12</sup>. Therefore, network providers are in charge of rendering access to the network through the provision of data transmission services to their customers, who may be either content providers or end-users<sup>13</sup>.

The specificity of this type of multi-sided markets is the creation of externalities – that is,

<sup>4</sup> Directorate General for Internal Policies, *Network Neutrality Revisited... op. cit.*, 39; Rolf H. Weber, “Competition Law Issues in the Online World”, *op. cit.*, 2.

<sup>5</sup> European Parliament, *The EU rules on network neutrality: key provisions, remaining concerns* (Briefing, November 2015).

<sup>6</sup> Barbara van Schewick, “Towards an Economic Framework for Network Neutrality Regulation”, *op. cit.*, 2 and 35. Also, on the reasons that explain the low level of network neutrality incidents within the EU, *vide* Directorate General for Internal Policies, *Network Neutrality Revisited... op. cit.*, 14.

<sup>7</sup> Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality... op. cit.*, 4.

<sup>8</sup> This Telecoms Single Market will enable the attainment of other goals set out in the Digital Agenda for Europe; namely, the establishment of a Digital Single Market where content, application and other digital services can freely circulate. *Vide* European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, COM(2013) 627 final (Brussels, 11 September 2013), 2. Also, *vide* European Commission, “Net neutrality in the EU”, in *Agenda for EU – A Europe 2020 initiative*, accessed 4 February, 2016, <https://ec.europa.eu/digital-agenda/en/eu-actions>.

<sup>9</sup> *Vide* the title of the Proposal for a Regulation: “laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent”. European Commission, Proposal for a Regulation, COM(2013) 627 final, *cit.*

<sup>10</sup> Framework Directive 2002/21, recital 18.

<sup>11</sup> Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality: Implications for Europe*. (Bad Honnef: WIK Diskussionsbeitrag, n. 314, 2008), 40.

<sup>12</sup> A feature of high-tech markets is, precisely, their multi-sided nature. *Vide* Rolf H. Weber, “Competition Law Issues in the Online World”, *op. cit.*, 2.

<sup>13</sup> Peggy Valcke, Liyang Hou, David Stevens and Eleni Kosta, “Guardian Knight or Hands Off: The European Response to Network Neutrality – Legal considerations on the electronic communications reform”, in *Communications & Strategies* (no. 72, 4th quarter 2008, pp. 89-112) fn 1. In this paper we will not enter into the analysis of the physical operation of the network; therefore, by network providers we refer to operators that provide Internet Access and transport services over the network. On the differences, *vide* Barbara van Schewick, “Towards an Economic Framework for Network Neutrality Regulation”, in *The 33<sup>rd</sup> Research Conference on Communication, Information and Internet Policy (TPRC 2005)* (September 2005), 3.

network effects<sup>14</sup>. The higher the number of users – participants – of a given network is, the higher the value of the network is, as the number of parties with whom the subscriber could potentially interact has increased<sup>15</sup>.

As a consequence of those externalities, first, users of a particular network may be less likely to opt for a network different from the one of the leading provider – mainly due to the switching costs; and, second, a provider that offers access to a wide number of users has a significant market power not only in the segment of the provision of the network, but also in the related segment of the provision of content<sup>16</sup>. These barriers to entry hinder the access of new operators to the segment of the network provision and, in addition, are prone to generate distortions in the competitive dynamics of the market<sup>17</sup>.

In relation with the switching costs, they may be either inherent or strategic – that is, they may arise from the nature of the product or the market (such as the need to inform other users of new contact information or learning costs) or they may be created by the network provider to keep users from changing providers (such as contract cancellation fees)<sup>18</sup>. Furthermore, the network itself requires a certain size to be efficient, so newly created networks are less likely to grab the attention of users so as to encourage them to change their network provider<sup>19</sup>. While strategic switching cost may be efficiently addressed through regulation –by, for example, simply banning their inclusion in the contracts for the provision of the network–, inherent switching costs, specially those arising from the nature of the market, unfailingly require a case by case analysis. Whereas regulatory responses are intended to apply indistinctly, competition responses are tailored to the factual circumstances of the case. A regulatory *ex ante* intervention is only justified to the extent that its social benefits are larger than the costs, as burdensome rules that diminish network providers'

return may reduce network providers' incentives to innovate at the network level and to deploy network infrastructure<sup>20</sup>. Contrariwise, an *ex post* intervention of the competition authorities serves a double purpose: on one hand, it may not constrain the incentives of network providers to innovate, as they will be allowed to look for the most convenient way to expand their profits, with the sole limitation of respecting the competition dynamics of the market; and on the other hand, it may also foster application-level innovation, as content providers will benefit from a undistorted neutral network<sup>21</sup>.

As for the significant market power of network operators, it is certain that in markets where no network provider has a dominant market share operators are more inclined to look for interoperability and interconnection options<sup>22</sup>. However, it is also unquestionable that network providers will seek to enlarge their networks in order to capture the externalities derived from the size of the network, to the detriment of both active and potential operators. Provided that they cannot further expand the size of their network, network providers will proceed to project their market power in the adjacent related segment of the provision of contents.

In such a scenario, it comes as indispensable the preservation of a neutral network, which will hamper an unconstrained expansion of the network providers' market power throughout the segment of the provision of content. Some detractors of network neutrality regulations have claimed their need to discriminate among network users with a view of managing the capacity of the network, which is limited<sup>23</sup>. Nevertheless, network neutrality claims do not hinder such management need since network operators are indeed allowed (and, to the extent that the bandwidth is limited, obliged) to prioritize –not

<sup>14</sup> Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality... op. cit.*, 11.

<sup>15</sup> The mere act of joining a network boosts the value of the network to all network users, even if they were not parties to the transaction, as explained in Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality... op. cit.*, 12. Also *vide* Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 2.

<sup>16</sup> Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 5.

<sup>17</sup> The literature refers to vertical conflicts –between players in the same value chain, such as a network provider and a content provider–, horizontal conflicts –between players at the same level of the value chain, such as two network providers– and diagonal conflicts –between players in different, but interconnected, value chains, such as a network provider and the user of a different network provider–. *Vide* Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality... op. cit.*, 18-23.

<sup>18</sup> Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality... op. cit.*, 12-13; Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 4.

<sup>19</sup> Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 5.

<sup>20</sup> Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", *op. cit.*, 35-38. On the seven communication markets that the European Commission considered susceptible to *ex ante* regulation, *vide* Directorate General for Internal Policies, *Network Neutrality Revisited... op. cit.*, 89.

<sup>21</sup> On the conception of the Internet as a general-purpose technology and its implications in relation with innovation, *vide* Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", *op. cit.*, 38-39.

<sup>22</sup> Directorate General for Internal Policies, *Network Neutrality Revisited... op. cit.*, 40.

<sup>23</sup> The bandwidth is limited. The Internet, as well as other electronic networks, is a good whose use and consumption limits the access of other users –rival good–. On the rival character of the Internet, *vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Fernández Rojo, "Neutralidad en la red y competencia en la UE: la regulación del mercado de las comunicaciones electrónicas tras el Reglamento sobre el Mercado Único de las Telecomunicaciones", in *Revista de Derecho de la Competencia y la Distribución* (La Ley, n. 17, 2015), 3.

discriminate— the execution of the contents that run through their network<sup>24</sup>.

The neutrality of the network may be sought through regulatory measures or its preservation may rather be left in the hands of competition authorities. Whereas in the realm of a monopolistic market, where there is just a single network provider, a regulatory intervention is imperative in order to accomplish the liberalization of the market, in so far as the market gradually opens to competition, regulatory intervention must diminish<sup>25</sup>. In conclusion, regulation is a necessary step in the transition from a monopolistic market to normal competition. Indeed, in the European arena there existed various monopolistic telecoms markets – nearly as many monopolistic markets as Member States<sup>26</sup>. It must be borne in mind that the ultimate goal is the establishment of a Telecoms Single Market, working under conditions of vigorous competition<sup>27</sup>. Consequently, we will proceed to analyze to what extent the initial picture –that is, the several existing monopolistic national telecoms markets– has changed – i.e., whether national telecoms markets have been finally liberalized and, nowadays, are effectively competitive. Only if national telecoms markets are competitive, we may proceed to the next step towards the attainment of the Telecoms Single Market: an EU-wide telecoms market, where no undertaking is favored, nor wilfully discriminated, due to nationalistic interests.

## **2.2. The pursuit of the Telecoms Single Market: from several monopolistic national markets to a (non-yet) competitive EU-wide electronic communications market**

In the pursuit of a Telecoms Single Market, the EU has adopted different regulatory instruments, whose binding force varies from one instrument to the other, as well as it does the objective of the EU institutions: from liberalizing the monopolistic

national markets to trying to accomplish a single competitively working EU-wide telecoms market.

The first legislative package was passed in 1998. It was formed by one general and four specific directives: the Framework Directive 2002/21 and the Authorisation Directive 2002/20, the Access Directive 2002/19, the Universal Service Directive 2002/22 and the Directive 2002/58 on privacy and electronic communications<sup>28</sup>. By passing such a regulatory package, the EU aimed at designing a European Framework for electronic communications, which was ultimately intended to make the first move in the path towards the attainment of the Telecoms Single Market – i.e., the liberalization of the Member States' national telecommunication markets<sup>29</sup>. National telecoms markets were, in the majority of cases, monopolist<sup>30</sup>. However, such legislative package did not specifically address network neutrality<sup>31</sup>.

In 2007, the Commission suggested a review of the legislative package. In the context of the review, proponents of network neutrality raised their awareness in respect of the identification of violations of network neutrality, and different alternatives were thus considered: (1) to impose specific network neutrality rules; (2) to maintain the existing regime unchanged, or (3) to maintain the existing regime, but make the appropriate improvements with regard to consumer rights<sup>32</sup>. Finally, a midway option was preferred and, in 2009, a new regulatory framework was passed.

The regulatory framework enacted in 2009 put in place measures intended (a) to ensure that consumers are fully informed of the relevant practices of their network operator; (b) to reduce the strategic switching costs; (c) to empower national regulators to impose minimum Quality of Service standards on network operators; (d) to establish the

<sup>24</sup> Such prioritization is referred to as 'Quality of Service'. *Vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Fernández Rojo, "Neutralidad en la red y competencia en la UE... *op. cit.*, 3-4.

<sup>25</sup> Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", in P.A. Buigues and P. Rey, *The Economics of Antitrust and Regulation in Telecommunications - Perspectives for the New European Regulatory Framework* (Cheltenham, Edward Elgar, 2004, 27-41), 30.

<sup>26</sup> On the explanation of the reasons that favored the creation of such monopolies or, in some cases, duopolies, *vide* Ben Scott, Mark Cooper and Jeannine Kenney, "Why Consumers Demand Internet Freedom Network Neutrality: Fact vs. Fiction", *op. cit.*, 7. It is submitted that the number of physical networks to transmit contents is very small and non-competitive.

<sup>27</sup> Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", *op. cit.*, 30.

<sup>28</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *Official Journal of the European Communities*, L 108/33, 24 April 2002; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), *Official Journal of the European Communities*, L 108/21, 24 April 2002; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), *Official Journal of the European Communities*, L 108/7, 24 April 2002; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *Official Journal of the European Communities*, L 201/37, 31 July 2002.

<sup>29</sup> Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", *op. cit.*, 27.

<sup>30</sup> Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Fernández Rojo, "Neutralidad en la red y competencia en la UE... *op. cit.*, 7; Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", *op. cit.*, 30.

<sup>31</sup> Directorate General for Internal Policies, *Network Neutrality Revisited... op. cit.*, 90.

<sup>32</sup> Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality... op. cit.*, 52-53.

right of end-users to access content and applications of their choice<sup>33</sup>.

In April 2011, the Commission asked the Body of European Regulators for Electronic Communications (BEREC) to undertake a fact-finding exercise with regard to the attainment of an open and neutral Internet<sup>34</sup>. The BEREC, after its traffic management investigation, published in May 2012 a report concluding that there was an undeniable problem regarding open Internet in Europe<sup>35</sup>. Right after that report, in Spring 2013, the European Council requested the Commission to make a proposal for achieving, once and for all, a single market in the telecommunications sector and, in September 2013, the Commission finally adopted a legislative package aimed at building a connected, competitive continent, where all traffic would be treated equally and no unjustified, disproportionate discrimination would be allowed<sup>36</sup>.

The form of the legislative instrument was openly debated, as several delegations raised their concerns in relation with the adoption of a regulation<sup>37</sup>. Transcending those reticence's, the Commission, in its Impact Assessment, concluded that the most adequate instrument was a regulation and, accordingly, on 27 October 2015, the Telecoms Single Market Regulation, which contains the first EU-wide net neutrality rules, was finally passed, after undergoing two reading votes in the European Parliament, who introduced, in its first-reading vote, amendments banning zero rating and defining specialized services as physically and logically separate to the Internet<sup>38</sup>. However, the Council of Ministers revised the amended text and, in a trilogue with the Commission and the Parliamentary

Committee Chair, made it resemble the original proposal<sup>39</sup>. Likewise, the introduction of potential amendments in the second-reading vote of the Parliament equally failed.

The final text is subject to controversy, as, on one side, its ample ambiguity hinders a direct application by the Member States of key aspects – e.g., the Regulation introduces multiple exceptions, which are to be appreciated by the network provider, to the general principle of equal treatment of the traffic; and, on the other side, it implies the adoption of additional rules, what could impede the ultimate transition from regulation to competition law<sup>40</sup>. Indeed, while harmful divergence among Member States must be combated, if a competitive Telecoms Single Market is to be achieved, flexibility needs to be ensured<sup>41</sup>. From our standpoint, the solution does not rest in the adoption of further pieces of legislation – i.e, in regulating the market more fiercely, instead, as we will address in the following section, the time for a de-regulation, for leaving the market in the hands of competition law (and of competition authorities), has come.

### 3. The de-regulation of the Telecoms Market: rowing fiercely, but purposefully, against the current

Market regulation takes place in a three-stage process: (1) market definition; (2) market analysis; and (3) imposition, when needed, of remedies<sup>42</sup>. When, after analyzing the market, one concludes that it has proven to be self-correcting – that is, when, thanks to the correcting powers of the market itself,

<sup>33</sup> Directorate General for Internal Policies, *Network Neutrality Revisited... op. cit.*, 14.

<sup>34</sup> European Commission, “Net neutrality in the EU”, *op. cit.*

<sup>35</sup> Body of European Regulators for Electronic Communications, *A view of traffic management and other practices resulting in restrictions to the open Internet in Europe*. Findings from BEREC’s and the European Commission’s joint investigation, BoR (12) 30 (29 May 2012).

<sup>36</sup> European Commission, COM(2013) 627 final, *cit.*; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Telecommunications Single Market*, COM(2013) 634 final (Brussels, 11 September 2013), 2. Also, *vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Fernández Rojo, “Neutralidad en la red y competencia en la UE... *op. cit.*”, 7-8.

<sup>37</sup> Council of the European Union, *Draft Progress Report on Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, Hellenic Presidency, 9950/14, 2013/0309 (COD), 8-9. Also, *vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Fernández Rojo, “Neutralidad en la red y competencia en la UE... *op. cit.*”, 8.

<sup>38</sup> All in all, “A Regulation, by its directly binding nature without the accompanying need for a transposition at national level, addresses the need for quick implementation. By virtue of its direct applicability, a Regulation also reduces the risk of national divergences and thus fragmentation”, *vide* European Commission, *Commission Staff Working Document – Impact Assessment: Accompanying the document Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, SWD(2013) 331 final (Brussels, 11 September 2013), 57-58 and 88. Also, *vide* European Parliament, *The EU rules on network neutrality... op. cit.*; Christopher T. Marsden, “Comparative Case Studies in Implementing Net Neutrality: A Critical Analysis”, in *TPRC 43: The 43rd Research Conference on Communication, Information and Internet Policy Paper* (March 31, 2015), accessed 26 February, 2016, <http://ssrn.com/abstract=2587920>, 4.

<sup>39</sup> Christopher T. Marsden, “Comparative Case Studies in Implementing Net Neutrality... *op. cit.*”, 16.

<sup>40</sup> Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality... op. cit.*, 53.

<sup>41</sup> Directorate General for Internal Policies, *Network Neutrality Revisited... op. cit.*, 15.

<sup>42</sup> Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality... op. cit.*, 40. For Prof. Hou, the three-stage process is as follows: (1) definition of the relevant market, (2) designation of the undertaking(s) with Significant Market Power (SMP) and (3) imposition of obligations upon undertakings with SMP. *Vide* Liyang Hou, “On Market, Competition and Regulation in the EU Telecom Sector” (February 4, 2015), accessed 1 March 2016, <http://ssrn.com/abstract=2560667>, 2.

there is low likeliness that the harm to competition is long-lasting, competition laws are preferred –rather than sector regulation– to react to anti-competitive behavior<sup>43</sup>.

The core goal of proponents of network neutrality is the observance of the principle of non-discrimination when network providers manage the traffic that flows over their limited network. Competition both in the segment of the provision of contents and in the segment of the provision of the network must be granted – or, to put it in other words, network providers must refrain from either excluding competitors by abusing of their market power or projecting such market power in adjacent markets to unduly discriminate among market operators<sup>44</sup>. It is submitted that, in order to address those distortions of competition, competition authorities are best placed<sup>45</sup>.

Competition authorities are empowered to assess, in view of the factual circumstances of the case, whether, in order to be cleared, the prioritization strategies carried out by network operators do meet the transparency standards and, similarly, whether such strategies are proportionate to the aim –deal with traffic congestions– and non-discriminatory. Sometimes, normal business strategies may be confused with anticompetitive practices, mainly due to the fact that market operators adopt future-oriented measures that cry for a balance between the benefits –in terms of incentives to innovate– and the harm to competition<sup>46</sup>. In any case, a foreclosure of the market –impeding or hardening the entry of operators to the market or, if they are already active, the provision of their services– indicates the existence of an anti-competitive behavior<sup>47</sup>. In a market opened to free competition, network providers would not be allowed to hide behind favorable regulatory provisions to shield from the competition authorities' scrutiny.

The adoption of overtly stringent legislation hinders a flexibilized application of the competition

principles that ground the attainment of a Telecoms Single Market working under conditions of vigorous competition<sup>48</sup>. Further, it may thwart operators' incentives to innovate, which comes as essential in this endlessly innovation-based competitive high tech markets<sup>49</sup>. Likewise, too traditional an approach on the side of competition authorities may also impair the dynamics of the market; competition authorities must be thus ready to adapt their assessment and enforcement actions to the fast evolving technological progress, not undermining its development<sup>50</sup>.

In conclusion, the achievement of a competitive Telecoms Single Market mandates its de-regulation and ultimate opening to competition. First, the once fragmented national markets have already been effectively liberalized. Second, the fast development of the high tech markets prevents the perdurance of long-lasting anti-competitive practices that could justify a regulatory intervention. And, finally, measures taken by national regulatory authorities, which could have been justified on the basis of a pure national public interest, risk to be deemed anti-competitive for the sake of establishing an EU-wide Telecoms Single Market.

#### 4. Conclusions

The EU has embarked on the task of regulating the Telecoms Single Market more intensely. At the beginning of the telecoms markets liberalization process, the existence of several national markets obliged Member States to resort to regulation in order to open their national markets to competition. Today, focus is placed on the achievement of an EU-wide telecoms market –rather than several national markets–, working under conditions of vigorous competition.

It is submitted that the Telecoms Single Market will only be established if –counter to the latest decision of the EU regarding the adoption of a Regulation– the practices of market operators are

<sup>43</sup> Several legal commentators have supported this view, *vide* Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, Study for the European Parliament, IP/A/ECON/2014-12 (2015), accessed 1 March, 2016, [http://www.euro.parl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL\\_STU%282015%29542235\\_EN.pdf](http://www.euro.parl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf), 62-63. Contra, arguing the lack of expertise with digital technologies of competition authorities, Lapo Filistrucchi, Damien Geradin and Eric Van Damme, "Identifying Two-Sided Markets", in *TILEC Discussion Paper No. 2012-008* (February 21, 2012), accessed 1 March, 2016, <http://ssrn.com/abstract=2008661>, 9-12; OECD, *The Digital Economy*, OECD Hearings, DAF/COMP(2012)22 (2012), accessed 1 March, 2016, <https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf>, 147.

<sup>44</sup> Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, *op. cit.*, 29-33; Nicolai Van Gorp and Stephanie Honnefelder, "Regulation and Competition: Challenges for Competition Policy in the Digitalised Economy", in *Digiworld Economic Journal* (no. 99, 3rd Q. 2015), 155.

<sup>45</sup> Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace", in *California Law Review* (Vol. 75, Issue 3, May 1987), 1007; Günter Knieps and Volker Stocker, "Network Neutrality Regulation: The Fallacies of Regulatory Market Splits", in *Intereconomics* (2015), 47.

<sup>46</sup> Nicolai Van Gorp and Stephanie Honnefelder, "Regulation and Competition... *op. cit.*", 155.

<sup>47</sup> Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, 68.

<sup>48</sup> On the reasons that explain why economic objectives aimed by competition and economic regulation are better achieved indirectly, that is, through competition law, *vide* Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace", *op. cit.*, 1006.

<sup>49</sup> Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, 67-68; Nicolai Van Gorp and Stephanie Honnefelder, "Regulation and Competition... *op. cit.*", 156.

<sup>50</sup> OECD, *The Digital Economy*, *op. cit.*, 108.

supervised by competition authorities. From our standpoint, the adoption of a Regulation does not contribute to the ultimate attainment of the Telecoms Single Market: while regulation is indispensable in the transition from several fragmented monopolist national markets to several liberalized national markets, the achievement of an EU-wide telecoms market implies its opening to the forces of competition.

All in all, competition authorities are best placed to adapt their analysis of a particular prioritization conduct that, albeit necessary, may unduly harm the competition dynamics in the Telecoms Single Market by obviating network operators' obligation of non-discrimination among competitors. That is, competition authorities may

balance whether the prioritization strategies carried out by network operators are indeed proportionate to the aim –deal with traffic congestions–.

The EU, as said, has opted for the regulatory instrument that ensures best an integration of the national legal systems. However, not only did it opt for a more stringent normative instrument, but also the Regulation itself is not absent of controversy, and, as pointed out by the literature, its ambiguity is expected to give rise to interpretative problems that may harden its uniform application throughout the Union.

Time (and research conducted hereafter) will tell to what extent this has been a missed opportunity of deregulating the telecoms market and leaving it in the hands of competition authorities.

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