Importance of Telecoms and net neutrality policy

European Union policy has been key to opening up and de-regulating telecommunications networks and promoting choice of providers for consumers and businesses. This is why there is choice of fixed line and mobile providers, and new players are able to get started. EU telecoms policy also lies behind the growth of the smart phone, which grew out of a European innovation in digital mobile phones in the 1980s and 1990s. The European standard (GSM) became the global standard. Britain has been a leader in this policy from the beginning of the Single Market in the 1990s. ¹

Telecoms policy is the foundation of the Digital Single Market. The aim is to support the free flow of data around the European Union. It does this by removing barriers to services operating across borders, and by ensuring that the Internet remains open, banning networks from discriminating against services, applications or content.

In protecting the open Internet and net neutrality, EU policy facilitates permission-less development of new systems and services. Developers do not have to ask, or agree terms, with a network provider in order to run their innovations. All they have to do is comply with the technical standards of the Internet, which are internationally agreed and open. The Digital Single Market facilitates scaling up and offering cross-border services.

¹ For the historic context of both GSM and British involvement in the early establishment of the telecoms Single Market see Maria Michalis (2007) Governing European Communications, Lexington Books.
Internet of Things (IoT) comprises networks of connected devices that are, in general, transmitting small amounts of data throughout the day. These devices don’t need large amounts bandwidth, but there are lots of them, and they do need a network that is always on, always available and in some cases – autonomous cars - fast. For the technically minded, they need a high speed, low latency network. Future updates of telecoms policy will be key to IoT development. The EU is already involved in IoT issues and building expertise in this area, driving various consortia and projects.

How EU law regulates telecoms and protects the open Internet

The EU Telecoms Framework is designed to encourage competition between network providers, and to ensure consumer protection rights for network subscribers. Telecoms regulators have a duty to promote the interests of European citizens.

- addresses the physical infrastructure – wires in the ground, mobile base stations, switches, transmission equipment – for long distance and local loop to homes and business premises. It also addresses how networks connect to each other, including across borders.
- addresses how the network operates for example telephone numbering
- addresses how network providers deal with consumers – contracts, transparency regarding service restrictions, switching providers.
- data privacy with regard to metadata collected by providers
- the right of network providers to trade within a Member State and oversight of their business (regulation)
- establishes the Body of European Regulators for Electronic Communications (BEREC).

The EU net neutrality rules are enshrined within the 2015 Regulation on Open Internet Access. The Regulation bans discrimination against specific types of content, services or applications by the use of blocking, filtering, throttling or paid prioritisation. Of direct relevance to IoT, the Regulation includes a carve out for services ‘other than Internet access services’ and ‘for which specific levels of quality, that are not assured by internet access services, are necessary’. In this category it specifically refers to machine to machine communications, hence IoT appears to have been in the minds of the drafters. These services may only be offered if there is sufficient capacity in the network, that they do not impact on the open Internet. Some IoT devices that include user interaction may not be classed as machine to machine, therefore falling under net neutrality rules.

What may change after Brexit?

National telecoms rules in Britain implementing EU legislation will remain the same, at least immediately after Brexit. Both the Communications Act 2003 and the

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3 Regulation 2015/2120 laying down measures concerning open Internet access

4 Ibid (1) Recital 16
Wireless Telegraphy Act 2006, being acts of Parliament on the Statute, will remain in force. The UK government advises that national legislation will need to be amended to remove references to EU bodies and policy objectives, but otherwise it does not expect disruption to businesses or consumers under any Brexit scenario.5

An issue does arise over net neutrality, because an EU Regulation has immediate effect in all Member States when it comes into force, and the Member State does not need to transpose it. The UK has not transposed it. The Regulation has been in force from 30 April 2016, and Ofcom has been monitoring it using the EU text directly.6

As such, it falls when the UK leaves the EU, but will be grandfathered into UK law under the EU Withdrawal Act 7 which gives strong powers to Ministers to change or scrap laws without Parliamentary scrutiny (the so-called Henry VII powers). The UK government policy has tended to favour network-based content filtering which is in breach of net neutrality rules and a question can be raised about the position it would take post-Brexit. Any change would mean that UK diverges from EU rules. In a hard Brexit scenario, changes could be made from 30 March 2019. If a Withdrawal Agreement is put in place, there will be an agreed transition when the UK will adhere to EU rules. Currently, the draft agreement provides for a 21 month transition to 31 December 2020.

Under the EU Withdrawal Agreement currently proposed,8 Ofcom could not remain a member of BEREC. New proposals for BEREC will strengthen its role, giving it legal personality.9 There are other new proposals that are in pipeline at the time of writing. These include the new Electronic Communications Code10, which updates the Telecoms Framework and the E-privacy Regulation 11 It is unclear whether the UK will implement these proposals, unless they are in force before 29 March 2019.

Issues

There is a concern that, should be government be minded to, it could change net neutrality rules without scrutiny. Some network providers are indicating that want to press Ofcom to revisit the net neutrality rules.

Along with that is the possibility that the UK government could be pressured in making a change as part of a trade agreement with the US, where the Trump administration has gone back on the net neutrality order made by the FCC under the previous administration. The UK, if cast adrift from the EU in a hard Brexit scenario, will be in weak negotiating position. The US Trade Representative may well insist on applying the requirements of US industries in the UK under a new trade deal. The recent USMCA treaty between the US, Canada and Mexico weakens net neutrality protections found in other treaties.

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6  Monitoring compliance with the EU Net Neutrality regulation A report to the European Commission June 2018
7  European Union (Withdrawal) Act 2018
9  Proposal for a Regulation establishing the Body of European Regulators for Electronic Communications COM(2016) 591 final 14 September 2016
such as the Trans-Pacific CPTPP.¹²

Such a move would create divergence from EU policy, and could jeopardise a EU-UK Free Trade Agreement on digital issues.

The EU has pointed out that UK providers offering services in the EU 27 will have to abide by its rules, no matter what the UK government does.

The EU is already working on a Digital Trade Policy. The possibility is being mooted for guarantees protecting the open Internet and net neutrality to be incorporated into Free Trade Agreements¹³. The EU could position net neutrality as a core value, and as a principle that it would wish to promote in trade agreements. The position is uncertain regarding the British government’s position.

The post-Chequers White paper does say that the UK will work with the EU to promote the ‘free, open and secure Internet’ but as yet there is no further detail. The previous Conservative government under David Cameron promoted default-on filtering for the six largest network providers.

If the UK maintains alignment with EU net neutrality policy, it will have to follow without having any input. Under the EU Withdrawal Agreement,¹⁴ Ofcom falls out of the strengthened EU regulatory body for telecoms, BEREC, that is in the process of being completely overhauled. This could affect the carve out for machine to machine communications and IoT, and other future developments. However, with Ofcom outside the EU regulatory body, the UK will almost certainly lose influence over future telecoms policy.

Open Rights Group (ORG) is the UK’s only grassroots campaigning organisation that works to protect your digital rights.

We believe people have the right to control their technology, and oppose the use of technology to control people.

We raise awareness of threats to privacy and free speech and challenge them through public campaigns, legal actions, policy interventions and tech projects.

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This brief is part of the VIRT-EU project, funded by the European Union’s Horizon 2020 research and innovation programme under grant agreement No 732027.