III-3.6: Thematic Report (Internet, Media): The « Autorité de régulation des communications électroniques et des Postes – ARCEP" (the French telecommunications and postal regulator) organized a colloquium on April 13, 2010, on « La neutralité des réseaux » (Network Neutrality).

Tuesday 1 June 2010, by Marie Cullin, academic assistant

MAIN INFORMATION

The Autorité de la régulation des communications électroniques et des postes – ARCEP (French Telecommunications and Posts Regulator) organized the Colloquium on "la neutralité des réseaux" The Network Neutrality), which took place on April 13, 2010. Each actor uses the generality of the term 'neutrality' in an interpretation that best suits his opinions. However, neutrality means that there should be no discrimination between Internet users; however, it does not mean that they have the right to everything for free: because there has to be some sort of traffic and bandwidth management, consumer and copyright protection, it is necessary to strike a balance between these contradictory rights in order to allow the network to develop. Therefore, a regulator is necessary. The future development of the Internet depends upon it. For the moment, nobody knows who these legitimate regulators are, and how they would be able to regulate these competing forces, organize information transparency, and encourage long-term investment, while preserving competition at the same time.

CONTEXT AND SUMMARY

Jean-Ludovic Silicani, the President of the *Autorité de régulation des communications électroniques et des postes* (ARCEP — the French telecommunications and postal regulator), made the introductory speech, in which he presented the reasons and goals of the colloquium: the desire to better understand 'network neutrality'—the mythical foundation of the Internet—which is a rule that prohibits discrimination as to the source, intent, or content of the information transmitted over the network. Indeed, the architecture of tomorrow's society will largely be defined by all that is digital, and this construction depends on whether or not the principle of neutrality will be upheld. The acceleration and expansion of the availability of new electronic communication services open up a vast field of new economic and social applications: they will allow (i) business to find new ways of enhancing productivity, (ii) for government actors to develop online government services and add new dimensions to certain existing public services, and (iii) for consumers to access a supplementary degree of interactivity and new means of expression and creation.

Already, in 2008, the sector of information and communications technologies represented 6,5% of the world's GDP; in France, it represented about 30% of economic growth and 3% of employment. We can see the face of a 'quaternary' sector of the economy, which could represent 20% of the global economy within a dozen years. This means that perfectly operating communications networks and Internet services will become essential issues for the future. Internet is a 'strategic collective good' that must work both optimally and in a manner that benefits everyone. Public authorities should therefore ensure Internet's endurance. If this task is becoming more and more difficult, and if people are wondering more and more about the possible excesses in this area, this is due to the specificity of Internet as a sector. First of all, Internet is a melting-pot of innovation, where many users are simultaneously producers and consumers. Also, the electronic communications market is two-sided: producers benefit from the growth in the number of consumers, and in return, consumers benefit from the increase in the number of producers. Thirdly, a great part of what is broadcast over the Internet is not-for-profit, and this vector of fundamental exchanges fulfills a sort of "general interest mission."

Finally, Internet's structure is fundamentally a superposition of a transport function, and transported elements, or contents.

The colloquium's discussion of network neutrality must therefore (i) facilitate innovation and the creation of the most appropriate economic and technical models, (ii) guarantee good quality of service, (iii) guarantee all users access to all networks and all contents, services and applications available on these networks, whether they be broadcast by other users or service providers, in a transparent and non-discriminatory fashion. The principle of Internet Neutrality is therefore, according to the speaker, an essential condition for the smooth operation and the development of tomorrow's Internet. In the United States, the Federal Communications Commission (FCC) has proposed four consumer rights since 2005: a right to access legal contents, the right to use the applications and terminals of their choice, the right to benefit from competition. In Europe, the "telecommunications package"—the European Union's legal framework for electronic communications, adopted in 2002 and amended in 2009—only discreetly affirms that access to contents is a primordial goal. The Directives within the telecommunications package basically define the goals of transparency towards the final user, minimal quality of service standards, and the enlarged jurisdiction of regulators to settle disputes, especially as concerns disputes between electronic communications operators and content and service providers. What configuration forthcoming regulation will adopt is therefore essential in the debate on neutrality.

The first panel was led by **Henri Verdier,** a member of the ARCEP's *Comité de Prospective* (Forward Planning Committee), and proposed the theme *état des lieux et une mise en perspective du contexte français, européen, et américain, des problématiques liées au principe de neutralité des réseaux* (overview and perspectives of the French, European, and American context of issues linked to network neutrality), and began with a presentation by **Timothy Wu**, a professor at Columbia University, who defines neutrality by comparing the Internet to the transportation sector. Neutrality is the non-discrimination of access to the network, the provision of a service without discrimination amongst the public. The importance of this neutrality can be explained by Internet's, not simply economic, but also cultural and social, value.

Eli Noam, also a professor at Columbia University, tempered this ideal of neutrality by pragmatically recalling the reality of the need for investment, and by a contrete analysis of "Net Neutrality". In a short-term perspective, the Federal Court of Appeals for the District of Columbia recently ruled that the FCC did not have sufficient authority to impose "net neutrality" on Comcast, America's largest Internet service provider.[1] In a medium-term perspective, the FCC's "broadband plan" could be challenged by this decision, and the future regulatory regime for broadband internet has to be defined, because if it is difficult to supervise what information is available on the Internet, it is crucial to control networks: they are the quarantine lines that serve as filters. This crucial role played by networks explains the nationalization of fiber-optic networks in Australia: the network is considered a public service.

This technical conception of "net neutrality" is rounded off by the contribution by **Yves Gassot**, General Director of the IDATE Corporation, who reexamines the wealth of definitions that can be ascribed to this concept. A radical vision "Net Neutrality" perceives Internet as an unchanging and definitive framework, but reality obliges us to realize that the augmentation of traffic makes differentiation procedures necessary. The second point of view takes Internet from an economics perspective, seeing it as a meta-platform for intermediation. The cost of Internet investment can be unilaterally ascribed to Internet service providers. However, it is important to ensure that investments made by an individual company do not exclude other service providers from accessing the network, which can be achieved via interconnections. Two principal risks persist as to network access: risk of abuse in vertical integration, and bandwidth management. In both cases, the interconnection plays a principal role.

Winston Maxwell, an attorney at Hogan & Hartson adds a comparative perspective to these general considerations. The United States and Europe both focus on the consumer and his right to access all legal contents, the quality of service he has the right to expect, and the transparency that must be upheld as to bandwidth management policies.

Yet, differences remain between the two systems. In Europe, economic power in the telecommunications sector is very rigorous, and is analyzed very economically, based on the free market, the determination of service providers, the definition of the competition issues, and the implementation of a minimal economic regulation. Accordingly, European policies are based on the essential role of basic rights, while in the United States, these questions of access and content are secondary. The question is therefore how to find a balance, and what tools should be used to implement it.

Finally, **Nicolas Curien,** a member of the Arcep, concludes this first panel by providing a rather pragmatic vision of neutrality, described as "quasi-neutrality," or the greatest amount of neutrality possible taking into account the extant constraints. As concerns bandwidth management, the proper approach should ensure optimal quality of service and cannot justify discrimination. A fair distinction between discrimination and differentiation should be established, in a just and transparent manner, and this regulatory challenge should be overcome in coordination with service providers.

Following this first panel, **Nathalie Kosiusko-Morizet**, *Secretaire d'Etat à la prospective et au développement de l'économie numérique* [Junior Minister for Forward Planning and Development of the Digital Economy], introduces neutrality via three points.

Neutrality is first of all technical neutrality towards content, which is made possible by the implementation of protocols that have become universal, and are understood by all elements that make up the network. The universality of these protocol allows for the union of producers and consumers of applications and content, as well as the broadcasting of content that are accessible and can be created using applications available on the Internet. The economic dimension of neutrality is the second point, because the digital economy makes up more than 7% of worldwide GDP. Internet is at the heart of the digital economy, and makes this economy possible, and creates new ways of adding value. Therefore, the debate must focus on the organization of contractual relationships between the various actors of the Internet's value-adding chain. Finally, the most important dimension is the political and societal aspect of neutrality. In this respect, the French Government is going to devote 2.5 billion Euros to the development of Internet use, content, and digital applications; and 2 billion Euros to infrastructure development. The State, here a wise investor, must help develop this industry of the future, and investment in content and applications is fundamental. Internet must remain a model of innovation: the user must be able to access all legal services available on Internet; and service, content, and application providers must allow potential access to all users.

Internet's success, however, creates challenges. Migrating towards very-high-speed Internet means that service providers are consolidating this economic model and use bandwidth management to ensure optimal service quality. The European Directive of March 7, 2002 regarding Universal Service and the rights of users has yet to be integrated within French domestic legislation, but as concerns existing bandwidth management policies, it provides for the ability to (i) distinguish between good and bad practices, and (ii) ensure transparency of such practices. The other challenge that must be overcome is allowing free access to content, uses, and applications, which must be maintained without occulting liability or the enforcement of other legal provisions in cyberspace. In order for rule of law to prime, we have to eliminate the double stumbling block of thinking either that the Internet cannot be regulated because of its very structure, or that punishment should be automatically be meted out. Internet's structure truly requires the law to keep up with Internet's ever more technical nature.

Nelly Kroes, European Commissioner for Digital Agenda, and Vice President of the European Commission, speaks about Internet's emotional aspect with regard to neutrality: a fear of a *Big Brother* syndrome, and of public censorship. Therefore, we must ask ourselves who must govern the Internet. In this perspective, the questions that Internet brings to the fore are numerous, and even though we do not yet have answers to such questions, there is no doubt that their consequences will be fundamental. Re-examining the new European Regulation allows one to understand the mindset of the Internet's burgeoning regulatory systems.

"Europe's New Regulatory Framework," adopted with a 2009 Directive, obliges national regulators to promote the possibility for end-users to access and distribute the information of their choice. It thereby recognizes the freedom of Internet users. The new regulatory system goes further by providing for the possibility for national regulators to impose a minimum standard for quality of service, in order to ensure that neither bandwidth management, nor potential differentiation policies, discriminate against non-commercial users who provide content and services. This regulation also imposes more transparency in order to allow the consumer to understand the service he obtains for the price paid: information on bandwidth management policies must therefore be provided in order to allow the consumer to choose between service providers in function of such policies. The adaptation of this Directive to national legal systems will be supervised and encouraged by the European Commission. Future reflections will be on how to deal with particular circumstances that might be revealed in practice, and the Commission will audition all concerned parties. A public consultation on 'Net Neutrality' will be launched before the summer.

Finally, Nelly Kroes presents the principles upon which Internet regulation will be based, and according to which its goals will be defined: (i) the fundamental character of freedom of expression, (ii) obligatory transparency, (iii) the need to invest in open and efficient networks, (iv) free-market competition, (v) support for innovation. The European Commission's primary goal is to strike a balance between all parties concerned by the Internet.

The *Second Panel* focused on the relationships between network operators, content servers, and content editors, and was led by **Patrick Raude**, a member of the Arcep. It asked *les questions de gestion du trafic, de tarification, et de partage de la valeur* (the questions of bandwidth management, pricing, and value sharing). These questions can be subdivided in the following manner: how to reconcile network optimization with (i) consumers' access rights, (ii) competition, and (iii) the efficiency of the Internet's economic model.

Stéphane Richard, the General Director of France Télécom, asks three questions. First, France Telecom is structurally favorable to the development of the Internet, which is only possible via the broad-minded concept of Net Neutrality, allowing for an open, broad, Internet. Net Neutrality should not, however, encourage naivety as to Internet's development, and since economic issues are so important, economic reality must be integrated into the reflection process. For example, the development of Smartphones has caused a 200% increase in data traffic, which is causing problems for operators that do not have proprietary 3G networks. Similarly, the iPad concretely restructures the way consumers will consume bandwidth. The Internet's economic stakes mean that competition authorities will have to be vigilant, which is made difficult by the fact that Internet is borderless.

Martin Rogard, the French director of Dailymotion, gives us the point of view of a content provider on network neutrality. He emphasizes that in France, there is a high level of integration between content and service providers. This requires the implementation of certain principles in order to avoid the eviction of certain content. In this respect, mobile telephone issues are important, because the operator has much greater control over what users access than via computer. Yet, mobile Internet is spearheading greater content accessibility, which might justify partnerships between mobile Internet service providers, and content providers, or even a revenue sharing scheme between the two, where one would give a portion of its subscription income to the other, in order to compensate for investments required.

This transversal conception of the Internet paves the way for **Matthew Kirk**, Vodafone UK's Public Affairs Manager, to introduce the theme of the value chain through a larger reflection on the best way to provide harmonious and efficient service. A part of the value chain is extremely regulated, and the simplest methods are the most expensive ones. However, Net Neutrality implies the absence of discrimination between the different types of services offered by operators. Applied to questions of bandwidth management, this implies a policy of transparency in order to allow clients to freely choose. The job of regulators is therefore to encourage free circulation of value and improve competition on the market.

In parallel to these economic analyses of neutrality, **Benjamin Bayart**, the President of the French Data Network, reviews questions of basic rights, especially freedom of access, which was emphasized in the *Conseil Constitutionnel* [French Constitutional Council's] decision n° 2009-580 DC handed down on June 10, 2009 relating to the Act *favorisant la diffusion et la protection de la création sur Internet* [promoting the broadcasting and protection of content created on the Internet]. However, freedom of expression is a principle that is rarely referred to in France, it is an 'export' that is very frequently expressed in the United States. Although the possibility of broadcasting content is both Internet's uniqueness and foundation, the existence of three or four huge platforms slightly denatures the concept of the Internet. Ensuring neutrality must therefore guarantee that the network conserves its double faculty of access and emission. In this respect, bandwidth management and permanent congestion mean that new networks must be built. Investment must be principally performed on the network, and not on the last mile (or last kilometer), which has the advantage of being less costly. Volume is expensive, so citizens should be able to choose the service that best corresponds to his use of the Internet. The fundamental error, especially as concerns mobile Internet, is the sale of something that is not Internet, because access is filtred and there is no public IP address. Finally, billing by volume does not present particular difficulties, but should not lead to violations of privacy, or the secrecy of correspondence[2], by distinguishing between the type of content conveyed (e-mails, videos, etc.).

Emmanuel Forest, president of Bouygues Telecom (the third-largest French mobile telephony service provider), adopts the idea of volume limitation, but anchors the legitimacy of such limitations in the principle of transparency. The ideal economic model of unlimited Internet, as fast as humanly possible, is a naïve concept, and a certain amount of segmentation is required. Two possibilities are conceivable: guaranteeing the maximum possible speed up to a certain amount of gigabytes, or offering different prices for different amounts of information transmitted. Whatever solution be adopted, it is important that everyone be able to access the Internet, and that everyone know exactly what he is purchasing. This implies a terminological clarification that will allow users to pay for the level of service that they choose.

Richard Whitt, Google's worldwide institutional director, readdresses the issue of segmentation by defining Internet's major challenge as the development of quality. Yet, no solution exists as to quality standards, which are defined according to the needs of a particular time and place. Non-discrimination must therefore be adapted in function of the individual market, and competition between service providers must be stimulated. This implies unbundling the local loop (what links a user to the network he uses, and allows him to benefit from the global structure of a public information transport system). It is, however, evident that competition does not guarantee openness in and of itself, it simply allows for consumer choice, in function of his country, market, and local political situation.

During the *third panel* on *les modalités d'accès aux contenus et aux services et sur la protection des droits des consommateurs* [the ways of accessing content and services, and the protection of consumer rights], **Joëlle Toledano**, member of the Arcep, insists on the fact that the Internet combines market sector services and non-market sector services; the general interest and profit-seeking motives. The debate on the questions of innovation, investment, value sharing, consumer wellbeing, social pluralism, legality, respect for cultural heritage, and the techniques for reducing congestion and saturation, is an economic one. The question can be summarized in the following manner: should there be limits to non-discriminatory access? The Internet's ecosystem is complex; it needs to be legible and transparent.

The first speech is given by **Hervé Le Borgne**, the vice-president of UFC-Que Choisir[3], insists on the fact that users' have the right to access internet and to have their privacy respected, consumers should therefore benefit from information that allows them to make enlightened choices between various service providers. As regards the offer of Internet services, the consumer's preoccupations are the following: he wants to access the most open and neutral possible Internet, and restrictions to this principle should be made public, objectively justified, and content-neutral.

Maxime Lombardini, the General Director of Iliad[4], replied that he is also opposed to content-specific filters, but that there is a very real problem because traffic used to be balanced, but now, it is mostly directed to and from four major American content providers, whose financial contributions do not correspond to their capacities in terms of traffic. Billing rules should therefore be rationalized in function of varying capacities in terms of volume. The question of neutrality also involves the question of exclusive content reserved by certain service providers to their subscribers, the question of vertical integration, and that of Franco-American inequalities.

Faced with this economic approach to neutrality, **Jean Musitelli**, a member of the *Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet* (HADOPI — French Online Copyright Protection Agency), developed a pragmatic and progressive definition of neutrality as the point of equilibrium between divergent interests at any given time. This flexibility does not prevent using the general interest as the standard of adjustment. The protection of intellectual property rights has reopened the debate on privacy protection, through the spectre of the 'nosy postman', and we cannot know to what extent neutrality supports cultural diversity. The dangers are, however, well known: vertical integration, concentration, and neutrality should be conceived as an "ethics of shared responsibility".

Jean-Dominique Pit, SFR's[5] strategic director, intervened to give a service provider's perspective on neutrality, and more specifically, access to content. Although this service provider is opposed to permanent content exclusivity, neutrality should not be understood as a form of inaction, but rather as a means to overcome the challenges of innovation. New applications, such as High Definition video or 3D, create new needs in terms of traffic capacities. For mobile Internet services, the challenge is economic and technical, because the local loop is shared. No individual user or service should be discriminated. The power of very large actors therefore presents a danger. It is possible that new applications will not have the means to deploy their own infrastructures, even though they are genuinely useful, such as medical services on the Internet, or helping the elderly to remain in their homes. These managed services must also be able to develop.

Marc Tessier, president of *Vidéo Futur Entertainment Group*, provides an analysis in conclusion of this panel that includes the question of the Internet's density. The parallel between the Internet and the medias limits the risks of segmentation, which limits the applications and efficiency of the media. Regulation needs a non-dogmatic formula, because each case requires a specific reply. Yet, the planned French decree on video-on-demand is an illustration of such methodological errors, because it is a simple reproduction of the decree on television.

The *fourth panel*, led by **Marie-Dominique Hagelsteen**, a *Présidente de Section au Conseil d'Etat* (a French Council of State Department Head), defined *les besoins de la regulation et en particulier de régulation publique, sur l'Internet, dans un environnement convergent*, or the needs of regulation, and especially public regulation, of Internet, in a convergent environment between the worlds of land-line telephones and mobile-telephones, between content and container, media and the Web. Ms. Hagelsteen emphasizes that neutrality is both a freedom and a risk, and brings up the question of its articulation with regulation. What type of regulation will ensure neutrality? What should be the articulation between various regulators? At what level should we regulate? These are the issues neutrality raises.

Denis Rapone, member of the Arcep, gave a speech that re-examines the three introductory questions: What regulation does Internet need? What are the foundations for pertinent regulation? How does the Arcep's regulation articulate with other regulators' action? The answer to the first question differentiates the Internet from the Arcep's traditional activities. The Internet has long been self-regulated through contractual relationships, customary rules, and the absence of fees. This leads to a certain form of opacity for consumers. However, the need for regulation can be clearly identified in the debates on Internet's ecosystem. The following desires have been identified: the formalisation of a principle of neutrality as to the content sent over the Internet, interconnection, the prevention and punishment of discriminatory behavior in vertically-integrated markets, and improved transparency on the contents of subscription packages. The legal basis for the Arcep's action must be defined, because it is currently poorly-defined.

The adaptation of the *Telecommunication Package*'s Directives into French law should, however, provide the Arcep with pertinent means of regulation in order to fulfil its goal of non-discriminatory access to content: rules for transparency, the power to set a minimum level of service, enlarged powers in dispute settlement. The Arcep should therefore ask itself what degree of regulation should be implemented, and what nature this regulation should adopt: indicative, prescriptive, based on co-regulation or on more restrictive forms of regulation, such as the analysis of the relevant market, such as IP interconnection. A balance must be established, but must not become ossified. Finally, the question of the articulation between various actors and different levels of regulation is perfectly reflected by the question of dispute settlement. Extant powers and new powers for the Arcep and the *Conseil supérieur de l'audiovisuel* (CSA — French Broadcasting Regulatory Body), will require us to decide on the nature of the optimum articulation between these two authorities, and should lead to a thorough dialogue between the two.

These first questions are taken over by the warning issued by **Isabelle Falque-Pierrotin**, the President of the *Forum des droits sur l'Internet* (Association for Internet Rights), and Vice President of the *Commission nationale de l'informatique et des libertés* (CNIL — French Data Protection Agency), who reminds us that in order to think about convergence on the Internet, we must begin with a simplistic conception of the Internet. Today's convergence involves all customs, services, and rules. The Internet is a social space, and not simply an infrastructure. What is the collective social contract that is desired for the Internet? 'Net Neutrality' also makes us wonder if legislation is necessary. Many areas of law are involved; codes of good practices could be enough to provide a legible operational structure. The guarantors of Net Neutrality are the regulators, the Arcep, the CSA, and the CNIL, as well as the magistrate, who are all competent to decide issues relating to the Internet. The articulation of these different authorities' action is crucial in order to avoid competition between them and incoherency of their action. In order to resolve the question of inter-regulation, innovation will be necessary, and for this, regulators should be provided with a neutral dialogue platform. A *Conseil National du Numérique* (National Digital Council) would be a method to explore.

 Christian Paul, a member of France's lower house of Parliament, the *Assemblée Nationale*, highlights the need to gather consensus around this issue. The Internet is first and foremost an architecture that must be defended in a democratic approach to Net Neutrality values, which must carry over into regulation. The Internet is a common source of information, and Net Neutrality is the keystone of this system. Therefore, Net Neutrality is the opposite of laissez-faire. The implication of this principle for the regulator is that he must preserve a space of innovation and freedom, a Net Creativity that involves freedom of expression, but also equality, the question of broadband coverage, and the prohibition of discrimination. Finally, peer-to-peer services are essentially egalitarian, and are structurally linked to the Internet. A certain 'operational secularism' must be upheld. However, today commercial and security concerns are causing tensions, such as the fight against terrorism. These questions must be dealt with, but the legal tools already at hand are sufficient for answering most of them. However, the legal consecration of the principle of Net Neutrality, a founding principle of the Internet, would have important symbolic force in a context where certain points are still being debated.

Howard Shelanski, a Professor at Berkeley University, brings the American conception of Net Neutrality to the debate: it is a goal that is approved in principle, but controversial as to its practical implications. Networks talk of management problems; content providers denounce the lack of network capacity to handle all users' content. What regulation should be adopted? The Comcast decision presents a true problem concerning the continuity of the FCC's action in this domain. Two possibilities are at hand. Either, Competition authorities, like the Federal Trade Commission (FTC) could regulate this question, or the FCC could opt to reclassify Internet access as a 'telecommunications service' rather than the current classification of 'information service', in order to regulate high speed Internet providers.[6] This reclassification makes us wonder about the future articulation between sector-specific authorities and horizontal authorities. Although an analysis of the Internet and consumers shows that these two should be complementary, the reclassification might overthrow this equilibrium.

Co-regulation also influences the definition of neutrality. **Emmanuel Gabla**, a member of the CSA, reminds us that neutrality is important on the Internet, but also for the audiovisual content transmitted over the Internet, such as is the case with 'triple play' internet packages, so that operators do not favor their own contents over others'. Neutrality is a question of basic rights, and all information must be accessible via premium quality service. Pluralism and diversity of content must be encouraged. The content regulator must: ensure all content sources have access to a basic offer, within which there is a guarantee of minimum quality of service. The access of all consumers to a premium offer must also be guaranteed, like recorded television or video-on-demand, in order to avoid the development of Internet exclusivities by service providers. This even raises the question as to whether public service television channels should be subject to a 'must carry' obligation, with a financial counterpart. The apparition of connected content is radically changing audiovisual consumption, and regulators must be able to settle differences between actors, in a spirit of cooperation.

Elisabeth Flüry-Herard, the Vice President of the *Autorité de la Concurrence* (French Competition Authority), completes this analysis of Internet regulation by the presentation of the action led by a horizontal authority, *ex post*. The *Autorité de la Concurrence*'s approach is to identify the relevant market, here, a 'double-sided platform' that raises questions as to value sharing. The Authority only takes decisions *a posterori*, on market behaviors and uses all of its powers, even consultative powers, and an opinion on a service provider is going to be published soon. The interplay of different regulatory authorities is not problematic, it is productive and efficient. *Ex ante* regulation is justified by specific market situations, but must be managed by public authorities. Imperfect information, access to public information, and negative externalities like phenomena of congestion on mobile telephone networks must be dealt with by sector-specific regulation or via diversified pricing policies.

Lastly, **Bruno Retaillau**, a French Senator, summarizes the elements that have been heard from the beginning of the colloquium. The Internet is a collective strategic good, with a universal dimension. The Internet is essential to social life, to the 'social contract', but this dimension goes beyond national borders. The Internet's importance comes from this link with basic liberties of access, choice, and expression. Net Neutrality is not negotiable, because it is the cornerstone of the Internet, but it suffers from many restrictions. According to the speaker, the subject is societal in nature, because of the increase in traffic, convergence, and vertical integration, with the *Time Warner-AOL* affair in the United States as an early warning signal. The development of access and applications augments the demand for regulation. Equilibrium must be found between the principle of neutrality, on one hand, and access and respect of privacy. The risk is network congestion and barriers to the free circulation of contents. The other risk is one of a two-tier, compartmentalized Internet. We should therefore be wary of premium Internet subscriptions and concentrate on best effort Internet. Landline and mobile Internet are, however, not subject to the same constraints. Regulation in this area is complicated, and should be dictated by simple ideas. First of all, competition is the ally of network neutrality, and allows the user to change service provider when he is not satisfied. Also, investment must be encouraged in order to promote the development of very-high-speed Internet, fibre optics, digital dividends, and measured taxation, in function of the signal that we want to send. Finally, the adaptation of the 2009 Directives from the *Telecommunications Package* into French law will allow for the implementation of effective safeguards, such as transparency and non-discrimination, which must be efficiently and firmly implemented by the law.

The colloquium ended with concluding remarks by **Jean-Ludovic Silicani**, the Arcep's President, who synthesized five major conclusions that can be drawn from this colloquium. First of all, we must (i) clarify the relationships between the Internet's actors by imposing more transparency. Then, the application of this principle should (ii) be extended to the relationships between network operators and content, application, and service providers, but also (iii) to the relationships between Internet service providers and subscribers. Fourthly, (iv) service management causes a certain saturation of networks because of traffic flows, but in counterpart, necessitates a transparent and non-discriminatory implementation. Finally, (v) a certain degree of regulation is necessary because the Internet's ecosystem cannot be exclusively auto regulated, and must respect all liberties in accordance with the jurisprudence of the *Conseil Constitutionnel* (French Constitutional Council) and the European Court of Human Rights (ECHR). The conclusion of Mr. Silicani's speech is that Internet governance requires an international dimension, because the Internet is of global strategic interest.

Within this world-wide governance, France has a tradition of balanced regulation that combines the implementation of lasting competition and the pursuit of general interest objectives, which correspond to the Internet's needs and will allow it to be a driving force.

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[1] Editor's note: see also *Regulatory Law Review II.4-3 & II.4-6 on the Court of Appeal's decision and the FCC's reaction*
[2] Editors note : the secrecy of correspondence is a basic right in many civil law systems, and enshrined in the constitutions of many continental European countries.
[3] Editor's note: UFC-Que Choisir is France's premier consumer association.
[4] Editor's note: Iliad is the holding company for Free, a French Internet Service Provider.
[5] Editor's note: SFR, or *Société française de radiotéléphonie* is France's second-largest mobile telephony service provider
[6] For a more in-depth analysis of these questions, *cf. Regulatory Law, 2010, II.4-3 & II.4-6.*

Links with other documents in the same sector

BRIEF COMMENTARY

The immense interest of this colloquium is to clearly show the questions that the Internet raises for regulation. The hybrid nature of its architecture, geographic localisation, consumer use, and economy causes us to realise that there is a real need for regulation. Government action is colliding with the globalization of the Net and the evanescence of the Internet as a physical object, which is in perpetual evolution. Regulation provides the necessary flexibility to espouse the Internet's multifarious forms, and provide an answer to the goal of regulation proposed by this colloquium. If it was made clear that no party wished to entrap the Internet in a definitive framework, the effort made to define neutrality shows a distinction between a few different regulatory tendencies, which are articulated around a refusal of discrimination, at the level of access, and of content. The absence of dogmatism in the analysis of these goals legitimates, once again, the need for regulation, which would be the craftsman of an equilibrium (which was amply demonstrated to be fragile and in constant movement). The flexibility of the regulator's action, his rapidity of intervention, and the technical knowledge required to balance out free-market principles with other, non-competitive principles (network architecture and traffic management), are more reasons why regulation is needed.

The Internet therefore appears to be a prime target for regulation. But, the Internet does not simply show us that regulation is needed. It also provides for the occasion to deepen our reflections on what regulation's true nature is. Regulation of the Internet involves many sectors and many nations. The problems of co-regulation are therefore at the heart of regulation's issues. However, the comparative analysis conducted by the debates highlight some of co-regulation's difficulties. Even if European Union action can be coordinated with Member States' actions, around common principles, the difference between European and American approaches could be a discriminatory regulatory factor. Net Neutrality is also the question of what we can qualify as being neutral regulation, in order to avoid forum shopping and to ensure consumer protection. The difficulty that the Internet presents is double: the Internet is described as some as a shared public good, but it is also a fundamental economic issue, and an abyss for uncertain investment. This ambivalence is the raison d'être of the this colloquium, which provides a basis for future regulation, but also shows us the limits of national regulations faced with a global market. Even if regulation must reflect its subject, the Internet—beyond questions of co-regulation—raises questions as to the optimal level of regulation, evoked during the debate, without any real answer being proposed. For the moment, progress is made by simply establishing the questions that we have to ask ourselves.