



EUROPEAN COMMISSION
Competition DG

Markets and cases II: Information, Communication and Media
Antitrust: Telecoms

Brussels, 5 May 2014
COMP/C-1(D/2014/)

**Note of a meeting between Unit C1 and [REDACTED]
[REDACTED] Rewheel, regarding so-called "zero-rated" apps,
on Tuesday 29 April 2014**

[REDACTED] accompanied by officials from his unit, welcomed [REDACTED] thanking him for the information provided to the Commission on the above matter in recent weeks. He asked [REDACTED] to clarify whether he was representing any third party. [REDACTED] confirmed this was not the case.

[REDACTED] explained that, as of today, no formal complaint has been made to DG COMP in relation to "zero-rating". He said that the information received from [REDACTED] qualified as market information and that, pursuant to the procedural rules, the Commission can, if it considers it appropriate, investigate market information on its own initiative regardless of whether or not a formal complaint has been filed. [REDACTED] said that he was aware of this and did not intend to file a complaint.

[REDACTED] then explained the "zero rating" issue to which he had referred in a number of previous emails to the Commission.

DG COMP explained that the Commission enforces the competition rules pursuant to Articles 101 and 102 TFEU. As regards Article 102, it would be necessary (but not sufficient) to establish that an operator has a dominant position or that collective dominance exists. Even if dominance could be established, the behaviour in question would have to be analysed based on its effects. As a matter of economic theory, it cannot be excluded that "zero-rating" might have pro-competitive effects in certain cases, promoting innovation.

[REDACTED] asked [REDACTED] whether he thought that the new telecom package would address his concerns by making the conduct at stake illegal pursuant to the net neutrality rules (in particular the draft Art. 23 of the Connected Continent proposal). [REDACTED] said that the kind of behaviour described related to data volume caps and as such would not necessarily be covered by the current proposal which focussed on internet speed. He hoped that it might, however, be addressed in the second reading.

[REDACTED] closed the meeting by confirming that DG COMP would continue to monitor developments.

[REDACTED]



EUROPEAN COMMISSION

Cabinet of Vice-President Neelie Kroes

Deputy Head of Cabinet

Brussels, - 6 MAI 2014
Ares (2014)

Dear [REDACTED]

Thank you for your e-mail of 2 April 2014 to Vice-President Kroes. Vice-President Kroes has asked me to reply to you on her behalf.

In your e-mail and the more recent op-ed that you also forwarded to Vice-President Kroes, you express the view that the exemption of the data volume used for a specific service from the monthly data allowance ("zero-rating") is a violation of net-neutrality and is anti-competitive.

It is unclear from your e-mail, however, as to whether you consider that providers of services such as *Joyn* would offer it as a specialised service as a means to discriminate against competing services. *Joyn* appears to be an instant messaging application provided over the internet and cannot therefore be considered a specialised service as it does not meet the technical and commercial characteristics of such services as defined in the *Connected Continent Regulation* currently under discussion.

With this clarification made, it is also necessary to examine whether, while providing access to a service such as *Joyn*, ISPs block or degrade other similar applications or services which would be a clear breach of net neutrality. If not, and provided that the strict transparency requirements also proposed by the Commission are respected, then the situation is no different from other price discounts that come with bundled products, such as free voice and sms with mobile internet access, which are in consumers' interest. This is a sign of a competitive response to innovative services being introduced in the market.

We consider that such commercial practices do not pose a direct obstacle to end-user access to any online service or application on the basis of his/her internet subscription and as such would not be a violation of net-neutrality.

We must of course remain vigilant about potential anti-competitive practices, and it would be necessary to examine whether any consumer harm arises from such pricing practices.

[REDACTED]
[REDACTED] rewheel
Helsinki, Finland
e-mail: [REDACTED]@rewheel.fi

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
Office: BERL [REDACTED] Tel. direct line +32 229 [REDACTED]

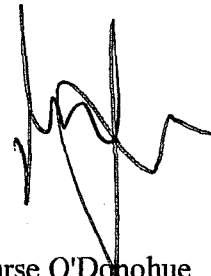
E-mail: [REDACTED]@ec.europa.eu

We note that, at the moment the actual take up of *Joyn* and similar initiatives developed by other companies is far from high.

With regards to your comment about the huge differences in retail prices for broadband connectivity across EU countries our own research has shown that, for the most common fixed broadband connections, prices can be up to four times higher in some Member States. While some differences between markets can be explained by different underlying costs and incomes, much of today's inconsistency is due to persistent market fragmentation. Our proposal for a Connected Continent will help overcome these price differences by giving greater power to consumers and a friendlier environment for investors across the EU Single Market, allowing efficient operators to sell their services to consumers in other countries.

I trust you will find this information helpful.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. O'Donohue', with a stylized, cursive script.

Pearse O'Donohue

From: [REDACTED] s [mailto:[REDACTED]@rewheel.fi]

Sent: Friday, October 17, 2014 10:38 AM

To: KROES Neelie (CAB-KROES)

Cc: O'DONOHUE Pearse (CAB-KROES); MADELIN Robert (CNECT); VIOLA Roberto (CNECT); WHELAN Anthony (CNECT); VAN ORANJE-NASSAU Constantijn (CAB-KROES); [REDACTED] (COMM)

Subject: Is zero-rating data-hungry services such as mobile video a net neutrality violation and/or potentially anti-competitive

Dear Ms. Kroes

In light of Digital Fuel Monitor's publication of the list of zero-rated apps in EU28, please see pictured attached, could you please state in writing the Commission's position with regards to the wide spread zero-rating practice over mobile networks in Europe.

We would like to hear your position on the following questions;

- a) Is zero-rating data-hungry services which are freely available in the internet or in application stores such as telco own mobile TV/film streaming video services or 3rd party video services such as YouTube a net neutrality violation under the Commission's original proposal or the European Parliament's 1st reading?
- b) Is zero-rating data-hungry services which are freely available in the internet or in application stores such as telco own mobile TV/film streaming video services or 3rd party video services such as YouTube potentially anti-competitive under European Competition law (abuse of dominant position or abuse of collective dominant position). The collective dominance applies to European markets such as Austria where all three mobile operators that control more than 90% of the access market zero-rate their own mobile TV/film streaming applications/services
- c) Will your position be different for a) and b) if the mobile TV or film streaming services are not available like other similar internet services over the internet (streaming through a website or with an application available at application stores) or over WiFi? Respective examples of such services are the Vodafone Netherlands mobile TV service which is investigated by ACM and T-Mobile's Germany mobile TV service. Such services are only available for the customers of the mobile operators over 3G and 4G networks (but not over WiFi). Will such services qualified as a "Specialized Service" under the Connected Continent Commission proposal or the European parliament 1st reading and thus be exempted from the non-discrimination, so they can be legally zero-rated at will?

This is a formal letter signed and sent electronically. I am looking forward to your prompt written response.

Kind regards

Helsinki 17th October 2014

[REDACTED]

[REDACTED]

Rewheel

Helsinki Finland

mob: +358 44 [REDACTED]

Twitter @ [REDACTED]

From: [REDACTED]@ec.europa.eu [mailto:[REDACTED]@ec.europa.eu]
Sent: 17 October 2014 16:33
To: [REDACTED]
Cc: Robert.Madelin [REDACTED]; Roberto.VIOLA [REDACTED]; Anthony.WHELAN [REDACTED]; Constantijn.VAN-ORANJE [REDACTED]; Neelie.KROES [REDACTED]
Subject: RE: Is zero-rating data-hungry services such as mobile video a net neutrality violation and/or potentially anti-competitive

Dear [REDACTED],

Vice-President Kroes has asked me to reply.

The issue of zero rating has already been the subject of an exchange of correspondence with you.

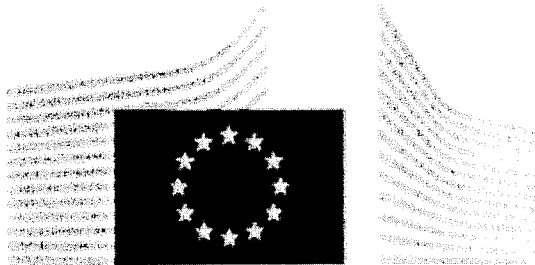
As stated then: We consider that such commercial practices do not pose a direct obstacle to end-user access to any online service or application on the basis of his/her internet subscription and as such would not be a violation of net-neutrality. We must of course remain vigilant about potential anti-competitive practices, and it would be necessary to examine whether any consumer harm arises from such pricing practices.

By coincidence we received a press enquiry just yesterday on the reply that I sent to you in May on the subject of zero-rating. Our press office indicated in response that a commercial service is subject to the same legal constraints as others. The effect of zero rating depends on the individual case involved. If the service involved were to be a data-hungry one (such as video) then the question that might arise is not one of Net Neutrality but whether the bundling amounts to abuse of a dominant position or below-cost selling, which are competition law issues.

For that same reason, VP Kroes is unlikely to pronounce herself on matters pertaining to individual cases such as those you refer to in your question b). As to question a) and c), it is not up to the Commission to interpret the position of the European Parliament, in particular while negotiations are ongoing.

Yours sincerely

Pearse O'Donohue
Deputy Head of Cabinet of
Vice-President Neelie Kroes



(CAB-OETTINGER)

From: (CAB-OETTINGER) on behalf of OETTINGER Guenther (CAB-OETTINGER)
Sent: 17 November 2014 10:19
To: CAB OETTINGER ARCHIVES
Subject: FW: List of 75 zero-rated, potentially anti-competitive mobile applications/services, violating net neutrality, in EU28 - Request for a meeting 18th November 2014
Attachments: List of 75 potentially anticompetitive net neutrality zero-rating violations in EU28 Q4 2014 PUBLIC.pdf; Minutes meeting DG Competition 5 May 2014.pdf; Deputy Head of VP Kroes response to Rewheel 17 October 2014.pdf; Deputy Head of VP Kroes response to Rewheel 6 May 2014.pdf; Rewheel letter to VP designate Ansip 21 October 2014.pdf
Follow Up Flag: Follow up
Flag Status: Completed

From: [mailto: @rewheel.fi]
Sent: Thursday, November 13, 2014 9:51 AM
To: OETTINGER Guenther (CAB-OETTINGER)
Cc: HAGER Michael (CAB-OETTINGER)
Subject: FW: List of 75 zero-rated, potentially anti-competitive mobile applications/services, violating net neutrality, in EU28 - Request for a meeting 18th November 2014

Dear Mr. Oettinger,

Next Wednesday we will meet Microsoft, Google, MEP Ramon Tremosa i Balcells and DG COMP Deputy Director General for Antitrust Mr. Madero to discuss vertical discrimination, paid prioritization (zero-rating) and specialized access/search internet services.

Our schedule is very tight but we might be able to accommodate a meeting on Tuesday afternoon/evening. So please feel free to suggest a convenient time.

Kind regards

Rewheel
Helsinki Finland
mob: +358 44
Twitter @

From:
Sent: 21 October 2014 13:38
To: andrus.ansip; margrethe.vestager; guenther.oettinger
Cc: martin.selmayr; juhan.lepassaar; ditte.juul-joergensen
Michael.HAGER
Subject: List of 75 zero-rated, potentially anti-competitive mobile applications/services, violating net neutrality, in EU28 - Request for a meeting

Dear Vice President designate Ansip, Commissioner designate Vestager and Commissioner designate Oettinger,

In light of the publication by the Digital Fuel Monitor of the list with 75 zero-rated potentially anticompetitive mobile applications/services, see pdf attachment, and Gigaom's story* on the apparent disagreement between VP Neelie Kroes who thinks that zero-rating of data-hungry apps such as video is potentially anti-competitive and must be dealt by competition law, while DG Competition is of the opinion that given the difficulty to establish "dominance" or prove "collective dominance" zero-rating should be rather addressed ex-ante within the scope of the Net Neutrality provisions of the Connected Continent package (see 2nd attachment letter from DG Competition), we would like to request a meeting;

- a) to present to the incoming Commission the Digital Fuel Monitor evidences of wide spread potentially anti-competitive zero-rating of data-hungry mobile apps/services in EU28
- b) to present technical arguments that disprove VP Kroes's written assertion sent to Rewheel last week that zero-rating, beside being potentially anticompetitive, does not violate the Commission's own narrow definition of net neutrality. Zero-rating effectively throttles (degrades) all other applications to very low speeds when the end user depletes its very expensive and overly restrictive open mobile internet volume allowance while in a discriminatory and potentially anti-competitive manner exempts from the degradation selective apps such as telco mobile film stores that compete with Netflix
- c) to present evidences that demonstrate that left unchecked, Specialized Services is a major loophole to net neutrality. Please see the responses of the Deputy Head of VP Kroes cabinet to our questions which unfortunately did not adequately address the issue at hand, 3rd and 4th attachments.
- d) to hear the views of the new Commission on how is it planning to address/tackle zero-rating which violates net neutrality and is potentially anti-competitive

This is a formal letter signed and sent electronically.

kind regards

[Redacted signature]

[Redacted contact information]

Rewheel

Helsinki Finland

mob: +358 44 [Redacted]

Twitter @ [Redacted]

(*) <https://gigaom.com/2014/10/20/is-zero-rating-a-net-neutrality-issue-europes-outgoing-digital-chief-doesnt-think-so/>

From: [redacted] [mailto:advice@[redacted].com]
Sent: Wednesday, November 19, 2014 7:54 PM
To: HAGER Michael (CAB-OETTINGER)
Cc: [redacted]@hsbcib.com; WHELAN Anthony (CNECT)
Subject: Perspektiven für die EU Telekomindustrie - Vorstellung Think-Tank Ergebnisse GROUP20 - Terminersuchen

Sehr geehrter Herr Hager,

Gestatten Sie mir bitte, mich einleitend kurz vorzustellen: [redacted]
[redacted]
[redacted] für die Europäische Telekom Industrie sowie das gesamte IKT-Ecosystem auseinander gesetzt. Seit Anfang dieses Jahres bin ich als Berater in diesen Bereichen in verschiedenen Rollen tätig. Mehr über mich finden Sie auf [http://www.\[redacted\].com/](http://www.[redacted].com/)

[redacted] (at HSBC Bank plc), einer der international profiliertesten Investmentexperten auf diesem Gebiet und ich haben einen **unabhängigen Think-Tank**, genannt **GROUP20** aufgestellt, der sich zum Ziel gesetzt hat, einen wesentlichen inhaltlichen Beitrag für die zukünftige Europäische Telekompolitik sowie die Regulierung beizusteuern. Mit diesem Ziel vor Augen ist es uns gelungen, eine Gruppe von höchst qualifizierten und gleichzeitig unabhängigen Experten aus allen einschlägigen fachlichen Disziplinen zusammenzustellen, die bereit waren und sind, einen solchen Beitrag zu leisten. Im Rahmen eines ganztägigen Workshops im Juli, an dem auch **Anthony Whelan** und andere Experten von DG CONNECT teilgenommen haben, wurden wesentliche Ergebnisse erarbeitet, die wir Ihnen gerne vorstellen wollen.

Wir sind der Überzeugung, dass gerade am Beginn einer neuen Kommission und den Herausforderungen, denen sich die Digitale Industrie im globalen Wettbewerb stellen muss, solche Inputs sehr hilfreich für Sie sein können. Anbei eine Liste einiger Themen, die wir behandelt haben:

- Fundamental goals of regulation: competition, static vs dynamic efficiency considerations
- Implications of fixed-line, mobile and content markets converging
- Wholesale vs retail stratification, functional separation

GROUP20 – THOUGHTS ON FIRST MEETING 22/7/14 –

*This document provides brief – and inevitably subjective – thoughts following a full day of discussion on European telecoms and regulatory policy by a set of independent industry experts. It is **not** intended to serve as a summary, for which please refer to the detailed session notes. In the interests of brevity, it is organised along the major fault lines of debate, rather than treating every individual topic in the order it was tackled on the day.*

Telecoms is widely regarded as a vital enabler of innovation and productivity growth, in the context of an increasingly competitive and globalised economy. Academic research indicates that economic progress in any given country is driven less by the mere arrival of new technologies, and more by the breadth and depth of their adoption. Consequently, it is tremendously important that operators invest heavily so as to ensure that the latest telecoms technologies are available on as ubiquitous a basis as possible.

Network investment is important for another reason also: as set out in our *Supercollider* report, it can be clearly demonstrated that the primary driver of lower prices in telecoms is capex. In deploying more of the most modern equipment, operators take advantage of new technology that is capable of handling traffic with greater efficiency, and thus at lower unit cost. (This is a classic example of dynamic efficiency gains in action). Lowering unit costs and prices should be a primary policy goal, as it is this that enables the development and adoption of novel applications and contributes towards productivity growth in the broader economy.

This obviously raises the question of what might induce operators to raise their capex, and here the empirical evidence is very plain. The most effective driver of higher network spending is higher margin, as this gives companies both the means and the incentive to invest. The central challenge facing regulatory policy makers is therefore how to best to secure a benign investment environment, in which healthy margins support heavy capex.

There are two principle perspectives in this debate.

Those favouring intervention argue that the industry exhibits significant barriers to entry as well as scale effects that make it difficult for competition to securely take root – and that in the absence of adequate competition, there is insufficient stimulus for operators to properly invest. From this viewpoint, it will continue to be necessary to regulate for the provision of wholesale services in certain bottlenecks, although it may still be desirable to cut down the extent of these interventions, perhaps restricting them to fixed-line broadband access.

Those in the opposite camp disagree *not about the importance of competition*, but rather on the merits of extensive intervention. Indeed, some of those most sceptical about the benefits of intrusive regulation are those most convinced of the efficacy of competition. Proponents of this view insist that the main objective of telecoms policy must be to remove the obstacles and disincentives to investment that currently exist (often introduced as the unintended consequences of regulation).

At its most fundamental, this debate is about whether regulation is really capable of specifying how markets should function. Most would concede this is something that is easier to achieve in industries subject to a slower pace of technological change and disruption (such as utility

How to avoid holding back European network infrastructure. The presence of infrastructure-light resellers as a mainstay of competition introduces entirely new and non-economic considerations into network decisions that would otherwise be judged on purely economic and technological grounds. There is a pronounced risk that obsolete platforms will be retained for longer than is fundamentally justified simply because competitors resell them. Of course, the constant evolution of technology does constitute a risk for telecoms companies, including for resellers – but this risk is also present in every other industry. The danger is that regulators seek to insulate resellers from such pressures (in effect, attempting to provide a degree of security that is not available in more conventional sectors of the economy), and in the process impede the transition to new platforms, such as fibre. Can the costs of such a policy (by retarding European productivity growth) really be justified by the supposed benefits? If operators are to justify the widespread deployment of fibre, they will need assurances that their decisions as to what to do with legacy platforms can be taken on an appropriate economic basis.

How to evolve regulation in parallel with the market's evolution. Regulation that was originally devised to deal with national monopolies is looking increasingly ungainly when confronted with contemporary markets, where incumbents have often lost considerable market share (including to cable operators using their own infrastructure). This latter circumstance is even more pronounced in urban areas, where the incumbent may very well no longer even be the market leader. The creation of sub-national markets is one way of addressing the variation in levels of regional market power. Within sub-national markets, incumbents are now increasingly likely only to be in a position of joint dominance (commonly alongside a cable company). This represents a considerable advance as compared with markets a decade-and-a-half ago, something that needs to be reflected in less intrusive regulation. After all, the very purpose of regulation is that it should stand in place of competition: when competition is present, there is less need for regulation.

How to promote and sustain differentiation. Interventions have a habit of acquiring a momentum all of their own – one leading to another – with regulators not merely addressing solitary issues but attempting to level the playing field within the telecoms market in all regards. To cite one example, it has become very difficult for mobile operators to distinguish themselves, since regulation has often deliberately sought to equalise their capabilities, particularly by applying asymmetric regulation supporting smaller operators, something that has been particularly apparent in the all-important area of spectrum issuance. The risk is that this weakens what differentiation is present, and forecloses upon experiments by the operators to find future means by which to distance themselves from their rivals. In short, telecoms operators innovate primarily by differentiating the capabilities of their networks; undermining this process of differentiation has the effect of undermining the primary source of innovation in telecoms.

How to ensure a consistent and robust process. There is a widespread tension between corporates emphasising the importance of consistent regulation across Europe's markets and national regulatory authorities (NRAs) insisting that variations in conditions between countries necessitate considerable local autonomy. Today, recommendations issued by the EC are not uniformly implemented, and the enforcement process is cumbersome, time-consuming and produces highly uncertain outcomes. This is a real concern given the degree of disconnect often observed between the EC and the NRAs.

notwithstanding this process, it still looks likely that there will be an excess of mobile over fixed-line players in any given market.

Since most of the largest operators in Europe run integrated platforms in their domestic market and mobile-only operations in their non-domestic markets, this implies that incumbents will effectively be compelled to purchase ever-greater quantities of fixed-line capacity from one another (purchasing fibre in their mobile-only markets from the local integrated incumbent, while selling fibre in their domestic integrated market to their mobile-only rivals). This growing mutual dependency should result in fixed-line fibre connectivity being made available on a much more reliable and consistent manner than has been the case previously (because of the mutual reliance involved – all the parties will need reciprocal fibre arrangements).

Ironically, these are the very terms that regulators are seeking to introduce via measures such as equivalence – something that might naturally have emerged from the industry's innate competitive and technological trends, and on a commercially negotiated basis. In fact, one concern is that, by enforcing parallel measures via intrusive regulation, regulators could inadvertently impede this process. This would deprive the industry of an internal mechanism that could incentivise the creation of a more integrated pan-European market with enhanced scale characteristics (since operators that would not 'co-operate' by mutually selling one another fixed-line capacity would be placed at a competitive disadvantage to those that were prepared to strike such agreements).

In conclusion, there is much agreement that de-regulation is justified, but there is also a fundamental divide present between those who believe that this de-regulation should be selective (determined by the 'three criteria' rules or similar) and those who think it should in future be the governing principle. Nonetheless, all sides call for a more cohesive approach, and the formation of a coherent industrial policy for the telecoms sector, so that it is better able to compete against its global rivals – in terms of network capability, unit pricing, and simply the ability to remain independent of non-European predators.