Open Internet self-regulation in the UK

The term ‘Open Internet’ is one that the digital minister, Ed Vaizey and I agreed some years ago was a better term for the UK than the American term – net neutrality.

Richard Hooper

Regulation of Internet access is a difficult process, as we saw in the case of the UK in Chapters 2–3. While regulator Ofcom has been groundbreaking in its research into traffic management measurement, it has tried to solve neutrality problems with co-regulation. This process needs a brief definition, and while I have written extensively on the matter, here I use the term defined by Lord Justice Leveson in the 2,500-page report into ‘phone hacking’. He states:

Co-regulation means any form of self-regulation with some sort of external, independent, incentives, oversight or form of backstop [including recognition] of a self-regulatory body by Government, law or a statutory regulator; approval of codes by Government or a statutory regulator; and compulsory membership or funding arrangements.

He adds detail:

a co-regulatory model can encompass anything that could be done under self-regulation whilst adding an element of compulsion to make effective enforcement possible. On the other hand, it can encompass anything that could be done by a statutory regulator but put relevant decision making in the hands of those closest to the industry, and rigorously separate from Government, to seek to gain the benefits of self-regulation without losing the benefits of statutory backing. This is a model that is much in use in the UK.

1 Hooper (2015).
3 Ibid., p. 1741, para. 2.38.
Ofcom responded with a combination of:

- denial that there is a problem
- an acceptance and willingness to deal with those problems that were shown to have emerged
- regulation of customer switching problems between IAPs
- regulation of video on broadband offered by the public service broadcaster BBC and
- a light touch attempt to persuade IAPs to offer greater transparency to users.

The first point is denial that a problem existed until 2006, even though BT admitted discrimination in 2001. The second is delay: attempting switching/transparency solutions throughout the period since 2006. This achieved some success: changes in General Conditions in 2006–08, supplemented in 2011. Ofcom also pioneered Quality of Experience measurement, using SamKnows to measure performance from 2010. The third element is to degrade and obfuscate the debate, from a regulatory responsibility to enforce net neutrality to an industry agreement to discuss the ‘Open Internet’. Government and Ofcom funnelled regulation into the co-regulatory forum, the Broadband Stakeholders Group (BSG), an industry forum funded in part by government, designing a Broadband Speed Code of Conduct over the period 2008–12.

I have previously described this as a ‘corporatist conceit’, and it was not agreed to by all IAPs until 2015, only weeks before the critical negotiations over Directive 2015/2120. This was at the very least a happy coincidence for the minister, as the UK attempted to show its European partners that it was successful in achieving what it insisted was ‘self-regulation’. I argue that it was co-regulation based on the inevitability that, had it failed, Ofcom would have imposed further changes in the General Conditions for IAPs to operate in the UK. I examine these three elements – denial to 2007, delay to 2009, degrading to 2015 – in turn.

In Section 1, I introduce the regulator and explain why it has not taken on any disputes over net neutrality despite substantial user disquiet about throttling and blocking of content. As explained in Chapters 2 and 3, the UK broadband market has relatively low competitive intensity with only one wholesale network for the majority of the population, and has experienced slower rollout to much lower speeds than the United States, South Korea, Norway or the Netherlands. As a result, government and regulator concern has been to encourage investment in faster services by the former monopoly BT. Direct state aid for

---

the former monopoly amounted to almost £1.5 billion in the period 2013–15. As we saw, problems of congestion have plagued the network since at least 2005, which were brought to the direct attention of Ofcom in person in 2006 by both IAP TalkTalk, which admitted to consumer anger at its throttling of P2P content (see Chapter 3), and the state broadcaster BBC, whose P2P video streaming was throttled by BT (Chapter 2).

The regulator and government response has been to insist that self-regulation could produce greater transparency for end users, and regulation should be limited to the theoretical possibility to switch should blocking and throttling occur. I examine these in turn in Section 1.

I then explain the slow progress towards a Code of Practice for greater transparency under the auspices of the government–industry partnership, BSG. IAPs had been persuaded by Ofcom to sign a code of conduct on advertising broadband speed and congestion in 2008, though this was inadequate and was then replaced by the BSG Code from 2011–13. Continued government and Ofcom light-touch review of this self-regulation was critiqued by amongst others Sir Tim Berners-Lee. BSG chair Richard Hooper was always pleased to announce: ‘The term “Open Internet’ is one that the digital minister, Ed Vaizey and I agreed some years ago was a better term for the UK than the American term – net neutrality.”6 At the IGF 2015, the rest of the world was happy to debate net neutrality, with a European declaration proudly stating the net neutrality law that had just been voted through into law.7 However, in contrast to that historical commitment to an Open Internet, the UK pursued a TMP Transparency Code 2011 and an Open Internet Code of Practice 2012.

Introduction to UK net neutrality policy

UK network neutrality policy is influenced both by its regulator, Ofcom, and its particular and unique network topology. I first introduce the regulator and explain why it has not taken on any disputes over net neutrality despite substantial user disquiet about throttling and blocking of content. British governments have consistently valued broadband deployment in a semi-competitive market above the needs of end users for open content provision on those networks. This dates to the provision of cable and satellite television in the 1980s, and the convergence between television and telephone services in the 1990s.8 The demise of the pioneering telecom regulator Oftel to be replaced by Ofcom

---

6 Hooper (2015).
7 European Commission, Internet Governance Forum 2015 Joint Declaration.
8 See the pioneering Oftel, Beyond the telephone, the television and the PC, 1998, especially point 16: ‘Oftel recommends that new rules on opening up interfaces and making infrastructure available to third parties on fair, reasonable and non-discriminatory terms are required, so that others can supply services over existing infrastructure while rewarding investment in infrastructure creation.’
took place gradually over eight years from 1995 (the Office of Communications Act 2002 and Communications Act 2003 fully implemented the new regulator), during which the UK pioneering position in telecoms regulation was lost. By 2003 the UK regulatory landscape had produced only 128,000 unbundled local loop lines, far behind European equivalents.

Ofcom has been the regulator of communications since the end of 2003 (Office of Communications Act 2002), merging the formerly separate regulators for broadcasting, telecommunications, spectrum and radio. Section 3(1) of the Communications Act 2003 (2003 Act) states:

It shall be the principal duty of Ofcom, in carrying out their functions –

(a) to further the interests of citizens in relation to communications matters; and
(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

(3) In performing their duties under subsection (1), Ofcom must have regard, in all cases, to –

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
(b) any other principles appearing to Ofcom to represent the best regulatory practice.

There is therefore a bold statement of the dual nature of the individual member of society: first as a citizen whose needs for information and communications services are paramount, and then equally as a consumer, whose greatest benefits may be secured ‘where appropriate by promoting competition’. This is far from a neo-classical view of regulation and competition. Ofcom in practice has tended towards the competition perspective with no intervention until harm is proved, wherever possible, and a ‘light touch’ in regulatory matters, based on the initial principles established by Lord Currie, its first chair, and its chief executive from 2006 to 2014, Ed Richards.

In the hiatus between the decision to create a new ‘converged’ communications regulator in 2001 and the actual launch of Ofcom, early net neutrality cases were ignored by the outgoing regulator Oftel, whose staff was preoccupied with finding new jobs, and the farce of Local Loop Unbundling (LLU) in the UK to introduce broadband.9 In 2007 Ofcom assumed that only the US need worry about net neutrality. By 2009 Richards had publicly disowned the expression ‘light touch’ in the wake of the economic recession and evidence of disastrous light touch regulation in the financial services in London’s markets, stating ‘I don’t like the expression “light touch” regulator. We try to be as unintrusive as we can be,

9 Marsden (2005), pp. 6–19.
not to intervene unless we have to, but if we have to and there’s a public interest in intervening, we are willing to do so swiftly and effectively.\footnote{10}  He reflected that:

The first five years of Ofcom’s life were characterized by focussing on the fundamental problem of the previous twenty years – regulation of the enduring bottlenecks, ensuring downstream equivalence and, through it, effective competition. More recently we have also significantly raised our game in ensuring effective consumer empowerment and consumer protection.

These were very real pro-consumer policy rhetorical shifts within Ofcom in 2009. They reflected a claimed significant realignment with the statutory duties, and a reflection on the previous ‘light touch’ reliance on market forces to provide for consumers/citizens.

Ofcom is, unusually for a sectoral regulator, required to write a justification for any decision occasioning a conflict between its treatment of the citizen and the consumer.\footnote{11} The objective for Ofcom under Section 3(2) of the 2003 Act is to make clear that a regulator’s role is far wider than simply acting as a competition tribunal between telecoms providers. Section 4 includes in Ofcom’s functions the ‘desirability of promoting’: purposes of public service television broadcasting; competition in relevant markets; facilitating the development and use of effective forms of self-regulation; investment and innovation in relevant markets; availability and use of high-speed data transfer services throughout the UK; consumers and other users. It is also charged (presumably intended to cover rights to reply and balanced and pluralistic voices in the media) with ‘the need to secure that the application in the case of television and radio services of standards … is in the manner that best guarantees an appropriate level of freedom of expression’. Ofcom is increasingly resorting to forms of co-regulation to balance these aims.

**Administrative development of Ofcom**

From 2004, Ofcom and government policies were designed to achieve:

- functional separation BT local loop and other businesses in the Telecoms Strategic Review 2004/05 and BT Undertakings 2006, resulting in lower

\footnote{10} See Marsden (2010), pp. 161–162.

\footnote{11} The Communications Act 2003 Section 3 states: (8) Where Ofcom resolve a conflict in an important case between their duties under paragraphs (a) and (b) of subsection (1), they must publish a statement setting out – (a) the nature of the conflict; (b) the manner in which they have decided to resolve it; and (c) the reasons for their decision to resolve it in that manner. (9) Where Ofcom are required to publish a statement under subsection (8), they must – (a) publish it as soon as possible after making their decision but not while they would (apart from a statutory requirement to publish) be subject to an obligation not to publish a matter that needs to be included in the statement; and (b) so publish it in such manner as they consider appropriate for bringing it to the attention of the persons who, in Ofcom’s opinion, are likely to be affected by the matters to which the decision relates.
local loop access prices for BT competitors, hastening BT roll-out of ADSL and then VDSL.

- a ‘Transparency and Switching’ solution to any consumer issues.

Because the inventor of the World Wide Web, Sir Tim Berners-Lee is British, the greatest UK contribution to the consumer Internet experience is associated with his work. In consequence, much public and especially political debate on net neutrality is reactive to Berners-Lee’s pronouncements. In 2006 Berners-Lee explained: ‘There have been suggestions that we don’t need legislation because we haven’t had it. These are nonsense, because in fact we have had net neutrality in the past – it is only recently that real explicit threats have occurred.’ Berners-Lee was particularly adamant that he does not wish to see the prohibition of QoS because that is precisely the claim made by some US net neutrality advocates – and opposed by the network engineering community.

The chief executive of TalkTalk revealed at Ofcom’s October 2006 international conference that he was receiving death threats from online gamers after their connections were throttled during evening peak hours:

We shape traffic to restrict P2P users. I get hate mail at home from people when that means we restrict their ability to play games. I’ve got two people that have said they’re going to kill me as a result of not allowing them to play certain games. From our point of view, it’s not about security, it’s about trying to figure out what type of traffic it is.

Though expressed partly in jest, in response to a question to the panel from me, Ofcom revealed that ISPs were receiving complaints when they deliberately throttled users. This revelation coincided with a study commissioned by Ofcom, and widely publicised by it, into traffic management for video on the Internet, warning that mobile and IPTV would become IAP-owned or affiliated walled gardens without regulatory intervention to ensure openness. British Telecom, the former UK monopoly (whose unbundled lines TalkTalk retails), was throttling the BBC’s iPlayer service regularly from 2006. The BBC is also a key player in UK net neutrality discussions, being both regulated by Ofcom for its commercial services and itself a major streaming media distributor via its iPlayer service. Network discrimination had arrived, if not net neutrality regulation. Despite this and other evidence, Ofcom confined itself to measuring IAP broadband performance, making it easier for consumers to switch to rival providers.

14 Marsden et al. (2006).
15 On these developments, see Marsden (2010), Chapters 2 and 6.
16 Kiedrowski (2007).
The initial Ofcom position was that there was no evidence of discrimination, no complaint from other IAPs, and therefore no need to examine the problem. In its 2006 response to the Content Online consultation, Ofcom defined net neutrality as permitting no QoS on the network, itself terming this an ‘extreme’ position:

Net neutrality implies there is absolutely minimal differentiation. It is therefore at the extreme end of this continuum of different approaches.17

This meant that institutionally Ofcom had decided there was little evidence of a problem, by taking that extreme definition. It explained that competition will settle the issue for IAPs: ‘if a single operator without SMP were to introduce charging for the delivery of third party content services, or to block specific services, consumers would be able to move supplier.’18 This is despite mounting evidence that IAPs were non-transparent in their blocking and throttling, and that IAPs were preventing consumers from switching by refusing to release their MAC (Migration Authorisation Code) numbers. Ofcom admitted:

If this [easy switching] is not the case, then there may be a role for regulatory intervention to protect consumer interests. However, any intervention would be best focussed on addressing the lack of consumer information, consumer empowerment or migrations processes.19

That became exactly its policy throughout 2007–08. Evidence was building that BitTorrent throttling was preventing downloads of updates to hugely popular multi-player online game World of Warcraft and that subscribers were unable to switch between providers in response. Ofcom’s Kiedrowski stated:

We could apply Article 5.1 of the Access and Interconnection Directive, which allows NRAs to impose ex ante obligations on operators to ensure E2E connectivity, without the need to find SMP. We could use our powers derived from the European Framework which enable us to require suppliers (even non SMP suppliers) to comply with various general conditions in order to take part in the market to address particular issues, for example, in relation to information transparency.20

In 2005 it became clear that many IAPs were not cooperating in letting unhappy customers switch away to better providers, whether for throttling or (more likely) other issues. This came into sharp focus in the period before the collapse of abusive IAP E7even UK Ltd on 3 July 2006,21 but it had been an

18 Ibid.
19 Ibid.
20 Kiedrowski (2007).
issue during the crisis at IAP Bulldog in summer 2005. Ofcom took regulatory action to ensure customers could migrate (‘switch’ or ‘churn’ in telecoms terminology) between IAPs by ensuring portability of MACs. In December 2006, after public consultation, Ofcom imposed a new General Condition, GC22, governing the obligations of broadband providers to switching customers. GC22 entered into force on 14 February 2007. Ofcom stated: ‘Under GC22, all broadband providers must use the MAC Broadband Migrations Process (“the MAC process”) if they receive a migration request from an end-user, customer or another provider.’ An 18-month enforcement action ensured, which Ofcom stated would force IAPs to comply with customer requests. The length of the action shows how difficult it proved to achieve the basic requirement that customers be able to switch provider – if they had managed to work out why their service was so poor in the first place.

Ofcom engaged in some strenuous IAP arm-twisting to arrive at a mediated self-regulatory position whereby IAPs did agree to provide the information on broadband speeds (if not necessarily service) in their Code released on 5 June 2008. Ofcom could use its powers under the general conditions to require all – even non-dominant – suppliers to provide better consumer information about their products, if self-regulation continued to be inadequate. Ofcom warned IAPs that a failure to continue to improve transparency could result in a regulatory action under the General Conditions of their authority to offer services. Point 39 of the Code states:

Where ISPs apply traffic-management and shaping policies, they should publish on their website, in a clear and easily accessible form, information on the restrictions applied. This should include the types of applications, services and protocols that are affected and specific information on peak traffic periods. Ofcom warned IAPs that ‘Ofcom also intends to monitor compliance with the Code through a number of methods including, but not limited to, carrying out regular mystery shopping exercises by Ofcom itself or its agents.’ The Code states that IAPs are required to:

• provide consumers at the point of sale with an accurate estimate of the maximum speed that their line can support;
• explain clearly and simply how technical factors may slow down speeds and give help and advice to consumers to improve the situation at home;

22 Richardson (2005).
23 Ofcom, CW/00946/02/07 Own-Initiative Enforcement Programme to Give Effect to General Condition 22), 2007.
25 Ibid.
Open Internet self-regulation in the UK

- offer an alternative package (if there is one) without any penalties, if the actual speed is a lot lower than the original estimate; and
- explain fair usage policies clearly and alert consumers when they have been breached.

Ofcom’s approach remained committed to light touch self-regulation where possible:

Within the UK, the need for specific regulation is likely to be lower, with ISPs and VoIP providers working together through industry bodies to agree a self-regulatory approach to providing consumers with transparency on whether service prioritisation or quality of service charging is being applied.26

Richards warned that “The shibboleth of net neutrality should not be allowed to become an obstacle or a distraction to investment in NGNs [Next Generation Networks] in the UK.”27 After 2007, domestic policy towards broadband was driven first by the work of the government-funded quasi-independent industry group BSG28 and then a series of policy discussions held in 2008, called the ‘Convergence Thinktank.’29 The BSG recommended to government:

Good solutions need to be found that align the interests of operators with upstream content and service providers and end consumers whilst mitigating concerns about blocking or degrading third party applications and services.30

The Thinktank was to inform the Digital Britain report,31 drawn up by former chief executive of Ofcom (2003–06) (Lord) Stephen Carter, who was appointed communications minister in 2008. It was written as a draft report in January 2009, before the final report was presented to the Cabinet on 16 June 2009. Concurrently, the Ciao Review to the UK Treasury of September 2008 was designed to examine how far deregulation and market forces could produce Next Generation Access (NGA) solutions.32 Carter appointed a list of business advisors on the Digital Britain report. IAPs are given carte blanche to breach net neutrality under Action 2:

ISPs can take action to manage the flow of data – the traffic – on their networks to retain levels of service to users or for other reasons.

26 Ofcom, Response to the European Commission Consultation on Content Online in the Single Market, 2006, para. 3.72.
30 Broadband Stakeholder Group (2009).
31 Department for Culture Media and Sport (2009), Chapter 4: Creative Industries in the Digital World.
The concept of so-called ‘net neutrality’ requires those managing a network to refrain from taking action to manage traffic on that network. It also prevents giving to the delivery of any one service preference over the delivery of others. Net neutrality is sometimes cited by various parties in defence of internet freedom, innovation and consumer choice. The debate over possible legislation in pursuit of this goal has been stronger in the US than in the UK.

Ofcom has in the past acknowledged the claims in the debate but have [sic] also acknowledged that ISPs might in future wish to offer guaranteed service levels to content providers in exchange for increased fees. In turn this could lead to differentiation of offers and promote investment in higher-speed access networks.

Net neutrality regulation might prevent this sort of innovation. Ofcom has stated that provided consumers are properly informed, such new business models could be an important part of the investment case for NGA, provided consumers are properly informed.

On the same basis, the Government has yet to see a case for legislation in favour of net neutrality.

In consequence, unless Ofcom find network operators or ISPs to have Significant Market Power and justify intervention on competition grounds, traffic management will not be prevented.

Some trade press journalists picked up on the decision to substitute net discrimination for any actual government support for roll-out:

In the UK, net neutrality was stillborn as an issue, but Carter was happy today to give its corpse a kick. As well as advocating tiered content delivery, he backed ‘traffic management’; the somewhat euphemistic industry term for BitTorrent throttling.33

The final Digital Britain report instructs Ofcom to tell IAPs to throttle connections of users suspected of illegal file sharing:

Ofcom will be placed under a duty to take steps aimed at reducing online copyright infringement. Specifically they will be required to place obligations on ISPs to require them: to notify alleged infringers of rights (subject to reasonable levels of proof from rights-holders) that their conduct is unlawful; and to collect anonymised information on serious repeat infringers (derived from their notification activities), to be made available to rights-holders together with personal details on receipt of a court order.34

Ofcom would also be given powers to block infringers’ connections without a court order, subject to three notifications of infringement. This power would be triggered if the notification process has not been successful after a year in reducing infringement by 70 per cent of the number of people notified. This

---

33 Williams (2009a).
34 Department for Culture Media and Sport (2009), paras 24 and 28.
provision has never been implemented, and warning letters were to be delayed until after the 2015 General Election to the British Parliament. Whether Ofcom will reach the ‘throttling point’ under even the 2015–2020 government must be open to severe doubt.

**Government net neutrality policy 2010**

The European laws which became effective in Member States in May 2011 stated that Member States may take action to ensure particular content is not discriminated against directly (by blocking or slowing it), or indirectly (by speeding up services only for content affiliated with the IAP). The reality is that the 2009 Declaration on Net Neutrality, helpful though it is in clarifying the legal situation, relies heavily on implementation at national level and proactive monitoring by the Commission itself. Nevertheless, it laid out the principle of openness and net neutrality. The Member States largely opposed the Declaration, and it was only appended as a sop to the European Parliament, which had taken up the consumerist and democratic cause of neutrality, much to the annoyance of the telecoms technical community and economists who insisted it was solving a problem which did not exist.

The devastating long recession of 2008–12 was in 2010 impacting government, after a two-year interregnum under Gordon Brown’s ‘dead man walking’ government, which ended with the historic hung Parliament and coalition of May 2010. The Conservatives, the largest coalition party, had proposed abolishing Ofcom or at least severely reducing its policy-making powers, returning many such policy functions to where they properly belong in government ministries. Thus the super-regulator’s wings were to be clipped, along with those of its parent department, by 25 per cent. Ofcom survived thanks to an involuntary decision to reduce headcount by over 150, about 25 per cent, and generally to reduce costs by 23 per cent. Between May 2010 and the end of that year, pre-redundancy letters were sent to 400 employees, or the majority of Ofcom staff. Those who took redundancy included key net neutrality policymakers. As a result, policy focus returned to the ministry, which itself was in upheaval following the Murdoch phone-hacking revelations and an indiscrete conversation by industry minister Vincent Cable, which forced broadband/telecoms functions to move from the Department


36 HM Treasury (2010): ‘Over the course of the Spending Review period, the Department for Business, Innovation and Skills (BIS) will reduce its resource budget by 25 per cent. Taking into account anticipated receipts, the cut to capital spending by 2014–15 will be 44 per cent. The Department’s Administration budget will be reduced by 40 per cent.’
for Business to the Department for Culture in early 2011.\textsuperscript{37} UK policy making on issues such as net neutrality was in a state of suspended animation as key actors faced institutional crises. Alongside these Ofcom and ministry upheavals (exacerbated by the new ministerial home of broadband being in general crisis dealing with BBC governance and the London Olympics 2012), the Communications Consumer Panel was reduced from a semi-detached, semi-autonomous consumer voice to a rump of a few non-experts as a result of similar funding cuts.

When ministries and regulators were taking austerity-induced 25 per cent cuts in staff, it is hardly surprising that they had no regard to reforming and strengthening a perceived ‘luxury’ policy such as net neutrality. Ed Richards’ July 2010 speech was certainly anti-interventionist on openness and interoperability:

Here in the UK, there have been no formal complaints about anti-competitive discrimination, although there have been a number of modest disagreements between content/service providers and ISPs/mobile operators. It is in this vein that we do not currently see a compelling reason for preventing, ex ante, all forms of discrimination using our sector-specific regulatory powers. But if genuine problems of anti-competitive practices in relation to traffic management emerged, we would of course have the ability to intervene applying our full range of ex post competition powers as appropriate.\textsuperscript{38}

Formal complaints were classified as those made by an IAP about another IAP, not those by content providers or consumers. The death threats to TalkTalk’s chairman, which he discussed at the 2006 conference at Ofcom, were therefore ‘informal’. Note, too, the discussion of ‘modest disagreements’ as referring to the BT and other IAP blocking of BBC streamed video in 2006–08. The solution \textit{ex post} is competition – which as we saw in Chapter 2 takes effect for Ofcom, based on the various disputes litigated by IAPs, long after the patient has died. Richards continues:

This allows us to take a measured approach, allowing certain practices – such as permitting operators and ISPs to set differentiated [QoS] – which may prove beneficial to consumers, but which could be caught by a blanket prohibition, whilst at the same time being able to take effective action to curb any genuinely anti-competitive practices that may emerge.

Although the evidence at this stage suggests a blanket prohibition is undesirable, our initial stance in this debate is that consumer transparency must be guaranteed wherever traffic management occurs … Developing some basic principles around transparency, and ensuring that operators and ISPs comply with these principles, is consistent with our broader functions and duties as a sector regulator.\textsuperscript{39}

\textsuperscript{37} Marsden (2014a), p. 11.
\textsuperscript{38} Richards (2010).
\textsuperscript{39} Ibid.
The analysis of behavioural economics, ‘nudging’ and transparency ends the speech, as analysed in Chapter 2. From 2010 to 2015 Ofcom would work to nudge IAPs towards self-regulation and transparency.

Consultation was needed on the implementation of net neutrality by the deadline of 2011. The European Commission closed its consultation period on 30 September 2010. The club of national regulators, BEREC, met on 30 September 2010 to discuss their response to the European Commission on net neutrality. Ofcom’s ‘so-called net neutrality’ consultation closed on 9 September 2010. UK government minister for communications Ed Vaizey spoke on 17 November 2010, stating the government’s opposition to regulated net neutrality. He argued that high speed broadband required ‘massive investment, and it may also mean networks and the traffic that flows over them are increasingly managed’. He stated that ‘ISPs should be allowed to manage their networks’ and do already, and Ofcom’s ‘transparency and switching’ solution should be continued: ‘it is important that consumers know exactly what service they are buying and have the ability to switch services should the nature of their service change.’

He or his speechwriters also argued that they must permit possible ‘evolution of a two sided market where consumers and content providers could choose to pay for differing levels of quality of service.’ He stated:

This Government is no fan of regulation and we should only intervene when it is clearly necessary … Quality of service guidelines [in Directive 2009/136/EC] are back stop powers. Competition in the market, combined with transparency, the ability to switch … should render such intervention unnecessary.

He concluded:

there is no need for intervention. There is broad agreement on the need for traffic management; and there is broad agreement that there is not yet evidence of any impact either on competition or consumers from traffic management.

UK implementation of the 2009 Directives in 2011 followed this approach of ensuring bare minimum powers for Ofcom to impose QoS guidelines, which in any case the minister made plain they were not to impose.

Unsurprisingly, Sir Tim Berners-Lee (universally known as TBL) was in vehement disagreement with this extremely negative position towards net neutrality – as were gamers, BBC iPlayer viewers, Skype users and other consumers.
who had seen content throttled for a decade. TBL stated that net neutrality was under threat, and that threatened the openness of the World Wide Web and human online communication. Vaizey phoned TBL at home the Sunday after his anti-net neutrality speech to claim that he was in favour of net neutrality and agreed with TBL. TBL politely suggested that they must agree to differ. This was then reported in the national newspapers, not least because Vaizey’s office continued to try to claim no disagreement between the pioneer of Open Internet content standards and a minister who was happy to see differentiated charging and pricing for Internet content.

Three days later, on 25 November, Vaizey set out his considered view to Parliament:

There is not yet any evidence that discriminatory practices are emerging, or that there is a problem with regards to how ISPs or networks manage the traffic that flows over them (something they all engage in for technical reasons to deliver the best possible service to consumers) … A contributing factor to the success of the internet has been the lack of legislative restraints that have been placed on it. It is important that we give the market the opportunity to self-regulate. Ofcom will closely monitor how the market develops and if it develops in an anti-competitive way they will intervene.

The difference in emphasis between TBL and Vaizey continued through the first half of 2011. TBL repeated his views somewhat more specifically and publicly after the government convened a private stakeholders meeting on net neutrality in March 2011: ‘Best practices should also include the neutrality of the net.’ Note that the European Commission was at this point refusing to actively intervene in favour of net neutrality despite its 2009 Declaration, and its formal statement on the issue in April 2011 could have been written by Ofcom: ‘transparency and ease of switching are key elements for consumers when choosing or changing internet service provider but they may not be adequate tools to deal with generalised restrictions of lawful services or applications.’

**Ofcom’s approach to net neutrality 2011**

‘Not neutrality’ became the task Vaizey had set for the neo-corporatist institution beholden to both him and the industry, the BSG. In 2011 Ofcom declared that it would maintain its position that net neutrality could be regulated by

---

45 Arthur (2010).
46 Vaizey (2010b).
49 Marsden, Chris (2015a).
self-regulation via a commitment to greater transparency by major consumer IAPs, added to its earlier reforms of the process by which consumers can change IAPs at the end of their contract, known as ‘switching’. The idea – if intellectually honest rather than ideologically driven by desire not to intervene – rests upon a notion that broadband consumers can ascertain the quality of their IAP’s service for their time-critical applications, and make a decision to switch provider based on that knowledge. It is therefore a two-step leap of faith by Ofcom in consumer activism, first that such knowledge can be gained by a reasonable proportion of the populace, and second that they will use that knowledge as an aid to choosing a new provider. I detail this in the following section.

The clearest statement of Ofcom’s transparency/switching mantra was issued on 21 November 2011. The document is an extraordinary mixture of relevant analysis and pleas for industry to do its job for it. In particular, it is littered with verbs such as ‘expect’, ‘encourage’ and ‘review’. I make comments on the relevant passages below.

[1.10] … if a service does not provide full access to the internet, we would not expect it to be marketed as internet access. [1.11] It is possible that providers may seek to market a restricted service as ‘internet access’ by caveating this with a description of the restrictions they have put in place. Consideration needs to be given as to whether this practice is acceptable.

This appears a strong commitment but it is unenforced. The reliance on self-regulation rather than any actual Ofcom action continues throughout this aspirational rather than regulatory document:

[1.14] We do not describe what more detailed information might be provided, over and above the desired outcomes set out above. We note, however, that the self-regulatory model recently proposed by major ISPs provides a good foundation. [1.17] We will monitor progress, and keep under review the possibility of intervening more formally in order to ensure that there is sufficient transparency as to the use of traffic management by network operators.

The document then goes on to dissemble by denying the existence of a problem which had been the subject of press attention for a decade!

1.22 From the perspective of protecting the citizens’ interest alone it will be important to be vigilant in relation to the core connectivity of the ‘best-efforts’...
open internet and the access to information and services which it provides. It is important to note however that we see no concerns in this regard in the UK at present.56

A more concerned approach is signalled in relation to the ‘dirt road’ scenario in which the Open Internet receives far less investment than Specialised Services:

1.27 … If the quality of service provided by ‘best-efforts’ internet access were to fall to too low a level, then it may place at risk the levels of innovation that have brought such substantial benefits during the internet’s relatively short life so far. This would clearly be a significant concern.57 [1.29] Any use of a minimum quality of service would need to be considered carefully, balancing the benefits of such an intervention against the associated risks. We are not, at present, aware of any actual concerns58 which would merit carrying out such an assessment. However, given the importance of ‘best-efforts’ access to the open internet for innovation, we will keep this issue under review.

Ofcom then entirely admits its lack of concern over blocking and its competition-based anti-intervention strategy:

1.32 We do not have a general objection to models of competition where vertically integrated operators do not provide open access to their networks, provided that there is genuine competition and rivalry among the firms. In such circumstances, we do not necessarily regard the blocking of services provided by competing providers, or discrimination against competing services, as being anti-competitive. We do however have a specific concern in the context of the discussion in this document that restricted access to the internet could have a stifling effect on innovation. [1.33] Our stance as a regulator is therefore that any blocking of alternative services by providers of internet access is highly undesirable … we expect such traffic management practices to be applied in a manner which is consistent within broad categories of traffic. Where providers of internet access apply traffic management in a manner that discriminates against specific alternative services, our view is that this could have a similar impact to outright blocking.

In conclusion at paragraph 1.34, Ofcom will not take any formal action to stop blocking, in the medium term: ‘Our current view is that we should be able to rely on the operation of market forces to address the issues of blocking and discrimination.’ It is a wait-and-see strategy, as it has been for most of the past decade.

56 What about BT blocking BBC services? This is apparently not enough for Ofcom.
57 But no ‘dirt road’ test is provided, notably for mobile.
58 Note that actual concerns had been flagged up for five years by this point.
Policy developments after 2012

In October 2012, in a rare public speech made in Seoul, Ofcom’s chief executive Ed Richards stated Ofcom’s continued belief in ‘Transparency and Switching’: ‘We have undertaken a strategic review of consumer switching in the UK … We will complete this process in 2013.’ On transparency, he flagged up the BSG Code, then made a strong non-statement about blocking:

We are very clear that any blocking of alternative services by providers of internet access is highly undesirable. We recognise that some forms of traffic management may be necessary in order to manage congestion … any regulatory intervention in this area (for example the imposition of a minimum quality of service) must be based on careful consideration. The present UK market is highly dynamic, and we would like to see market forces address the issues of blocking and discrimination in the first instance.

He reiterated this in his next published speech 11 months later: ‘our work on traffic management is now focused on whether awareness needs to improve and, if so, how.’ He added that switching was still not working effectively six years after the previous round of reforms: ‘to transform the switching experience in the consumer interest and to support a more competitive market’. By this point, his search for switching solutions instead of consumer protection was becoming ludicrous: one can imagine a similar speech being made in 2023 expressing how with even better information and switching, consumers can protect themselves finally from having Skype throttled.

The UK Ofcom Draft Annual Plan 2012–13 had a small section on traffic management which was bland and uninformative, but promised that Ofcom would ‘undertake research on the provision of “best-efforts” Internet access’. In January 2013 Ofcom published its draft Workplan 2013/14 for consultation. Five mentions of net neutrality were made in the workplan draft – with a response to COM(2013) 627 as needed (the consultation was published in September 2013), and analysis in the wider Ofcom Infrastructure Report to be published in November 2013, plus a general commitment to helping government policy formation as required. In April the technology press reported on Ofcom’s Annual Plan 2013/14: ‘Ofcom has [in its Annual Plan] decided that

---

59 Note that Ofcom published only this speech in a 17-month period in 2012–13, an extraordinary period of public policy silence. See http://media.ofcom.org.uk/speeches/.
60 Richards (2012).
61 Ibid.
63 Ibid.
65 Marsden, Chris (2013a).
treatment all packets of internet traffic as equals without discriminating against particular protocols and services — trendily known as net neutrality — is a non-issue in the UK.\(^66\)

In July 2013 the government issued the UK Communications ‘consultation paper’, which was the centrepiece of the coalition government’s communications policy strategy.\(^67\) Pages 13–14 confirm that it intended solving net neutrality via transparency and switching:

Internet traffic management: Cisco predicts that internet traffic will reach 1.4 zettabytes (a zettabyte is equal to a trillion gigabytes) a year in 2017. As the amount of data exchanged increases we want to ensure that consumers are aware at the point of sale of the internet traffic management policies that their internet service provider or mobile network operator has in place. For example, some mobile network operators block the use of apps like ‘Skype’, although this may be reflected in cheaper contracts. We think it should be for consumers to decide what best meets their needs, so, in the first instance, we have asked Ofcom to work with internet service providers to encourage them to make their traffic management policies more transparent on a voluntary basis — the challenge for industry will be to do this in a way that is clear and understandable to consumers. Where there is evidence of consumers not being made sufficiently aware, Ofcom will act to require operators to make their traffic management policies more transparent. We believe in the principle of an open internet and will keep this area under review.

There is a longer regurgitated Ofcom policy line (at page 41) which astonishingly suggests that traffic management could prioritise Skype services — when presumably every incentive exists to do the opposite, that is discriminate to prioritise VoIP that is not a competitor to the IAP: ‘firms may prioritise time-sensitive services like video streaming or voice calls over the internet — such as the type of services offered by Skype — over other content which is not as sensitive to time delay’.

The UK Code of Practice, which sets standards for transparency, was negotiated by industry via the government’s forum. Ofcom put severe pressure short of actual regulation on major UK consumer IAPs to join the BSG Traffic Management Transparency Code 2011, to which all had finally agreed by 2012.\(^68\) The government-funded BSG produced a Code of Conduct, launched in March 2011,\(^69\) in which Vaizey indicated that TBL would play an oversight role.\(^70\) It is entirely unclear what this represents for TBL, and the industry’s July 2012 enhanced Code was at first not supported by a large minority of the

\(^{66}\) Ray (2013).

\(^{67}\) Department for Culture Media and Sport (2013b).

\(^{68}\) This committed them to issuing Key Fact Indicators (KFI) which were updated on the BSG site in June 2013. See Broadband Stakeholder Group (2013b).

\(^{69}\) Broadband Stakeholder Group (2013b).

\(^{70}\) Vaizey (2011).
IAPs. In 2013 a renewed Code was published, which appears to have general consensus of support. It contains a process by which consumers and content providers can complain about traffic management practices which breach the Code. The BSG Open Internet Code of July 2012 has interesting language that marks IAPs’ attempt to show they listened to Ofcom’s November 2011 policy statement:

The signatories to this code therefore believe that it is right that Ofcom take ownership of this issue and also believe that the new proposed process will be a useful input to Ofcom as it continues its work in monitoring the nature and impact of traffic management practices in the market and the effective co-existence of managed services and best efforts internet access.

It is clear that the voluntary commitments being made in this code closely relate to ongoing monitoring work Ofcom has said that it will conduct. Signatories to this code are happy to discuss with Ofcom how its future work plans regarding open internet issues could support or input into a review of these voluntary commitments [emphasis added].

The idea that content providers might lodge an unresolved complaint with the BSG (see Annex 1 to the Code) instead of going direct to Ofcom or the EC was frankly ludicrous: exactly zero such farcical reports were forwarded from the BSG to Ofcom in 2013. It is too early to assess the effect of the new Code of Practice on the market and society as yet.

Though the Code was updated in May 2013 from its initial version, a new version of that Code was suggested by Ofcom in September 2013 consumer research, with more user-friendly terms. An example of user-friendly Key Fact Indicators (KFs) is that a 100GB cap on monthly use will equate to about 25 high definition feature films, as explained by the Apple iTunes Store, a standard of transparency not yet deemed necessary by the BSG. It is notable that the Apple warning includes express instruction that low-speed Internet connections are unsuitable for downloading films.

In 2013 Ofcom commissioned market research company Kanders to conduct a multi-stage survey of consumers to find out if net neutrality was important to them, though without using the term ‘net neutrality’. In a 63-page report, the term only appeared to sum up Ofcom’s 2011 statement dismissing net neutrality. The term ‘Open Internet’, the FCC/EC preferred

---

71 Marsden, Chris (2012).
73 Apple (2012).
74 Ofcom, Consumer research into the transparency of traffic management information provided by ISPs, 2013. The report of 7.4MB took 2 minutes to download on Virgin Broadband (based on BT Wholesale not fibre-coaxial hybrid) on Wifi at 10 p.m. on 9 September 2013.
alternative, was also not used. Only once was the term ‘throttled’ used, to illustrate the most invasive possible practices. However, it emerged that consumers rapidly became concerned once they understood the practices their IAP could indulge in to their detriment: ‘once the term and processes of traffic management were explained to them 35% of these respondents felt that they may have been affected by these processes.’75 Unsurprisingly, ‘It was clear that most were not aware of the underlying processes supporting the internet or how it operates.’76 If government, Ofcom and the industry publicises the implications of ‘traffic management’, consumer concern rises from 1 per cent to 35 per cent. This reveals a massive failure to educate the public on media literacy.

The research concluded that ‘consumers state a preference for information being provided in online formats and by 3rd party independent sources’. Ofcom decided that this represented an initiative to act on gainer-led switching for broadband, which will similarly take years to implement.

As the previous section establishes, there are two camps in net neutrality debates in the UK as elsewhere in the world: the anti-regulatory and pro-regulatory. In 2012 the UK official consumer interest group Consumer Focus released a report into consumer understanding of information on traffic management and stated:

we conclude that increased transparency alone is unlikely to safeguard effectively the open internet and prevent discriminatory restrictions online. Our research finds consumers are not aware of traffic management practices, and even if they find information on traffic management restrictions on providers’ websites they cannot digest the meaning of unfamiliar terms such as P2P or VoIP.77

They suggest:

The findings of our research demonstrate the need to extend the existing regulatory framework by additional non-blocking and non-discriminatory principles that would clarify which type of traffic management is legitimate. If a self-regulatory or co-regulatory solution is a preferred option it must have a robust compliance and enforcement mechanisms monitored by Ofcom. In addition broadband providers need to do more to raise awareness of traffic management through improved marketing of information to customers. This is the only way to ensure consumers can use the broadband connection of their choice to access the internet and any legal online content and applications they wish, free of negative discrimination, and to protect the innovation.78

75 Ibid., p. 31.
76 Ibid., p. 35.
77 Consumer Focus (2012).
78 Ibid.
This proves the need for neutral consumer champions to find out what IAPs are doing and stop it if it harms their Internet connection – especially when it is blocking or throttling rival applications such as VoIP or media streams. The same of course applies to IAPs routinely providing a slower connection than advertised, which was the subject of updated 2013 advice given by the Advertising Standards Authority, the self-regulator of text and Internet advertising. It is rather like research on smart metering: if the consumer lacks the technical knowledge, they also do not know what is going wrong. A more appropriate question would be to ask the remote workers if it is wrong for their IAP to throttle Skype during the working day. That might raise a flicker of recognition.

Ofcom explained its 2013 holding pattern: ‘As part of our monitoring program we expect to include an update on IAP’s traffic management policies in the 2013 edition of the Communications Infrastructure Report. Ofcom will also support BEREC to assess market and regulatory developments at the EU level.’

**BSG Code update 2015**

BSG Chair Hooper stated in November 2014:

>This Code of Practice plus competition obviates the need for statutory regulation which is being backed by some other European countries despite the UK approach being taken up around the world – most recently by Switzerland. Incidentally, the digital minister Ed Vaizey and I agreed that we should not use the American term ‘net neutrality’. In the UK we call it the Open Internet.

It should be noted that the BSG is not of the multi-stakeholder kind – it consists of big corporates with no prosumer representatives at all.

In 2015 BSG could finally claim UK IAPs had signed the voluntary Code. Not only did it take EE, Vodafone and Virgin almost three years to sign up, but the alleged ‘consumer champion’ Jo Connell, Chair of the Communications Consumer Panel, sounds like a mouthpiece for government, stating:

>The Code usefully supports open access to the internet and builds on previous commitments by ISPs to provide transparent information to consumers about their traffic management policies. We are delighted that EE, Virgin and Vodafone have now agreed to become signatories. The Code has gained significant interest.

---

79 There have been 69 rulings against misleading broadband speed/quality advertising in under five years: see www.asa.org.uk/Rulings/Adjudications.aspx?SearchTerms=broadband#results. For the most recent example, see Advertising Standards Authority (2013).

80 Ofcom, Consumer research into the transparency of traffic management information provided by ISPs, 2013.

81 Broadband Stakeholder Group (2014).
internationally as a positive example of industry responding to a developing consumer need.82

The announcement of a successful funded review by BSG after five years, on 17 November 2015, was that the UK industry was pleased to award itself high marks for its self-implementation not of neutrality but of ‘Open Internet’, with no ‘official’ complaints. WIK conducted the actual review and it is the WIK footnotes and page numbers to which the analysis below refers.83 Note from Hooper’s comments what the client BSG thought of net neutrality regulation as opposed to self-congratulation:

The UK approach, which has proved to be eminently successful, has required no statutory regulation [but] our approach has been undermined in some ways with the Connected Continent Regulation passed by the EU in the summer. This regulation is directly applicable in the UK. Unfortunately, they have pursued a more prescriptive approach than is necessary or desirable in the UK and potentially hinders the ability of network providers to provide innovative services.84

WIK heard claims that the value of self-regulation was proved, in that dialogue between content providers and IAPs was just as important as the Codes themselves. The Open Internet Forum (OIF) has no website, is membership only and has no transparency. There has been no ‘official complaint’ to the OIF from industry players.85 This may be unsurprising given that the Code is not enforced.86 Effectiveness of the Code is only measured by market share: ‘more than 90%’ of users are served by IAPs that have signed the Code, though no exact figure is available. These IAPs claim that the ‘overwhelming majority’ of users enjoy full access, that is very little blocking, and that blocking is mainly of spam. No statistics were available on consumer awareness, nor do signatories or Ofcom show any willingness to test how much awareness there may be. This indicates that the Code’s signatories, BSG and Ofcom have created a ‘Potemkin’ self-regulator,87 with no actual

---

84 Hooper (2015).
86 Discussion in the OIF took place about an IAP-blocking VoIP. ITSPA was unhappy as VoIP was degraded and not improved by new router standard implementation, as the IAP argued. Information from Huw Saunders, Director, Network Infrastructure, Ofcom, personal communication. See https://indico.uknof.org.uk/conferenceOtherViews.py?view=standard&confId=33 (Accessed 7 September 2016).
87 Marsden (2011), p. 60, footnote 75: ‘In the original “Potemkin” villages, General Potemkin (or Potyomkin) infamously created facades of villages in 1787 to present an image of prosperity to Empress Catherine II of Russia, in which there was no substance to the buildings, a myth for which a website of equally contested veracity provides discussion.’
Open Internet self-regulation in the UK

powers or consumer awareness. There were no recorded consumer complaints.

The Code needs to be reformed in 2016 in order for the UK to comply with European law, and a process was announced that should culminate in autumn 2016. An obvious problem lies in the IAP KFIs which throttle ‘unreasonable’ traffic management during all hours when people are home from school/work. A further clear issue is that of zero-rated and Specialised Services. Finally, adult content filters will need legislation in order to continue to be legal, especially for crude blocking such as that exercised by TalkTalk, or opt-out blocking as exercised by Sky.

There is no published research into whether consumers knew about KFIs, though Ofcom in 2013 recommended Code improvements. The only organic change to the Code in 2013 was public Wifi use.

Net neutrality law 2016

In 2014 Ed Vaizey informed Parliament that an actual net neutrality law may be agreed, though in the final analysis it was less strict than he and UK IAPs feared:

We will continue to work closely with industry and Ofcom to ensure that our input into negotiations is as influential as possible. Should the European institutions decide that Regulation is the only way forward and UK is unable to gain wider support for its self-regulatory stance, we should prepare to ensure that any adopted text is as workable as possible given the current state of the UK market and the existing self-regulatory approach.

UK ‘transparency and switching’ policy has been maintained for almost a decade, supported by the European Commission’s wait-and-see approach up until 2013. It is now supplanted by the European Regulation which must be implemented in 2016. In July 2015 Vaizey informed Parliament that:

With regard to net neutrality, the Minister says that:

– overall, the text agreed is principles-based and service and technology-neutral, will ensure an open internet across Europe where all legal traffic is treated equally and end the unfair blocking of rival services;
– it thus fully meets the wider criteria in the Government’s negotiating position;

88 Wik (2015), footnote 111, p. 36 explains that the ‘Code neither addresses remedies nor penalties’ – it is toothless.
89 Ibid., p. 33, footnotes 99–100.
90 Vaizey (2014).
91 COM(2013) 627.
with regard to the impact on the UK domestic regime, the work of the Internet Watch Foundation (IWF) and the current voluntary parental control filters regime can continue without further intervention, by implementing the necessary legislation in the UK;

his Department is now taking this forward, on the basis of a December 2016 deadline for implementation that provides ‘ample time’ to complete this process;

bearing in mind how it evolved from Commission and European Parliament proposals that were largely unpalatable for the UK, this outcome is ‘largely positive overall’ and ‘well within a range of outcomes that would have been acceptable to HMG’; and he can therefore, on balance, support it.92

The UK domestic obsession with its co-regulatory model for child pornography removal from the Internet has been documented elsewhere,93 but it is clear from Minister Vaizey’s reports that it is the single matter that was raised as a red line in negotiation, rather than the principle of a neutral Open Internet. This may be seen as a uniquely British position – censorship but without law – with which the Latvian Presidency of the European Council had to grapple before finally telling the British to stop their ridiculous charade, as is clear from Vaizey’s note and my interviews. There will therefore be a new law more formally authorising the IWF as a co-regulatory body in 2016, to which one can anticipate some co-regulatory recognition for the Open Internet Code of Practice. Ed Vaizey stuck to his script on net neutrality self-regulation, even producing it as evidence of effective self-regulation before Parliament in March 2016.94 Yet we have seen there is no evidence to demonstrate its effectiveness, and the forensic examination by Alissa Cooper to show that it is not.

In November 2015 the Department for Culture, Media and Sport was very vague on whether there will be a need for co-regulatory legislative provision that can be shared with Internet pornography filter amendments that will be needed in late 2016. The Prime Minister announced on 28 October 2015: ‘I can tell the House that we will legislate to put our agreement with internet companies on this issue into the law of the land so that our children will be protected.’95

92 European Scrutiny Committee (2015).
94 House of Commons 571, Business, Innovation and Skills Committee (2016).
95 Cameron (2015).
Evaluation of UK regulation and future development

UK network neutrality policy is influenced both by its regulator, Ofcom, and its particular and unique network topology. Such has been the dismissal of net neutrality in the UK as compared to its source of telecom and regulatory inspiration, the United States, that it has led to substantial scholarship on the differences in stakeholder mapping. For our purposes, what matters is the degree of cajoling of IAPs and others into a self-regulatory mechanism backed by Ofcom’s powers to enforce their General Conditions (licences) to provide public communications and/or to bring a competition case against dominant players. This was a vanishingly slight risk in the political circumstances pertaining to 2015, as we shall see. My analysis of Ofcom’s arm-twisting was that it became so extreme as to approximate to co-regulation, especially by 2015 when all IAPs had finally signed a ‘voluntary’ Code of Practice on Traffic Management.

In 2016 the difference between co- and self-regulation becomes academic, as Ofcom will have to bring that Code into a form of formal co-regulation via statutory regulation – not the least reason why the intransigent ‘refusenik’ IAPs finally signed up to the (in)voluntary Code in 2015. But this is not the end of the story: the Code is currently a ‘Potemkin’ regulator with no enforcement or dispute resolution practice to support its principles. It is in 2016 the equivalent of the Association for Television on Demand (ATVOD in 2009). UK communications experts will be aware that ATVOD was reformed into a co-regulator under the Digital Economy Act 2010, then abolished in 2015 with its functions subsumed into Ofcom. I would be very surprised if it takes as long as five years from 2017 for the net neutrality ‘self-regulator’ obligations to become a part of Ofcom’s remit.

Both as a practical and normative matter, it is extremely unfortunate that the NRAs charged with implementing net neutrality have such a poor record (in general) of upholding state obligations under Article 10 of the European Convention on Human Rights, and Article 19 of the International Covenant on Civil and Political Rights. For instance, Ofcom has about 300 responsibilities under its empowering legislation, the Communications Act 2003 (as amended, hence the estimate of its powers). It is only in Section 3(4)(g) that you locate any responsibility for freedom of expression, and that is mealy-mouthed: ‘that

---

96 Cooper and Powell (2011).
97 Marsden (2011), pp. 147, 222.
98 Ofcom, Future regulation of on-demand programme services, 2015: ‘From 1 January 2016, Ofcom will be sole regulator (other than in relation to advertising) for on-demand programme services (“ODPS”) under Part 4A of the Communications Act 2003 (the “Act”).’
best guarantees an appropriate level of freedom of expression’. Reference to implementation of network neutrality by BEREC needs to include a coda that agency officials implementing net neutrality must be trained in the latest case law of the European Court of Human Rights, and Declarations and Guidelines of the Council of Ministers, in order to fully comprehend what freedom of expression means in their duty to implement net neutrality and the ‘Open Internet’.

100 Declaration of the Committee of Ministers on network neutrality adopted 29/9/2010: 1094th meeting of the Ministers’ Deputies, a soft law instrument to guide member states in the application of net neutrality rules: aspirations of Articles 6/8/10 of the Convention. Declaration on freedom of communication on the Internet, Adopted on 28 May 2003 at the 840th meeting of the Ministers’ Deputies. See also Council of Europe (2013) 29–30 May, Multi-stakeholder dialogue on network neutrality communicated to the Council of Europe Steering Committee on Media and Information Society (CDMSI).