

TAKEAWAYS FROM THE CERRE EXECUTIVE SEMINAR - 21 MARCH 2019

DEVICE NEUTRALITY: ISSUES AND POLICY OPTIONS

BACKGROUND

On 21 March 2019, the Centre on Regulation in Europe (CERRE) organised a high-level seminar on the newly coined topic of 'device neutrality' put forward by the French regulatory authority for telecommunications (Arcep) in a recent [report](#).

Today, neutrality and non-discrimination obligations only apply to Internet Access Service (IAS) providers. But should the EU extend these concepts to device manufacturers and to their integrated operating systems?

Some are indeed concerned that device manufacturers and providers of operating systems (OS) could use their market power to distort competition between content providers on one side and access to content by consumers on the other side.

To debate this, CERRE gathered around 50 representatives from telecom operators, device manufacturers, internet platforms and regulators, representatives from the European Commission's DG COMP and DG CNECT, and other key stakeholders such as consumer organisations.

Christopher Yoo, Chestnut Professor of Law, Communication and Computer & Information Science at the University of Pennsylvania and Sébastien Soriano, Chairman of Arcep, respectively delivered the event's opening and the closing address.

Questions were at the heart of the debates:

- ▶ What discriminatory practices exist in the field of device and OSs?
- ▶ What are the limits of current competition law? Is it (in)sufficient and why?
- ▶ What efficient regulatory tools could be put in place?
- ▶ Could and should the concept of neutrality be extended to device manufacturers and their integrated OS and under which conditions?

To guide the discussions, CERRE Research Fellow Prof. Jan Krämer (University of Passau) prepared an [issue paper](#) titled 'Device neutrality: the missing link for fair and transparent online competition?'



THE ISSUES AT STAKE

As underlined by one of the speakers, there are two technical bottlenecks when it comes to connecting to the Internet: the access and the device. The Net Neutrality Regulation was designed to solve the "access" question. It is fair to wonder what issues are at stake and what should be put in place regarding the second potential obstacle: the device.

Among the discriminatory practices existing in the field of device neutrality, some participants cited the **differentiated access to application programming interfaces (APIs)**, stressing that not all applications have access to the same APIs and this can benefit some over others.

It was also pointed out that **not all web browsers have the same capabilities on all devices**, as some are limited by the OS of the device. This is an issue, given that browsers are a way to bypass app stores and a way for consumers to gain access to a wider range of services and apps.

Finally, **some apps are preinstalled on some devices and as a result, do not compete equally with other apps**. It is all the more problematic as it can be complicated for users to determine whether some of those pre-installed apps are an integral part of the OS, or if they can be removed. There are also applications that cannot be deleted. In a similar spirit, it was argued that voice assistants, by definition, further limit consumer choice.

DEVICE NEUTRALITY: ISSUES AND POLICY OPTIONS

EXISTING REMEDIES

Participants largely discussed whether **competition law** is sufficient to prevent such discriminatory practices. But in this case, it is necessary to consider whether those practices are competition issues. If so, some argued, most of it could be addressed by existing competition law.

It was however stressed that this area of law should be improved in order to become more adapted to recent and future transformations in the digital sector.

If more fairness is desired, a clear impact assessment and a clear problem definition are needed.

Consumer law was also cited as an essential complement to address certain practices that limit the choice of consumers. In the end, the aim is to ensure security, privacy and quality of service for users, argued one of the speakers.

Others suggested that there should be a **debate at the societal level** on browsers, preinstalled apps, connected devices and similar technologies.

It was also mentioned that the **Platform-to-business Regulation** is a step in the right direction to correct existing discriminatory practices related to devices.

REGULATORY & POLICY OPTIONS

Various participants insisted that **the debate around specific regulatory remedies should be problem focused**. In other words, discriminatory practices should be assessed on a case by case basis, in order to identify specific market failures.

It should also be business model neutral, according to participants, to allow for a curated approach that ensures a space for integrated business models that guarantee experiences to users. Namely, regulation should not prevent vertical integration, as it allows firms to achieve benefits for consumers such as ease of use, privacy and security. It would also ensure that incentives to innovate are not reduced.

Finally, **it should be market based and the market power of potentially discriminatory firms should be assessed**: if their market share is high (and only if this condition is met), there may be room for regulatory intervention, some argued. I

n this regard, one speaker also stated that, before taking any action, authorities should consider whether a company has the ability to harm competition, whether it has incentives to do so, whether it creates an issue for consumers and whether there can be an effective remedy. *"Just because there is a problem does not mean that it is fixable by law"*, they added.

With consumer welfare in mind, some argued that digital companies need to adopt a **duty of care** towards their users.

Yet, there seemed to be a general agreement that we should be very careful when contemplating the possibility of applying neutrality and non-discrimination rules to device manufacturers and their integrated OS.

Mainly because **it is not easy to prove the benefits of neutrality rules nor to show that these are greater than the disadvantages they may cause**. There are indeed both negative and positive effects to net neutrality.

In addition, resorting to a principle-based approach also means that we will need more and more agencies to look at specific cases, one argued, which raises the following question: what would be the **optimal institutional setup** and what specific toolkit would be needed? In this regard, a participant wondered whether digital regulators should be put in place.



DEVICE NEUTRALITY: ISSUES AND POLICY OPTIONS

CONCLUSIONS

Although there were dissenting views around the necessity to implement additional regulatory remedies to enhance device neutrality, most participants agreed that:

- ▶ Applications should not be blocked;
- ▶ Reducing barriers to switching should be encouraged; and
- ▶ Transparency for consumer choice should be enhanced.

Most importantly, **user welfare** must be put at the heart of those concerns and the choice of consumers must be respected. There was consensus on the necessity for consumers to have access to an open internet.

Some underlined that it has been a common goal for everyone, including providers and device manufacturers, and it should continue to be this way as it brings benefits to everyone, consumers and business alike.

It should also be recalled that we are faced with fast-evolving technology, and devices will continue to significantly evolve in the years to come. The regulatory and policy options we envision should thus be as future-proof as possible and should allow for innovations such as 5G to take place swiftly. They should also ensure that start-ups continue to grow.

Looking ahead, it seems clear that the question of voice assistants will be at the heart of future debates, as it may enable the OS to give advantages to business partners and this concerns all parts of the digital industry including retail, media, content and even delivery services.

In the end, a level playing field across all layers of the value chain should be guaranteed, argued CERRE Research fellow Jan Krämer, adding: "*we need to be coherent in our approach to neutrality across all layers*".

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CERRE ISSUE PAPER
'DEVICE NEUTRALITY: THE MISSING LINK FOR FAIR AND TRANSPARENT ONLINE COMPETITION?'



✉ info@cerre.eu
🌐 cerre.eu
🐦 @CERRE_ThinkTank

📍 Avenue Louise, 475 (box 10)
1050 Brussels, Belgium
☎ +32 2 230 83 60