

CRITICAL VIEWS ON THE FRENCH APPROACH TO “NET NEUTRALITY”

By Catherine Jasserand

Net neutrality refers to a principle whereby all electronic communications must carry all data streams in a neutral fashion, in other words regardless of their nature, their content, their sender or recipient. The concept can apply to any network, but is particularly relevant when applied to the networks that make up the Internet. In theory then, the principle of neutrality means that an operator cannot block or throttle, *i.e.*, slow, certain traffic streams on its network or, on the contrary, give higher priority to others - for instance by giving priority routing to its partners' content.¹

This definition borrowed from the ARCEP (*Autorité de régulation des communications électroniques et des postes*), the French telecoms regulator, refers to the notion of net neutrality as it is usually perceived in the telecommunications field.

Discussions on net neutrality have started three years ago in France and find their roots in the discussions which occurred after the adoption of the revised European Telecoms Package. In 2007, the

European Commission proposed to reform the 2002 European Telecoms Package to include, among others, provisions on net neutrality. According to the Impact Assessment accompanying the proposals of revision, the purpose was to avoid that network operators would unfairly discriminate content, services or customers. The original proposals contained a much stronger net neutrality policy than the one which was finally adopted by the European Parliament and Council in November 2009.² The adoption of the revised Telecoms Package opened the debate on the notion in France. In the three years' time, the ARCEP published two reports (under the form of 10 non-binding principles and a technical-economic analysis addressed to the Government and Parliament).³ The Government released two reports (a technical report and a more political report).⁴ Whereas Members of the French Parliament issued opinions as well as information reports on the notion and introduced two draft laws on the topic.⁵ This high volume of contributions shows that the topic has generated a lot of interest even if the discussions do not seem to have been conducted in a very consistent way. However they also show that the scope of the topic is not confined to one issue or field and goes much beyond a competition and telecommunications issue. It encompasses freedom of communication (with the right to access the Internet) and touches upon copyright law enforcement issues.

The purpose of the article is to reflect the complexities of the debate from a policy point of view without a specific focus on a sector, field or player. As the debate was born in France after the adoption of the revised European telecoms rules, it seems logical to structure the article around the implementation of these measures. But first, to understand the ins and outs of the topic, a description of the forms and origins of the concept is necessary.

NET NEUTRALITY: A PLURIFORM NOTION

Discussions on net neutrality are extremely complex since the network is a system where there are numerous players, which can each of them have an influence on the traffic of data: (Internet) access providers for sure, but also transit operators, access operators, equipment manufacturers and even content editors. (...)

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The difficulty to apprehend the topic can explain the profusion of initiatives and the implementation of the “Telecoms Package” offers in that respect a good opportunity to lay down the first principles in our legislative corpus.

In this quote, the French Senator Catherine Morin-Desailly summarizes the issues surrounding the notion of net neutrality.⁶ The numerous reports that have been issued on the notion show its complexity.

TERMINOLOGY ISSUES

As preliminary remarks, some terminology precisions on the notion of “net neutrality” are necessary. The expression is often quoted in its original English-language but it has also been translated into French. In the first articles relating to the notion, “net neutrality” was translated by *neutralité des réseaux* (i.e., network neutrality). This translation is faithful to the original expression, which is deemed to have been coined by Tim Wu.⁷ However, it should be noted that when the debate on net neutrality spread to the Government and Parliament in 2009, this original translation was somehow forgotten. The different reports issued at that time refer to *neutralité de l'internet* (Internet neutrality), which has also been shortened into *neutralité du net*. The term “net” in French is not the strict equivalence of the term “net” in English. Net is the abbreviation of Internet in French; whereas “net” stands for NETwork in English. But does this difference of translations really matter? After all, Internet is the abbreviation of INTERnational NETwork and thus Internet is also synonym to network.⁸ The reality is a bit different as the term “Internet” is used in different contexts and has other meanings than “network”. As the French telecoms regulator and the Government have explained in their respective reports, Internet can refer to the network but also to applications and services it carries.⁹ The most important point is therefore to define the scope of the Internet. This is, for example, what the French telecoms regulator did in its two reports and therefore it does not matter whether the regulator referred to “*neutralité de l'internet*” or to “*neutralité de l'internet et des réseaux*” as long as it is understood that the Internet is the network. The Government

also took the precaution to define the Internet as a network of networks based on the “best efforts.” As for the various opinions and reports written by Members of the French Parliament on the topic, they are either directly referring to the Internet as a network or are assuming that the principle of net neutrality applies to the Internet as a network (this can be deduced from the logic they follow). However in the French literature, some authors (for example, Derieux) have not defined the scope of Internet but included in their discussions on the topic considerations on neutrality of hosting providers and other intermediaries.¹⁰ This position seems far away from the original U.S. debate on network neutrality, which was to ensure that network providers (broadband Internet access providers) were not discriminating end-users in respect of content, applications and services they were carrying.¹¹ But this broader approach of the topic also shows that the debate is moving towards a larger debate on the neutrality of the Internet ecosystem. And as Krämer, Wiewiorra and Weinhardt have shown, “while the NN [net neutrality] debate is currently focused on ISPs as the gatekeepers of the customer access network, other gatekeepers of the information society may soon enter center stage on other forms of neutrality.”¹² The neutrality of the different players in the value chain has already been defended by several academics but is not the approach followed yet by the different authorities and institutions involved in the debate at French level.¹³

ORIGINS OF THE DISCUSSIONS

It is usually admitted that the debate on net neutrality started in France with the adoption of the new European Telecoms Package. However some authors consider that the debate started much earlier when telecoms regulators had to face the first cases of network providers’ discriminatory practices against specific content or applications, even if at that time the term “net neutrality” had not been coined.¹⁴ In particular, mobile operators were trying to keep their users within their “walled gardens”, i.e., they were trying to limit their users’ ability to access portals and content of their choice. As an example, in 2000, France Telecom, the main French network provider, was ordered by French Courts to unlock the mobile phones it was selling with a pre-programmed access to

its Internet mobile portal. The Paris Court of Appeal found that the contracts between France Telecom and the device manufacturers integrating the locked WAP (Wireless Applications Protocols) features had a restrictive effect on competition.¹⁵ Following the Court decisions, the French telecoms regulator (called ART at that time *Autorité de régulation des télécommunications*) established recommendations on the development of mobile Internet. The regulator acknowledged the need for end-users to be informed of the pre-setting of their mobile phones to an Internet access or service provider and to be allowed to re-program their mobile phones. These recommendations were meant to ensure Internet access through the WAP of mobile operators in “a climate of fair and open competition”.¹⁶ They contain the premises of the principle of net neutrality, *i.e.*, offering fair (in the sense of transparent) information to end-users to enable them to choose their service providers.

The debate on net neutrality did not further develop in France until 2009. The roots can actually be found in the United States. In 2003, Professors Wu and Lessig pleaded in favor of regulation of network neutrality in an open letter to the Federal Commission for Communications (FCC).¹⁷ In 2005, the FCC had to face for the first time a network neutrality issue. An Internet Service Provider (ISP) called Madison River Communications had blocked VoIP (Voice over Internet Protocol) traffic to favor the use of its traditional phone lines. The case was settled between the FCC and the ISP, which agreed to pay a fine and end any discriminatory practices in respect of VoIP traffic.¹⁸ Following the case, the FCC published its Policy Statement on Network Neutrality promoting four freedoms for Internet users (access lawful content of their choice; run applications and services of their choice; connect their choice to the legal devices not harmful for the network and get competition among network providers, applications and service and content providers).¹⁹ Between 2005 and 2006, after a wave of several mergers within the telecommunications industry, the FCC tried to enforce its policy, which was until then non-binding.²⁰ After having sanctioned another ISP (Comcast) for blocking P2P traffic, the FCC adopted in December 2010 an order to lay down rules on net neutrality, composed of the four freedoms and completed by an obligation of transparency concerning traffic management

practices and an obligation of non-discrimination.²¹ However the authority of the FCC to adopt net neutrality policy (and regulate Internet traffic) was successfully challenged by Comcast before the U.S. Court of Appeals, which invalidated in April 2010 the FCC's decision against Comcast.²²

In the meantime, in 2007, the European Commission introduced a proposal to review the European Telecoms Package, which contained provisions on net neutrality.²³ The adoption of the new European Telecoms Package launched at the end of 2009 the debate on net neutrality at the national level. The debate was greatly influenced by the one that took place in the United States (many references to the definitions of Tim Wu and Lawrence Lessig, as well to the work of the FCC). Discussions started quasi at the same time on all fronts: the telecom regulator at its own initiative, the Government at the request of Parliament and Parliament when discussing the Government bill to enable the Government to adopt the measures via an Ordinance. As early as fall 2009, the French telecoms regulator launched internal discussions on the topic and opened up the debate to stakeholders during a conference on net neutrality in Spring 2010.²⁴ In November 2009, the French Parliament, which was finalizing the adoption of a “law on digital divide,” took the opportunity of that law to introduce an amendment requesting a report from the Government on the notion of network neutrality.²⁵ These first initiatives led to two Government reports on Internet neutrality and a series of proposals by the French telecoms regulator. The Government adopted a “wait-and-see position.” After having highlighted the complexity of the issues (such as the multiple definitions of the notion), it concluded that at that stage of the discussions and taking into account the on-going work at European level, there was no need to propose other provisions than the ones already contained in the revised European Telecoms Package. The French telecoms regulator issued 10 non-binding recommendations on the Internet access network (including recommendations on traffic management practices, transparency towards end-users, quality of internet access services and interconnection market) and invited the different stakeholders and public authorities to consider the role played by other players in the Internet value chain and the impact of net neutrality as well as the issue of equipment/device neutrality. The ARCEP

opened the door to discussions on neutrality of the Internet ecosystem.

In September 2010, the clock of the new European Telecoms Package's implementation deadline started to run and the Government felt urged to adopt measures in national law as soon as possible to avoid any penalties.²⁶ As a consequence, the Government introduced before Parliament a Government bill to request the Parliament's authorization to implement the provisions of the new Telecoms Package via a Government Ordinance (*i.e.*, without discussions of the bill by Parliament). The topic of net neutrality was then addressed during the parliamentary debates of that bill. The Opinion of the Senate's Economic Committee highlighted a different aspect of net neutrality, which is the fundamental right perspective. It assessed that Internet was "a strategic public good, carrying freedoms as fundamental as freedom of expression, [freedom] of information or also [freedom] of access to information, to which the Constitutional Council has conferred a constitutional value."²⁷

This high volume of discussions and reports gave an impression of rashness, impression reinforced by the tight agenda that the French Government had to follow to implement in due time the European provisions. At first sight, discussions also seemed to go in all directions in a very disorganized and inconsistent way, especially since no leading authority had been designated to conduct the discussions. One could think that the French telecoms regulator could have been the right authority. However its role is limited to telecommunications issue whereas the topic is not only confined to that field. It has also a political, economic (competition) and fundamental right aspect. This is the case, even if at European level, the notion of net neutrality has mainly been dealt from a telecommunications perspective.

REGULATORY FRAMEWORK LIMITED TO TRANSPARENCY OBLIGATIONS AND QUALITY OF SERVICE

In August 2011, the Government adopted the Government Ordinance through which it officially implemented the European provisions on net neutrality.²⁸ Prior to the implementation, the French

Code of Posts and Electronic Communications (CPCE) already contained a provision on neutrality.

EXISTING FRAMEWORK PRIOR TO THE IMPLEMENTATION

Two elements composed the framework: the obligation of neutrality imposed to electronic communications providers in the transmission of messages and the fundamental right to access the Internet.

The right to access the Internet is not a right conferred by the French Constitution or codified in any code. But the right derives from the right of freedom of communication and expression as protected by Article 11 of the French Declaration on the Rights of Man and the Citizen of 1789. This is what the French Constitutional Council affirmed in its decision (2009-580 DC) reviewing the constitutionality of the HADOPI law (law establishing a three-strikes mechanism to fight online copyright infringement).²⁹ The right to access the Internet has since a constitutional value.

As for the notion of neutrality, it was not completely absent from the legal landscape applicable to the telecommunications sector in France before the implementation of the European provisions. Until 1984, Article L. 38 of the postal code, enforced at that time, allowed the transmitter (*releveur*) of a telegram to suspend its transmission if he considered that the text was contrary to public order and morality. This provision dated from the law of 1850 on electric telegraphy but was repealed by the law of 1984 on public service of telecommunications.³⁰ During the parliamentary debates of that law, the Senate acknowledged that "*the repeal of Article L. 38 established the neutrality of common carrier on which users' trust could rely and the democracy should be based.*"³¹ The principle of neutrality was not inscribed in the law until 1996. The law of 26 July 1996 on regulation of telecommunications set up an obligation of neutrality to electronic communications operators in respect of transmitted messages (codified in Article L. 33-1 of the CPCE) and required the Minister in charge of electronic communications as well as the French telecoms regulator to monitor, among others, that electronic communications operators were complying with their obligation of neutrality (codified in Article L. 32-1 of the same code).³² It should be noted that

what the notion of electronic communications operator covers is not crystal clear. However the French telecoms regulator itself considered that Internet Access Providers (IAPs), also designated under the term Internet Service Providers (ISPs), benefit from the status of electronic communications operator.³³

PROVISIONS ON NET NEUTRALITY LAID DOWN IN THE REVISED EUROPEAN TELECOMS PACKAGE

After two years of intensive debates (including three readings at the European Parliament's level), the revised European Telecoms Package was finally adopted. The new Package is composed of one regulation setting up a European body of national regulatory authorities (BEREC)³⁴ and two Directives amending the pre-existing Telecoms Package. These two Directives are known as the Citizen's Rights Directive (Directive 2009/136/EC) and the Better Regulation Directive (Directive 2009/140/EC).³⁵ They have amended the 2002 European Telecoms Package, which is composed of five Directives known as the (regulatory) Framework Directive,³⁶ the Authorization Directive,³⁷ the Access Directive,³⁸ the Universal Service Directive³⁹ and the e-privacy Directive.⁴⁰ In 2002, the European regulatory approach was to privilege competition rules over ex-ante regulation of markets, whereas in 2009, the approach was to further harmonize the regulations applicable across the EU Member States. Provisions relating to net neutrality can be found in the Framework Directive and the Universal Service Directive.

The revised Telecoms Package does not define the expression of net neutrality nor does it directly refer to it. Instead, it contains underlying principles such as transparency obligations and quality of service issues. National regulatory authorities (*i.e.*, telecoms regulators) are under the obligation to promote access, distribution and use by end-users of information, applications and services of their choice. Article 8.4 (g) of the Framework Directive sets up a "net neutrality" objective for national regulators.⁴¹ It is interesting to note that the wording of that article is close to the four freedoms established by the FCC in its Internet Policy on Network Neutrality.⁴² In this regard, Recital 28 of the amending Directive 2009/136/EC (Citizen's Rights Directive) makes even

a more explicit reference to the American "net freedom" policy.⁴³

Besides an objective of promotion of net neutrality, national regulators are granted additional powers to settle disputes between network providers (in the text, electronic communications providers, including IAPs) and third parties with whom they do not necessarily have contractual relationships (such as interconnection, transit providers).⁴⁴ Until the revision of the European Telecoms Package, telecoms regulators could only resolve disputes arising between IAPs.

In application of the new provisions of the Universal Service Directive, IAPs are obliged to more transparency towards their end-users: customers must be informed about the restrictions of access to the networks as well as the level of quality of service offered (Article 20.1 (b)). In addition, national regulators are empowered to set up minimum quality of service requirements to "prevent the degradation of service and the hindering or slowing down of traffic over networks." (Article 22.3).

If the new European Telecoms Package does not contain direct references to "net neutrality," it should be noted that the Commission accompanied the adopted European measures to a declaration on net neutrality.⁴⁵ On the topic, the European Commission issued also a communication in 2011 and launched in 2012 a public consultation on Open Internet.⁴⁶ Despite the skepticism of many observers, the European Commission announced its plan to use the results of the consultation to propose recommendations on net neutrality.⁴⁷

IMPLEMENTATION A MINIMA OF THE RULES IN THE FRENCH CODE OF POSTS AND ELECTRONIC COMMUNICATIONS AND THE CONSUMER CODE

The European Telecoms Package did not leave much leeway to Member States for implementation into national law, with the exception of the provisions relating to net neutrality.⁴⁸ Concerning the implementation of these measures, the Government had already expressed its position in its report of July 2010 in which it considered that the European framework was adequate and that no additional legislative provisions were necessary at that stage.⁴⁹ The position of the Government was therefore to copy and paste

the European provisions in French law, despite the discretion left to Member States on these issues.

The amendments to the provisions of the CPCE reflect the choice made by the Government, to the exception of one provision added by the French Parliament when it authorized the Government to adopt the measures via an Ordinance. During the parliamentary debates of the enabling law, the Senate considered that the revised European Telecom Package did not provide any ground for the French telecoms regulator to act in case of discriminatory practices between electronic communications operators and content providers in respect of traffic routing and access to services. The Senate proposed to lay down the principle of non-discrimination as a regulatory objective. The purpose was to enable the French telecoms regulator (together with the Ministry in charge of electronic communications) to monitor the “absence of discrimination, in similar circumstances, in the relations between operators [electronic communications operators, IAPs] and electronic communications service providers [*e.g.*, content and applications providers] in traffic conveyance and access to their services.”⁵⁰ This amendment, added in the enabling law of March 2011, has been codified in Article L. 32-1.II.4 bis of the CPCE.

On 24 August 2011, the Government Ordinance implementing the European measures was adopted.⁵¹ As a result, the CPCE contains new (net neutrality) objectives and grants tools to the French telecoms operator to achieve these objectives (relating to transparency, quality of service and settlement of disputes). Nothing more or nothing less than what the revised European Telecoms Package contains.

In particular, the “net neutrality objective” contained in Article 8.4 (g) of the Framework Directive has been transposed in Article L. 32-1 (15°) of the CPCE.⁵² The objective of fair and effective competition between network providers and providers of electronic communications services provided by Article 8.2 (b) of the Framework Directive can be found in Article L. 32-1 (2°).⁵³

In terms of transparency, obligations have been split between the CPCE and the Consumer Code. According to Article L. 33-1 (n) of the CPCE, “providers have the obligation to provide users with the information listed in Article L. 121-83-1 of the Consumer Code.” Article L. 33-1 (n) is completed by Article D.98-12 of the same code, which stipulates

that “information listed in Article L. 121-83 of the consumer code will be presented in a clear, comparable and up-to-date fashion, and made readily accessible.” Obligations made to IAPs towards their end-users and information they need to provide them via the service contracts are described in Articles L. 121-83 and L. 121-83-1 of the Consumer Code. This concerns: “the services provided, their level of quality and the time needed for their delivery”; “the procedures the provider employs to measure and shape traffic to avoid filing a link to capacity or overfilling a link, and how this will affect the quality of service”; and “restrictions on access to services and their use, and on the use of the terminal equipment supplied”.⁵⁴

Concerning the quality of service, Article L. 36-6 of the CPCE has been amended to add the new power granted to the ARCEP to set up minimum requirements to protect quality of service. In application of Article D. 98-4 of the CPCE, the telecoms regulator can put in place a monitoring system to assess the quality of service. The ARCEP has thus announced that it will release a decision by the end of 2012 to specify the Quality of Service Indicators for fixed Internet access services and the methods to measure them.⁵⁵

Finally in application of Article L. 36-8 of the CPCE, the ARCEP has been assigned new powers to settle disputes on access and interconnection issues between an electronic communications operator (such as an IAP) and another service provider (such as a content provider). The regulator considers that the scope of the dispute can relate to “reciprocal technical and pricing terms and conditions governing traffic routing” but cannot extend to content-related issues (such as exclusivity agreements or content distribution) for which it does not have any authority.⁵⁶

The French regulatory framework calls for two remarks. First of all, no obligation of compliance with a net neutrality principle has been inscribed in the law. The implementation of the revised European Telecoms Package has led to an increase of transparency imposed on network providers (IAPs) towards end users and to the promotion of the objective of net neutrality but not to a general obligation of net neutrality. This also means that the existing regulatory framework falls short due to lack of remedies for non-compliance with principle of net neutrality. It is true however that the French telecoms regulator has, under Article L. 36-11 of the CPCE, a general power

to impose sanctions on network providers and service providers in case of failure to perform (“*manquement*”) their obligations. The tricky issue is the definition of the obligation that has not been properly performed. If it seems difficult for the regulator to sanction the non-compliance to the objective of net neutrality, it could however sanction the lack of transparency, which is not an objective but a series of obligations detailed in the Consumer Code. As for the quality of service, the topic is not addressed in terms of obligations imposed on IAPs but in terms of obligation for the telecoms regulator to monitor the quality of the Internet access. In its report on net neutrality, the regulator pleads for extra tools to control the quality of service.⁵⁷ Enforcement of the measures provided by the European framework remains a delicate issue. Obligations in the European Telecoms Package have been defined in broad term. And although the telecoms regulator benefits from a general power to impose sanction, it cannot use it without having first specified the obligations not properly performed by IAPs. To summarize, without guidelines from the regulator on the application of the different obligations, the French telecoms regulator will not be able to use and enforce its power of sanction.

The other existing and well-established remedy that could be used to sanction network providers (IAPs) for non-compliance with the principle of net neutrality, is the *ex post* intervention of the Competition Authority for violation of competition rules. However, this remedy is limited to practices having an impact on competition (such as abuse of dominant position or collusion). As an illustration, in a recent interconnection dispute between the French network provider, France Telecom, and the American transit provider, Cogent, the French Competition Authority (*Autorité de la Concurrence*) had to decide on the application of the competition rules. In April 2011, Cogent complained to the French Competition Authority that France Telecom was charging fees for additional interconnection capacities. The plaintiff claimed that the practice was abuse of dominant position. The Competition Authority ruled that France Telecom had the right to charge for opening extra interconnection capacities but was under the obligation to make its peering policy (internal agreements) more transparent. According to the Competition Authority, interconnection issues, and in particular the issue at stake in the case, are part of the debate

on net neutrality.⁵⁸ On the issue of interconnection, the French telecoms regulator considers for its part that issues on interconnection do not necessarily relate to net neutrality. In its report on net neutrality, the ARCEP states that: “non-discriminatory conditions of interconnection are not directly linked to the debate on net neutrality since they do not infringe the principles of net neutrality. They are part of a more general issue on the financing of networks and the economic balance between operators and users... These issues, since they are related to the development of the networks on which are based the Internet need to be carefully monitored by the regulator.”⁵⁹ The ARCEP concludes that it should remain vigilant on the practices. For this purpose, the regulator published in March 2012 a decision on the periodical gathering of information on “the technical and pricing terms governing data conveyance and interconnection.”⁶⁰ But at this stage, it “considers the system to be adequate and does not... plan on introducing *ex ante* regulation.”⁶¹

ELEMENTS OF THE DEBATE BEYOND THE IMPLEMENTATION OF THE EUROPEAN PROVISIONS

The debate on net neutrality did not end with the implementation of the revised European telecoms measures into national law. The French Government did not want to go beyond the implementation of the European provisions, whereas the French Parliament was not satisfied with the implementation *a minima*. The evidence lies in the additional net neutrality rule that Parliament added to ensure that the French telecoms regulator would monitor any discriminatory practices between electronic communications operators (*i.e.*, IAPs) and electronic communications services providers (*i.e.*, content, services, applications providers) as explained in the previous section.

ABORTED LEGISLATIVE ATTEMPT TO REGULATE NET NEUTRALITY

The Socialist Group of the National Assembly (Second chamber of the French Parliament) introduced on 20 December 2010 a draft law to regulate Internet neutrality.⁶² The proposal was discussed

concomitantly to the law enabling the Government to transpose the revised European Telecoms Package via Ordinance. In February 2011, the National Assembly rejected at first reading the draft law, which was deemed not timely proposed. In addition to the implementation of the European measures, a parliamentary Information report on network and Internet neutrality was under preparation and due to deliver in April 2011.

The draft law contains however interesting features that deserve some attention. First of all, the proposal was based on the freedom to access the Internet as established by the Constitutional Council (Decision 2009-580 DC), which it defines as one of the preconditions for the exercise of freedoms of expression, information and communication. The purpose of the proposal was to ensure the effective exercise of these freedoms by delimiting acceptable exceptions. The proposal also defined net neutrality in terms of “prohibition of discriminations linked to content, senders or recipients of digital data” (Article 1). No specific player of the Internet value chain was targeted. Violations of net neutrality could therefore originate from any player (and not only from network providers or Internet access providers). The proposal then determined technical terms governing interconnection (Article 2), freedom to connect several pieces of equipment to the same Internet connection (Article 3) and allowed certain traffic management practices under certain conditions (Article 6). In addition, the draft law provided for the possibility to filter (or block) traffic under restrictive conditions (express agreement of the telecoms regulator or following a Court’s order). It also established an administrative sanction mechanism in the hands of the French telecoms regulator for non-compliance with the obligations of net neutrality. As stated by the Member of Parliament in charge of a parliamentary report on the draft law, “inscribing the principle of neutrality in the law only ma[de] sense if there [was] a mechanism to impose sanctions on persons who d[id] not respect it”.⁶³ The draft law proposed to provide enforcement tools to the telecoms regulator. But for the reasons explained above, the proposal did not go through.

The idea of regulating net neutrality reappeared in 2011 during the presidential campaign. The socialist candidate, Mr. Hollande, affirmed his intent to inscribe the principle of net neutrality in the law.⁶⁴

After the elections and the victory of the socialists, the new Deputy Minister in charge of Digital Economy reaffirmed this priority in July 2012 but backed off a few months later considering “there (was) no urgency to legislate. If there (were) violations to net neutrality, the ARCEP could act.”⁶⁵ In August 2012, the Prime Minister asked several Ministers to study the possibility of a merger between the French telecoms regulator and the French broadcasting authority (*Conseil Supérieur de l’Audiovisuel*- CSA), ruling out any possibility to inscribe the principle of net neutrality in a law.

In its report on net neutrality addressed to the Government and Parliament, the telecoms regulator did not take any position on the need (or not) to adopt a law on net neutrality. Its report points out some flaws but concludes that “it is up to the legislator to assess what actions to take.”⁶⁶ As for the legislator, the draft law introduced in September 2012 by the Member of Parliament who was also in charge of the Information report on the same topic should be mentioned.⁶⁷ However, at this stage, the proposal has not generated any official support from other Members of Parliament and has not been scheduled for discussions.

IMPACT OF A POSSIBLE MERGER BETWEEN THE TELECOMS REGULATOR AND THE BROADCASTING AUTHORITY ON NET NEUTRALITY

The request made by the Prime Minister draws more attention, especially since a potential merger would have consequences on net neutrality and the topic is not a new one. The idea of merging regulators emerged in a parliamentary information report in 2006 and was reintroduced in a second parliamentary information report in 2010.⁶⁸ However, these proposals were not warmly welcomed by different Ministers and by the authorities themselves.⁶⁹

With the change of political majority, the idea of merging the telecoms regulator (in charge of network regulation) with the broadcasting authority (in charge of cultural regulation) was revived. The underlying issues are the reform of the audiovisual and telecommunications regulations.

In his request, the Prime Minister has asked the two authorities to present their position on the issue.

The ARCEP and the CSA have both delivered their recommendation to the Government. In its report, the French telecoms regulator highlights the risks that such a merger would have on net neutrality and positions itself as the advocate of the freedom of communication on the Internet. The regulator considers that the principle of net neutrality as resulting from the European provisions prohibits the regulator from discriminating audiovisual content from other types of content.⁷⁰ The CSA on its side is not opposed to a (partial) merger between the two authorities, although it reminds the complexity of the audiovisual regulation in France. On net neutrality, it takes a bold approach and proposes to create a kind of “cultural exception” to net neutrality as described by Maxwell in his article on the CSA’s position.⁷¹ This exception is indeed a positive discrimination. French IAPs would give preference to service providers financially contributing to the French audiovisual production. Not only this proposal clashes with the position expressed by the ARCEP but it is also certainly in violation of the European rules on media law. But Maxwell explains that the CSA’s proposal is “the first step toward an “audiovisualisation” of telecom regulation.” This might be the new trend that will absorb the topic of net neutrality.

At the time of writing, the position of the Government on the potential merger between the two authorities was not officially known. According to the latest information however, a full merger was no longer considered, instead the setup of a body common to the two authorities was under discussion.⁷²

NOTES

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41. "The national regulatory authorities shall promote the interests of the citizens of the European Union by inter alia [...] (g) promoting the ability of end-users to access and distribute information or run applications and services of their choice.", see consolidated version of 19.12.2009 of Directive 2002/20/EC.
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