

## Comments on Ofcom's Strategic Review of Digital Communications

*by the C<sup>2</sup> Coalition, October 2015*

The Communications & Connectivity (C<sup>2</sup>) Coalition welcomes the opportunity to comment on Ofcom's Strategic Review of Digital Communications (hereafter 'the Review').

Our comments will be limited to Question 24.

**Q24: What are the potential competition and consumer protection implications of the rise of OTT services? Might the adoption of such services enable future deregulation without raising the risk of consumer harm?**

Terminology: the inappropriate OTT expression

C<sup>2</sup> would first like to remark that from a terminology point of view, the trend to use 'OTT' as an expression to cover content, application and services providers is slightly disturbing. For reference, the term over the top is used when something is done in excessive amounts or beyond reasonable limits. The term was first coined during the Great War when the troops became engaged in trench warfare. When the troops were sent over the trench wall, the order given would usually be over the top lads and best of luck.

We honestly believe that the terminology adopted by the BEREC in its Report on differentiation practices and related competition issues in the scope of net neutrality,<sup>1</sup> namely CAPs (content and application providers), gives a less biased and negatively coined image of these market players and would encourage national regulatory authorities to refrain from adopting this expression.

The 'level playing field' rhetoric

In our view claims around potential competition and consumer protection implications of the rise of content, application and service providers relate to the 'level playing field' rhetoric that is being very effectively used by incumbent telecoms operators in order to:

- 1) imply that players such as Skype, Google, etc. are escaping regulation which should in fact apply to them in areas such as privacy and data protection, switching and data portability, audiovisual rules, taxes, and identification and safety-related measures; and,

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<sup>1</sup> See, BEREC. (2012). BEREC Report on differentiation practices and related competition issues in the scope of net neutrality. Available at, [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/1094-berec-report-on-differentiation-practice\\_0.pdf/](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/1094-berec-report-on-differentiation-practice_0.pdf/).

2) try to obtain at the same time that telecoms operators be relieved from some of the burden of regulation, by having services such as Skype and others considered as substitutes to traditional voice telephony.

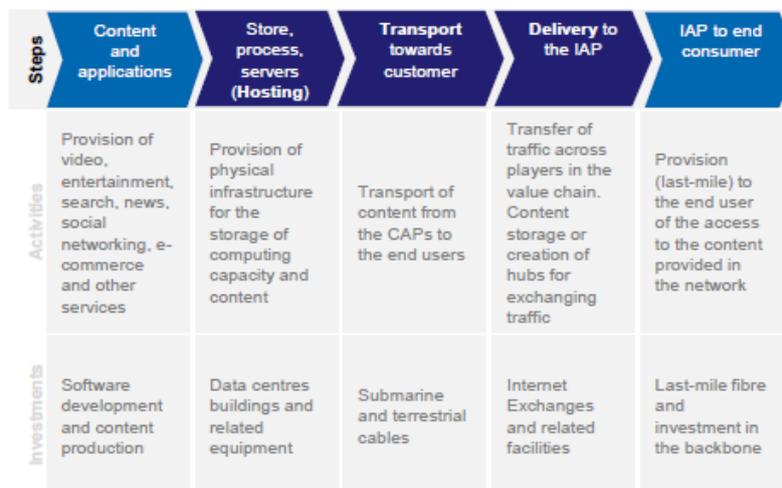
The funny thing about the level playing field image is that it seems to appear in all sorts of contexts, yet no one ever bothers to define the field they are talking about.

C<sup>2</sup> does not agree with this blanket ‘level playing field’ rhetoric. In our view the playing field can only be levelled between actors that are on the same field. This is not the case for networks and services. These are two distinct fields in the Open System Interconnect (OSI) model, the network operates at layer 1-2, while the services, such as content, application and service providers, operate at layer 3-4. These various layers interact together in the Internet ecosystem. The different levels are populated with different companies and different type of investments are made at the different levels – see **Figure 1** and **Figure 2** below.

	Type of companies	Examples
Content Application Provider (CAP)	Companies that provide end users with Internet content and applications	Google, Facebook, Yahoo!, Microsoft, Amazon, eBay, Netflix, BCC, Spotify, Dailymotion, Axel Springer
Service provider (SP)	Companies that help delivering Internet content, including data centre and backbone providers, IXPs, CDNs	Level 3, Cogent, XO Comms, Tata, Equinix, Akamai, CenturyLink, SunGard, Amazon (AWS), AMS-IX, DE-CIX, LINX
Internet Access provider (IAP)	Companies that provide Internet connectivity for consumers and businesses	NTT, Comcast, AT&T, Deutsche Telekom, Time Warner Cable, Verizon, Orange, KT

**Figure 1: Overview of the categories of companies active in Internet investments<sup>2</sup>**

<sup>2</sup> See, See, Analysys Mason. (2014, September). Investment in Network, Facilities, and Equipment by Content and Application Providers. Figure 3.5 – p. 17. Retrieved at, <http://www.analysismason.com/Research/Content/Reports/Content-application-provider-Internet-infrastructure-Sept2014/Report/>.



**Figure 2: Key activities involved and investments made in networks, facilities, and equipment required at each stage of the Internet value chain<sup>3</sup>**

The complaints by telecoms operators regarding the 'lack of level playing field' that exists between them and content, application and service providers could be compared to builders of football stadiums complaining about the fact that they are subject to a raft of regulations when building a stadium (possibly with subsidies) and that their investment takes decades to have a return, while football players that come to kick a ball in their stadiums make millions in a very short time span. Some would say that spectators rarely come to look at empty football stadiums but that they are attracted by the performance of these 'shallow' football players. Some would also argue that for every successful football players, there are thousands of failed players, with no career or shattered knee-caps. Some would finally say that the claims by the football stadium builders are absurd as it is impossible to compare such diverse 'market players'.

'Electronic communications services' (ECS) v 'information society services' (ISS)

Some stakeholders call for a re-evaluation of the existing definition of 'electronic communications services' (ECS). We believe that the distinctions between ECS and 'information society services' (ISS) is one of the principles that helped generate growth and innovation in the sector to date.

The interpretation and application of the ECS definition determines how broadly telecommunications regulations will be applied to new, innovative services. This could lead to a general and worrisome extension of telecommunications regulation to Internet content, applications and services, which are very different from traditional telecommunications services. An unconsidered application will have negative consequences, as it 1) risks to stifle innovation, instead of enabling and encouraging it, and 2) runs the risk of being incoherent when looking at the bigger EU picture.

<sup>3</sup> Based on Analysys Mason. (2014, September). *Ibid.* Figure 5.2 – p. 32.

### *Stifling innovation*

C<sup>2</sup> wants to emphasise the need to keep Internet applications and services with communications features outside the ECS classification. This guarantees that innovation can flourish. Where applicable, the ISS classification ensures that the provisions of the E-Commerce and Data Protection Directives provide protections for ISS users.

### *The bigger picture: the EU telecoms review(s)*

We would also like to stress that both the 2009 Review of the Regulatory Framework and the ongoing Telecoms Single Market / Connected Continent proposal do not touch the ECS definition. The European Parliament amended the European Commission's proposal for a 'Connected Continent' to safeguard that the next review ensures that "substitutable services are subject to the same rules, taking into consideration the definition of electronic communications services in Article 2(c) of Directive 2002/21/EC, in order to achieve equivalent, coherent and consistent regulation of electronic communications services and services substitutable to them, including with respect to access, all aspects of consumer protection, including portability, as well as privacy and data protection".<sup>4</sup>

BEREC has also recently recognised that "[...] in many instances, services and applications provided by OTT players are not considered under the Framework to be electronic communications services".<sup>5</sup> The European Commission's explanatory note to the relevant markets Recommendation also acknowledges this, as it notes that "currently OTT services are not yet at a level in which they can be considered actual substitutes to the services provided by infrastructure operators".<sup>6</sup> The explanatory note also indicates that "unmanaged VoIP is still not considered by the great majority of NRAs as a substitute for fixed voice".<sup>7</sup>

### De-regulation or Targeted Regulation?

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<sup>4</sup> European Parliament. (2014, 3 April). European Parliament legislative resolution of 3 April 2014 on the proposal for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC, 2002/22/EC, and Regulations (EC) No 1211/2009 and (EU) No 531/2012 (COM(2013)0627 – C7-0267/2013 – 2013/0309(COD)) (Ordinary legislative procedure: first reading. Amendment 229, Article 39 – paragraph 1. Available at, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0281>. This amendment is obviously still being discussed under the co-decision procedure.

<sup>5</sup> See, BEREC. (2014). BEREC Opinion on the Commission Recommendation on Relevant Product and Service Markets Susceptible to ex ante Regulation [BoR (14) 71]. p. 9, Section 3.1.2. Available at, [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/4438-berec-opinion-on-the-commission-recommen\\_0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/4438-berec-opinion-on-the-commission-recommen_0.pdf).

<sup>6</sup> See, European Commission. (2014, 9 October). Explanatory Note Accompanying the Document Commission Recommendation on Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services; p. 17. Retrieved at, <http://ec.europa.eu/digital-agenda/en/news/explanatory-note-accompanying-commission-recommendation-relevant-product-and-service-markets>.

<sup>7</sup> See, European Commission. (2014, 9 October). Explanatory Note. *Ibid.* p. 24.

We would like to point out that with the recent adoption of the European Commission's Recommendation on relevant markets,<sup>8</sup> the retail market for access to fixed telephony has been de-regulated. The European Commission decided to 'liberate' the fixed telecoms markets because:<sup>9</sup>

"There has been a decrease in volume of fixed calls as customers have turned to alternative solutions, such as voice-over-IP (VoIP) and mobile calls, but also to alternative providers, like over-the-top (OTT) players."

This decision should alleviate at least in part the claims by network operators that the substitutability of VoIP diluted their voice market share, as the European Commission seems to have placed fixed telephony and VoIP on the same 'level playing field' for the purpose of its market analysis.

C<sup>2</sup> is not convinced by this outcome and, as remarked above, we do not agree with this blanket 'level playing field' rhetoric.

Instead of proposing sweeping new rules, or seeking to 'level the playing field' and treat the service layer as an outgrowth of the 'access networks' (*i.e.* physical) layer, regulators and policymakers should prevent the emergence of new barriers to innovation and competition for content, application and service providers, especially given the churn of new services and abundance of new market entrants.

#### C<sup>2</sup> Recommendations

- **Going beyond buzzwords and rhetoric:** We encourage Ofcom and its colleague national regulatory authorities to put an end to some of the sterile discussions taking place in the telecoms world, and to stop using terms such as OTT and level playing field, unless they are prepared to properly define in each case what field they are talking about.
- **Moving towards targeted regulation:** Where barriers appear to emerge, regulators should ask whether there is an enduring market distortion or other harm in the provision of specific digital services that requires intervention. If those harms are found, then they should be targeted in a proportionate and technology-sensitive manner.
- **Ensuring adopted regulation does not stifle innovation:** Instead of attempting to regulate the service layer like the access network layer, efforts should focus on encouraging the same kind of competition in the access network layer as on the service layer.

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<sup>8</sup> See, European Commission. (2014, 9 October). Telecoms: Commission to Cut Number of Regulated Markets in Europe [IP/14/1112]. Retrieved at, [http://europa.eu/rapid/press-release\\_IP-14-1112\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1112_en.htm).

<sup>9</sup> See, European Commission. (2014, 9 October). Telecoms: Commission to Cut Number of Regulated Markets in Europe [IP/14/1112]. *Ibid.*

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We thank you in advance for taking consideration of these views. Feel free to contact Herman Rucic, C<sup>2</sup> Coalition, by phone (+32 (0)478 966701) or email ([hrucic@c2coalition.eu](mailto:hrucic@c2coalition.eu)) should you need further information.

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### **About the C<sup>2</sup> Coalition**

The Communications & Connectivity (C<sup>2</sup>) Coalition is the voice for Internet enabled innovation and the policy framework that enables it. Its current members are Google, Microsoft, Rakuten and Voxbone.

The C<sup>2</sup> Coalition believes that with the right public policies, Internet-enabled communications, services, applications and content, can benefit consumers, increase competition, provide a platform for innovation, drive broadband demand, and enable economic growth. The C<sup>2</sup> Coalition is [listed](#) in the Transparency Register.