Softer Smarter Faster…

Differentiating Net Neutrality Rules

To Promote Competition in Digital Communications Markets

A Response to Ofcom Net Neutrality Review

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Summary

- The diversity of digital communication markets requires more flexible rules on Net Neutrality. It *is* conceptually possible – and if possible, then indeed normatively necessary – to design softer Net Neutrality rules, allowing, on one hand, for the full protection of the core societal values of digital constitutionalism and democratic governance traditionally associated with Net Neutrality, while re-legitimising, on the other, some selective instances of competition on connectivity when such competition is beneficial for markets.

- Softer Net Neutrality rules (re-legitimising some selective instances of commercial traffic management) could be used for triggering competition and other public interests in deeply entrenched and monopolised digital communications markets. In some of them premium connectivity may remain the only meaningful way for stimulating competition.

- Premium connectivity services could be considered by some CAPs as an effective strategy of new entry into deeply entrenched and tipped digital communications markets. If such business strategy corresponds/complies with the societal interests in encouraging a

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more dynamic competition in digital communications markets, it should be permitted and indeed encouraged.

- The mechanism of the softening of the rules should be designed and the process itself supervised by Ofcom (or jointly with the CMA/DMU) in communication and coordination with the Government and other digital regulators within the DRCF.
- Access to premium connectivity services should depend on the position of an undertaking in a specific digital communications market: the stronger the position the more difficult such access should be. And vice versa – if used as a tool to enter the new markets, such opportunity could be encouraged. The regulatory mechanism itself should be flexible and future-proof, envisaging effective adjustments.
- No instances of discrimination should be allowed for undertakings not participating in the commercial traffic management agreements and no consumer should be harmed by the new rules as premium connectivity can only be a factor for switching between comparable content/services (SSNIP/SSNDQ rationale).
- Some part of the premium connectivity services can be used for encouraging media plurality, local news and other non-commercial but societally significant goals.

Introduction

The Ofcom Net Neutrality review consultation is timely and welcomed. It is launched at a period when digital communications markets are undergoing tectonic technological transformation, accompanied by paradigmatic changes in the very regulatory philosophy underpinning the reforms.

For decades the mechanism of Net Neutrality has been perceived in a binary, categorical and polarising way. From its very emergence, the ethos of Net Neutrality has been strongly associated with the societal values of fairness, Internet freedom, universal access, and digital human rights. Any proposed discussion on possible softening and differentiation of Net Neutrality was immediately portrayed, perceived, and treated as a rent-seeking encroachment into these fundamental values of liberal democracy. In the eyes of the overwhelming majority of citizens, Net Neutrality was seen as ideological, normative and the technological cornerstone of a digital society, requiring unreserved first-order support.

Ofcom's consultation unveils the multifaceted nature of the phenomenon of Net Neutrality. Twenty years since the active use of the idea in policymaking, academic and activist circles, the consultation offers a real opportunity to examine if the merits and demerits of the phenomenon of Net Neutrality were calibrated correctly in the past and if

further readjustments are needed in light of the rapidly changing digital environment of the future.

Greater scrutiny may even pose more critical questions about the plausibility and proportionality of some of the supposed threats that current hard Net Neutrality rules were initially designed to counter. Some may further observe a conceptual causality between the deeply entrenched, oligopolistic and self-serving nature of most digital market ecosystems on the one hand and the absolute absence/prohibition of competition in network connectivity differentiation for various content, applications, or suppliers on the other – the directly intended outcome of a hard version of Net Neutrality.

While aiming to write this response for the purposes relevant only to the questions identified explicitly in the Ofcom consultation, some of its aspects require going broader, reflecting on the issues associated with the origins of the phenomenon of Net Neutrality, its evolution, and the need for the eventual differentiation of the currently binary (non-differentiated) principle. After explaining the reasons for the adoption of a softer definition and application of Net Neutrality rules, and after coining the *normative* argument for a need for the re-legitimation of a more permissive commercial approach to delivering network connectivity, this response reflects upon the practical mechanisms for effectively overseeing those reformed rules.

Net Neutrality: From Binary to Differentiated Rules

Net Neutrality rules are of paramount importance for our economy and our society as they set out the very preconditions, the very architecture of digital markets and ecosystems, as well as the wider digital value chain. In this regard, Net Neutrality is a symbol of digital freedom, and to a large extent the value of the concept of Net Neutrality is based precisely on this ideological dimension much more so than on a practical implication. The reform of the (enforcement of the) current hard Net Neutrality rules can and should be done in a way so as not to endanger the former ideological aspects, while reshaping fundamentally the practical foundation of how Net Neutrality is delivered. This submission offers a version of such a win-win solution, where all safeguards remain in place, while a more permissive, practical and economically supportive regime is introduced.

Giving the quintessential role of Net Neutrality in the overall regulatory design and functioning of digital communications markets, any discussion on the eventual differentiation of Net Neutrality rules needs to be synchronised with and seen through the lens of the wider reforms around the UK's future regulatory approach towards digital markets

and ecosystems and in accordance with the principles underpinning the UK Digital Strategy (at the governmental level), the functioning of the UK Digital Regulation Cooperation Forum (on the inter-agency level) and Ofcom's own approach to competition and consumer issues in internet-based communications markets, as reflected in its 'Digital markets in the communications sector' document (September 2022).

The general argument of this response is twofold. It first submits that the current hard version of Net Neutrality encapsulates the model, which, while granting protection for some fundamental values and architecture of the Internet, simultaneously endangers other fundamental values of digital communications markets. Secondly, it concludes that the complex and multifaceted nature of the phenomenon of Net Neutrality cannot be captured by the binary, categorical 'hard' rules. Such an absolutist approach is a harmful anachronism.

Instead, a more differentiated treatment is needed. The new regulatory treatment should continue to support those elements of the principle of Net Neutrality that correspond to the deontological liberal-democratic ethos of digital constitutionalism while eliminating the excessive and counterproductive aspects of hard rules, which prevent or discourage the effective economic functioning and regulatory management of competition in digital markets. Fortunately, these values are not mutually exclusive and there is a way of achieving both objectives simultaneously.

This response optimistically submits that it is conceptually possible and normatively necessary to separate the *wheat* of the benefits of Net Neutrality from the *chaff* of its shortcomings. Even more so, all the advantages of Net Neutrality can be preserved while all of its disadvantages overcome through changing the regulatory perception of the principle from a *binary 'one size fits all'* to a more *differentiated* approach. If the rules are recalibrated correctly, a softened version of Net Neutrality would continue protecting all the relevant fundamental values of digital constitutionalism while simultaneously beginning to remedy all the current harms associated with the lack of competition caused by a hard prohibition of the ability of communication providers to offer differentiated connectivity, allowing them to better meet the needs of consumers and businesses, and offer longstanding benefits for digital markets.

Defining relevant digital markets

It is important to note that for the purposes of the commercial traffic management and Net Neutrality discussion more generally, the definition of content goes far beyond its conventional perception, which usually associates the term chiefly with copyrightable

materials of some artistic entertaining merits. The definition is much broader. Indeed, any information transferred by the ISPs via their networks is *content*. For this purpose, all core platform services as envisaged for example by Art 2(2) of the EU Digital Markets Act *(online intermediation services such as e-commerce market places or online software applications services, online search engines, online social networking services, video-sharing platform services; messengers, operating systems, web browsers, virtual assistants, cloud computing services, advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services*) – but also any audiovisual content, programmatic advertising, streaming, emailing, gaming, posting, eSports, external storing, industrial data or IoT services, augmented reality and virtual reality experiences – all these and various other digital products and services are *content* in the sense that their consumption (and the position of undertakings in each of the above digital markets) is being directly impacted by connectivity requirements – and may be changed by introducing smarter, softer and more differentiated rules regulating commercial traffic management.

Further, the lion's share of all content is generally substitutable – at least in the dimension relevant for Net Neutrality discussions. The formula is comparable to a well-known economic SSNIP (*small but significant and non-transitory increase in price*) – and even more so to SSNDQ (*small but significant non-transitory decrease in quality*) tests. If a *small but significant* improvement in connectivity does nudge end users to switch to another comparable content, that content for those users is substitutable. Inasmuch as such a switch would only be possible if contents are of comparable quality, the feature of *substitutability* embraces the feature of *comparability* automatically. An average viewer, for example would easily switch to another average Champions League match available in a better quality on 'Tuesday' – but not on 'Wednesday', when their favourite club plays. The 'Tuesday' matches thus would be substitutable for that user, and a match broadcast with premium connectivity parameters is more likely to be selected by them. It would not be the case for the 'Wednesday' slot, as that user would be willing to watch their club's match even on a black-and-white, low resolution glitching small screen, let alone at the normal connectivity parameters (still compulsory available for all CAPs not engaged in premium connectivity). The 'Wednesday' slot would thus be irrelevant for the purposes of the premium connectivity offerings for that specific viewer/s. This obvious feature illustrates that the discussion about the reasonable softening of the hard Net Neutrality rules is a discussion about the edges, not about the core principles. It is only relevant for cases when viewers are either keen to watch specific content at a higher quality (and then there is absolutely no reason to constrain such free economic agreement between the relevant CAP, ISP and end user) or can be behaviourally nudged to switch to a comparable content offered at premium connectivity quality – and then the switch would

only concern a substitutable content and only for as long as the substantive quality of the substituting offer is comparable to the incumbent one. No premium connectivity would trigger the users to consume content of a lower quality provided the better-quality incumbent content is still available at normal speed. This last feature also explains why the premium connectivity service could be offered not only to informed end users, but also to those CAPs interested in increasing their presence in a specific geographic and product market. The premium connectivity alone will never suffice for triggering a switch to a content of a lower quality (inasmuch as the incumbent content is still available at the normal connectivity parameters, i.e., provided no incumbent is actively discriminated against) – and this is an absolute behavioural parameter, safeguarding consumers from any eventual harm.

Additionally, on the terminological side, it would be prudent to avoid using the term 'gatekeeper' in respect of the role of communication providers. The term has strong connotation and association with the vocabulary of the EU Digital Markets Act with direct reference to the entrenched and systemic position in the market associated with the DMA-gatekeepers, operating their own unique internet platforms or ecosystems. This is markedly different from the role of ISPs who in the UK operate within a competitive retail market environment.

When prioritisation is not discrimination

Digital markets are nuanced and differentiated. Their effective regulatory management requires equally nuanced, differentiated, 'smart' treatment. The categorical boldness of the current hard Net Neutrality rules is anachronistic not only from the perspective of the substance of the rules but also from the point of view of the contemporary principles of effective digital governance.

The main goal of this submission is to advance the conceptual argument for the possibility of allowing ISPs to conditionally charge content providers for offering differentiated connectivity (such as carrying traffic with a premium speed), while ensuring baseline safeguards remain in place to provide universal access. Such a change would ultimately require a relevant decision by Government and Parliament, but Ofcom's consultation invites views on how it might wish to advocate for changes to the underlying legislation to enable it to fulfil its statutory duties to further consumer interests in relevant markets, where appropriate, by promoting competition.

Ofcom's working definition of Net Neutrality refers to the current absolutist and categorical hard version of the principle. Under this hard approach any instance of a

particular content or service being prioritised or slowed down is seen as violating the principle of Net Neutrality. Under the softer and more permissive version advanced by this response, conditional, steered and permitted prioritising for commercial purposes would be permitted, while targeted traffic slowed down for purely commercial reasons would not be.

Conceptually, there could indeed be instances when a prioritisation would lead to discrimination. This would be the case for example when content providers and ISPs are scarce, and the prioritisation is drastic and is offered to a content provider already enjoying a significant market power. In situations when content and services are provided by millions, prioritising one (if non-dominant) or handful (if non-dominant) may be seen as discriminatory only in a Pickwickian sense.

This response further proposes for such prioritisation to be allowed to be provided basing on the benchmarks of facilitating new entrance, improving contestability and fairness in digital markets and not causing harm to consumers.

The concrete parameters of the new regulatory model could be fine-tuned after agreeing in principle about the beneficial nature of competition on connectivity.

The proposed regulatory formula would allow for the ISPs to play a much more active commercial role in shaping digital markets. It would also facilitate new CAP entries to the overall benefits of the very structure of digital communications markets.

Synchronising regulatory agenda

The systemically entrenched markets are being consensually perceived as the key obstacle for the effective functioning of competition in the digital economy. Asymmetric rules are recognised to be the only remaining way to limit and slowdown the uncontrolled concentration of digital markets. The current hard Net Neutrality rules are in manifest dissonance with the overall regulatory spirit and direction. They protect disproportionately those who pursue their ambitious commercial interests behind the façade of democratic slogans, further concentrating and consolidating digital markets.

It has been recognised both in the EU and in the UK that the regulatory asymmetry, the imposition of additional regulatory limitations on the omnipotent and omnipresent digital platforms-ecosystems, constitutes a distinctive feature of the new pro-competition regime for digital markets (see e.g., the status of ‘gatekeepers’ under the EU Digital Markets Act; the status of ‘very large online platform’ and ‘very large online search engine’ under the EU Digital Services Act; or the concept of ‘undertaking with strategic market status’ under the proposed UK New pro-competition regime for digital markets). All these newly established

regimes identify the cause of the systemically entrenched situation in digital markets – the largest platforms. The situation is paradoxical: on one hand we introduce interventionist rules aiming to limit the omnipotence of the largest CAPs-platforms, while on the other continue enforcing the most absolutist version of hard Net Neutrality rules, which prohibits communication providers from offering differentiated connectivity to trigger competition at these digital markets, deterring thereby any meaningful possibility of new entry, and challenging the status quo. There is a need – and a way – to synchronise the regulatory philosophy and the technical mechanics underpinning these mutually negating regimes by re-authorising some instances of competition on speed with which the content can be delivered to end users while preventing the situations where the largest CAPs access the new mechanism to further strengthen their market power.

The elements of the new regulatory mechanism

It is essential to design the contours of a mechanism of prioritisation which would in no way endanger the core principles and interests underpinning the concept of Net Neutrality. Importantly, the proposed mechanism is embedded harmoniously into a broader regulatory framework of a new pro-competition regime for digital markets as envisaged in the latest Government (DCMS & BEIS) proposal. It aims to introduce or reinforce competition in digital markets to the benefits of most of the participants of the digital value chain in conformity with and pursuant to Ofcom's duty and power to promote competition and encourage investment and innovation in relevant markets.

As a matter of illustration, one may select randomly any entrenched digital market – for example, the online search engine. Under the current absolutist rules, no differentiation in the speed with which online search engines could offer their services is permitted. Such categorical prohibition benefits the current gatekeeper. Alternative horizontal search engine operators propose different business models which could attract the attention of end users: privacy enhancing (DuckDuckGo), environmental support (Ecosia), revenue sharing (Neeva) etc... In reality, none of these noble and innovative proposals can turn into an increase of their presence in the market. The situation could be different only if any one of these alternative horizontal search engines were contractually prioritised by a certain ISP in a relevant geographic market. Consumers receiving their services faster would be incentivised to switch (of course only if the quality of the services is comparable). Speed remains the only factor of meaningful entry into many systemically entrenched digital markets. Remarkably, under the proposed formula, competition in such deeply (hopelessly) monopolised markets would be triggered by market forces – not by regulatory intervention.

The regulatory intervention could and should steer the process by for example limiting the ability of ISPs to enter into prioritisation agreements indiscriminately (as in the above illustration where the market leader had confirmed +90% share of the relevant market, where such prioritisation would further entrench that market position meeting the threshold of harm). However, there would be nothing to prevent a smaller search player from paying for prioritisation as means of gaining market traction. In a more crowded market like entertainment streaming, where multiple players vie for eyeballs, paid prioritisation by one of more players is unlikely to meet the threshold of harm to trigger a prohibition. Of course, this illustrative model could only be permitted if prioritisation of some is not done by discriminating against the others.

Only the uncontrolled reauthorisation of commercial traffic management would violate the principles of Internet freedom inasmuch as in most cases the agreements would be reached between the ISPs and already entrenched CAPs, and these agreements would only reinforce the power of the entrenched market players.

Under the model, proposed by this response, the ISPs would only be allowed to enter into the prioritisation agreements with content providers under strict conditions monitored by Ofcom (or jointly with the CMA/DMU). Such conditions would be flexible and adjustable in accordance with the principles of a futureproof regulatory sandbox.

A long catalogue of safeguards would frame and shape this re-authorisation to enter into bilateral commercial traffic management agreements. For example, only content providers with market presence below X% would be eligible (thus the reformed rules would meet a legitimate concern/expectation from Ofcom in terms of 'benefit[ing] smaller CAPs or CAPs who compete in a more crowded market (such as entertainment content streaming), which do not have the same degree of bargaining power as larger, market dominant CAPs'. Further, there could be safeguards, preventing prioritisation exceeding more than X% of overall traffic delivered by a certain ISP and they would not be permitted to exceed X% in comparison to the average speed/connectivity quality. Such a prioritisation could further be captured by introducing certain periods of contract duration, geographic location or an absolute number of end user-beneficiaries. Additionally, the ISPs may be requested to enter into X% of prioritisation agreements with undertakings to provide local news, socially significant but commercially less attractive content or to incorporate other substantive societal interests as reflected e.g., in the Ofcom Media Plurality and online news Discussion document (November 2022). As with any regulatory sandbox, different parameters of prioritisation should be subject to regulatory tests, pilot schemes and further innovative flexible instruments, allowing for the finetuning of the elements of the mechanism, coming thereby

to the formula, which would trigger innovation, competition, diversity and incentives to invest, on one hand, while maintaining the core of Net Neutrality principles, on the other.

None of the legitimate societal interests underpinned by absolutist hard Net Neutrality rules would be compromised with the smart and nuanced softening of the rules, making them more differentiated and less categorical, serving the interests of all participants of the digital value chain, as opposed to the current model which benefits the largest most (at least implicitly). Hard Net Neutrality rules are blatantly excessive. Their softening and differentiation would trigger competition, innovation, and other societally desirable outcomes without undermining the legitimate societal interests associated with Net Neutrality.

Noticeably, the improvements highlighted by the illustrated example may be mutatis mutandis delivered to all other digital communications markets. The potential for generating benefits for the digital economy is omnipresent in all possible segments of digital markets as all of them are time/speed/delay-sensitive. In addition, the costs associated with the payment for prioritised speed would not be passed on to the consumers inasmuch as most of these products and services are substitutable and zero-price. The recoupment will take place from the increased market share, implying a greater access to data and advertising markets as well as overall benefits associated with scaling up in the network economy with zero marginal costs. The remaining 99.9% of the traffic would remain unchanged as the proposal offers a 'normal+' (prioritisation), not a 'normal–' (downgrading) model.

Re-legitimising (some instances of) competition on speed

Paragraph 4.12 of the consultation identifies an important and rapidly evolving trend, namely that the largest CAPs hold unprecedented power across a host of (often vertically integrated) digital markets. This part of the consultation document emphasises that unlike the largest CAPs, which are able to leverage their market power and mitigate/avoid possible concerns associated with the more proactive role of the ISPs, the size of most of the other CAPs does not permit them to act independently. To meet these concerns, the proposed model would encourage the entrance into traffic prioritisation agreements for the latter category of CAPs. While not all of them would actively utilise this opportunity, all of them would be eligible to do so, and many actually would. For some CAPs this would enable the long and eagerly awaited opportunity to scale up and to create competitive challenges to the largest entrenched CAPs. The overall logic of the proposed formula would be as follows: the higher the market share/potential for harming consumers are – the lower the chances for entering into premium connectivity agreements should be, and vice versa.

Further, paragraph 4.13 correctly identifies that there is a variety of ways for the largest CAPs to leverage their power to steer consumer choices from markets not covered by Net Neutrality rules to those which are covered by Net Neutrality. Such a situation essentially means that while formally all CAPs remain in an equal position, the possibility of exploiting their entrenched position in other digital markets allow the largest CAPs the opportunity to benefit from the absolute Net Neutrality rules significantly more. In their case, the rules de facto apply only to the smaller CAPs, not the largest ones, working essentially as another barrier to entry/scaling up for the remaining CAPs.

Differentiation of Net Neutrality rules, which envisages a re-legitimation of some forms of commercial traffic management, can, and should, only be done in a way that fully meets the concerns expressed in paragraphs 4.15 and 4.16. While premium connectivity services would only be arranged via bilateral commercial agreements, this would not affect all other CAPs, which would continue operating in the present format. No changes would be needed for those not intending (out of 'a very long tail of smaller CAPs') – or those which would not be eligible (CAPs with entrenched positions in digital communications markets) – to enter into commercial traffic management agreements. They would continue function after the softening of the rules precisely as they function before it.

Equally, the proposed model would remedy concerns expressed in paragraphs 4.17 and 4.18, requiring information about such prioritisation agreements to be communicated publicly and in accessible way.

A fundamental feature of the proposed differentiated Net Neutrality rules is its categorical and unequivocal condemnation of practices expressed in paragraph 4.19, resulting in 'the blocking or throttling of individual CAPs'. It is worth reminding that blocking and throttling were among the key drivers for the original Net Neutrality movements. These concerns remain fully legitimate – even if for the UK context always hypothetical – but their implementation into regulation may and should be done by a much less draconian – and more proportionate – means, envisaged in the softer Net Neutrality rules.

Additionally, the proposed softening of Net Neutrality rules would help to solve an important element of the discussion related to the ISPs' incentives to recoup, invest or innovate, opening for the industry another differentiated and very dynamic source of revenue (paragraphs 4.21–4.23 of the consultation document).

Premium connectivity as a privilege

With regards to ***Question 2,*** this response partially disagrees with Ofcom's formula of defining legitimate Type II offers of zero rating as elaborated in particular in paragraph 5.56. While formally assuring all CAPs to take part in zero-rating commercial agreements on equal basis is proportionate, in reality such a formula would deprioritise the smaller CAPs. It would be beneficial to elaborate a mechanism enabling the entrenched large CAPs to become subject to additional commercial and/or technological and/or behavioural checks when entering into zero-rating agreements in those cases where such agreements would strengthen further their market dominance or harm consumers. This adjustment would make the provisions of paragraph 5.56 compatible to those elaborated in paragraph 5.68. Those articulate Ofcom's concerns about the situations of providing zero-rating services to CAPs with 'a degree of market power over consumers'. The biggest CAPs should be economically, technologically or behaviourally limited in any conduct which would reinforce their position in relevant digital markets. Instead, from the perspective of the new pro-competition policy, any commercial steps (including zero-rating agreements) between the ISPs and the newcomers/maverick challenging the mono-/oligopolistic status of the biggest CAP/s should be perceived as presumptively procompetitive.

Another aspect requiring a change of regulatory approach concerns the issue of non-differentiated pricing on the consumer/retail side. The rationale of Article 3(2) of the Regulation is based on the logic of avoiding excessive charging in situations where ISPs are motivated to engage in exploitative abuse of their consumers/retail customers. These situations are blatantly anticompetitive from the perspective of ex-post competition law and having a second layer of ex-ante regulation appears to be suboptimal in itself. There could indeed be situations where ex-ante regulatory rules could duplicate the elements of ex-post competition law, but these situations should be exceptional and the standard of justification for adopting such parallel enforcement should be very high. Otherwise, the enforcement of ex-post competition rules should be a sufficient deterrent factor for these situations.

The disproportionate features of the current rules become even more problematic inasmuch as such an orthodox broad-brush approach to protecting some hypothetically endangered consumer interests is being pursued, to a large extent, at the cost of consumers themselves, many of whom essentially subsidise the most active layer of end users with the highest level of traffic consumption. At the same time, often such cross-subsidisation is taking place unwillingly as many of those cross-subsidised are prepared to pay a more proportionate price, particularly if such a price reflects the highest available (as opposed to the average guaranteed) quality standards (as articulated in paragraph 6.31 of the consultation document and going above these parameters). In other words, the rule uses a societally appealing

slogan and a very basic formula, which in reality stifles innovation, restricts competition, limits choice and disincentivises investment.

The statement of the consultation document that '[t]he framework should support beneficial retail offers which could better meet diverse needs and support our objectives' as well as the argumentation developed in paragraphs 6.38–6.38 could not be formulated more precisely. In light of the above this response provides affirmative answer to ***Questions 5*** and ***7,*** welcoming Ofcom's proactive outside-the-box approach to these longstanding problems. Users are diverse, services are diverse, devices are diverse, preferences are diverse – not all implications of this multifaceted commercial and technological plurality of needs should be constrained automatically by the binary boldness of hard Net Neutrality rules. Some may well be. Others – not.

The gist of the problem of categorical hard Net Neutrality rules is based in the issues presented in ***Section 7*** of the consultation document. Ofcom is clear and correct that introducing the changes in this field would require a new Government proposal. However, the discussion is needed already, as the wide scope of issues requires their reconceptualisation. Starting from the very basic, foundational question: what are the merits, the rationale and the reason for prohibiting so categorically and unequivocally the very possibility of CAPs competing with each other on parameters other than substance of their content, and prohibiting ISPs from entering into commercial agreements on providing premium quality services for a premium charge? There must be something obviously convincing in such a radical policy choice, something which could not be done in a more proportionate way. It is also important to ask who the main beneficiaries of such market homogenisation are and if the categorical version of Net Neutrality has been promoted as the only possible option in way of a tacit collusion by the main economic beneficiaries of the policy (prima facie, a more plausible scenario) or if it has been achieved with some elements of coordination. The reform would never be accomplished without elucidating these historical questions. However, identifying the core of the historic misconception would be only the first step. The next and much more important one would require an in-depth discussion on designing the mechanism of the reformed rules, allowing, on one hand, for the protection of the core societal principles endorsed by every (including, of course, by the current categorical one) version of Net Neutrality, while simultaneously opening up sustainable competition in digital markets in line with the latest strategic reforms and pursuant to Government rationale of a new pro-competition regime for digital markets.

Allowing ISPs to charge CAPs for premium services – provided the general level of quality available to all other participants of the supply chain and the mechanism itself is designed, supervised and monitored by digital regulators – is the main driving force for encouraging

competition in digital communications markets. It remains mysteriously unclear why such banal, self-evident economic activity has been so categorically humiliated, tabooed and pathologised in the first place. Clearly, the beneficiaries of this absolute prohibition of competition on speed is a handful of the largest CAPs, which are capable to win the race for consumers' eyeballs not least by subsidising their own CDNs (as indicated inter alia in paragraph 7.46 of the consultation) and/or leveraging their entrenched position in other digital markets, on one hand, while not allowing newcomers/challengers to get consumers' attention via offering their digital products and services at higher speed at least in some markets. The situation becomes paradoxical: the categorical rules and the rhetoric of absolute fairness are being promoted and fuelled by those who have an ability to overcome the equality effect of the Net Neutrality principle. No doubt, if the main implication of the categorical Net Neutrality rules is 'neutralisation' of smaller CAPs, the main 'neutralisers' would continue fuelling this rhetoric, while applying pervasively various very well-known disintermediation and self-preferencing techniques in all digital markets dominated by them.

Net Neutrality and innovation

There is nothing inherently innovative or fundamentally superior in most of digital products and services – and in particular in such generic digital markets as defined in Art 2(2) of the EU Digital Markets Act – which could not be duplicated or done differently. The stable preferences in consumer choices are to a large extent explainable by behavioural patterns, self-preferencing, leveraging and cross-subsidisation. Allowing newcomers to attempt to challenge this vicious circle by offering their alternative products/services in the specific geographic market of a specific ISP at a higher speed is an obvious way to trigger competition. There is no reason to prohibit so categorically something which could be so obviously designed in a pro-competition fashion. Evidently, the rehabilitation of competition on speed can perfectly coexist with a softer version of the reformed Net Neutrality rules. Such mechanism could be based on the compensatory rationale (expecting those using most of the bandwidth to contribute their fair share), but it could equally be offered on a pro-competition one.

A more differentiated approach to Net Neutrality is needed. It would require designing a mechanism for allowing some instances of commercial traffic management under the control, steering and supervision of Ofcom (or jointly with the CMA/DMU). While the mandate for the new mechanism can only be provided by introducing new legislation, as correctly pointed out in paragraph 7.4 of the consultation document, it would be more

beneficial for the contours of the possible reform to be reflected upon, discussed and refined by relevant stakeholders within the present consultation.

This submission fully concurs with Ofcom's statement in paragraph 7.45 that 'the current net neutrality framework could potentially undermine our objective to safeguard well-run, efficient and robust networks, if it encouraged CAPs to use ISPs' networks inefficiently' and aims to puts forward a conceptual argument for and to provide the contours of the mechanism for fostering competition by sustainable and non-discriminatory means. By re-legitimising instances of competition on premium connectivity, the host of digital markets would show new dynamics. This would facilitate new entries and contribute to various types and forms of efficiency, meeting thereby Ofcom's concerns raised in paragraph 7.47 that it remains to be seen 'whether there is the opportunity for significant efficiency improvements to result from a charging regime'. This regime however should be introduced in a way encouraging smaller or non-entrenched CAPs to use premium connectivity.

An important specificity of the proposal is that while operationalising the interests and rights of the ISPs to charge CAPs for premium services, the real beneficiaries of the proposed model would be a variety of non-entrenched CAPs themselves as well as digital communications markets more generally. Premium content delivery remains the only meaningful economic factor capable to bring competition into the most monopolistic digital markets: a faster / better digital service may become a sufficient (and often even 'only remaining') factor, impelling consumers to switch – be it more responsive social media, a faster video-sharing platform, a low latency cloud service, a faster e-commerce market place, a low latency online search engine, a faster messenger, a faster web browser, a faster advertising network, a higher definition streaming platform, a low latency gaming service, a faster augmented and virtual reality experience, a faster IoT service … and *ad infinitum*. In the worst-case scenario, the switching would not take place and the positions of the competitors would remain as they were before entering into a commercial traffic management agreement.

Ofcom is correct in its cautious approach as the reform is inherently hazardous and, as such, requires very careful calibration. This factor however should be seen as one which pleads for further proactive steps rather than discouraging or preventing them. Life is full of hazards. Some should be avoided, others – managed.

Ofcom's concerns about the technical ways of marking prioritised content expressed in paragraph 7.58 are well-substantiated, yet if the proper regulatory incentives are created, this would encourage a more proactive and effective cooperation between the interested stakeholders aiming at agreeing upon these technical standards and mechanisms.

Towards a new pro-competition regime for digital communications markets

It is correct that, as stated in paragraph 7.60 of the consultation document, 'any charging regime may require a significant degree of regulatory oversight. This oversight could be challenging to deliver, considering the complexity and the dynamic nature of commercial context (e.g., if an intervention was needed to decide on the appropriate cost-based charges applied to CAPs)'. Contrary to the rationale developed in the consultation document, this response disagrees partially with the hypothesis that the largest CAPs should be charged for premium content as opposed to the rest of the CAPs. Designing such a model would indeed transfer some wealth from the largest CAPs to the ISPs compensating to the latter some continuous market misbalances. This mechanism however should not be applied at the cost of competition in the digital communications markets. Without safeguards such a formula would further strengthen the market power of the biggest to the detriment of the rest. The idea underpinning this submission proposes to expand further the compensatory logic of the fair share discussion and introduce the softer rules to trigger competition in digital markets. In addition to the proposals related to charging the most intense users of traffic for non-premium connectivity given the load they place on the network, the new rules should also limit the largest CAPs from accessing the premium, top-gear, privilege if there is the prospect of harm for competition and consumers in digital communication markets. Under this logic, non-entrenched CAPs should not be prevented from, but on the contrary, encouraged to entering into such premium services agreements with the ISPs. There will be no shortage of interest in such agreements as self-evidently faster speed is a universal decisive factor for increasing market share. In doing so, the compensatory function of the reform (on the ISPs side) would be complemented by the pro-competition function (on the CAPs side) to the benefit of end users and digital communications markets more generally.

Accessing premium connectivity is a privilege, a scarce, finite and invaluable resource permitting for a change in consumer preferences and an increase in market share by delivering comparable services at faster speed. Not everybody should be allowed to do so. Paragraph 7.60 of the consultation document expresses legitimate concerns that 'any considerations of the merits of a charging regime would need to take account of whether it is possible to implement and enforce such a regime in a timely and effective way in line with its objectives, and in a way that minimises the scope for unintended consequences', and it would be reasonable to run the reformed model in a beta version, as a piloting test, permitting only an insignificant proportion of overall traffic of each relevant ISP to be offered on a premium basis and/or capping the premium speed to X% of the average one. There are various other instruments in the regulatory toolbox/sandpit allowing for the minimisation of any possible risks while receiving representative results from such experimental case studies.

Ultimately, all the premium-service activities should be done under the control of Ofcom (or jointly with CMA/DMU).

Paragraph 7.61 of the consultation document is welcomed for its acknowledgement that 'in principle there could be benefits to a charging regime, particularly in improving the incentives on CAPs to deliver traffic efficiently'. It is important to identify, calibrate, shape and channel these benefits. The purpose of this response was to highlight the importance of introducing a softer and more differentiated Net Neutrality regime, which, while meeting all the societal objectives of the previous categorical version of the rules, would trigger steered competition in all relevant digital communications markets by legitimising selective, controlled, responsible and sustainable commercial traffic management. The contribution further reflects on the contours of the new regulatory mechanism, enabling the implementation of the suggested reform, as well as on the principles underpinning its effective functioning.

Universalising the model

It is essential to point out that the reform proposed in this response would benefit not only the direct participants of the digital markets supply chain. The introduced mechanism could be further synchronised with other interests, the protection and promotion of which is designated for Ofcom. One of the most representative examples in this regard is the current Ofcom Media Plurality consultation. As evident inter alia from the extensive outcomes of the recent CMA Online Platforms and Digital Advertising Market Study Final Report (July 2020), the media sector experiences strong economic and societal constraints from the largest CAPs, and in particular search engines, social media and operators of digital advertising networks. These constraints are systemic and hard to avoid.

As correctly pointed out in the introduction to the ongoing Ofcom Media Plurality consultation, these 'intermediaries increasingly play the role of gatekeepers, curating or recommending news content to online audiences, it is not clear that people are aware of the choices being made on their behalf, or their impact.' It identifies further a cascade of challenges associated with the rapid transformation of the field. The risks go far beyond economic analysis giving the existential role of the media in the functioning of liberal democracy.

The mechanism of premium services could also be used to improve the situation in the markets of some/designated/local media CAPs. ISPs may be required, for example, to reserve a certain part of the allocated premium speed services for some/designated/local media

CAPs, allowing them a greater opportunity to increase their market presence (similar to other public benefit initiatives – such as e.g., with regard to zero rating or the practice of some public service broadcasters linking their websites to local newspapers). This mechanism would not solve all the challenges identified in the Ofcom Media Plurality consultation but would contribute to a successful mitigation of at least some of them, as, essentially, the ideas of economic competition embedded in the effective functioning of digital markets have a very similar pedigree to (and have very similar challenges as) the ideas of cultural competition embedded in the notion of free speech and reflected in the format of media plurality. In the same way, it could contribute to UK digital resilience considerations as well as to the situations indicated in the joint advice from Ofcom and the CMA on how the financial relationships between the big digital platforms and news publishers could be made fairer.

Conclusion

The consultation document identifies correctly two decisive factors predetermining the functioning of digital communications markets: (i) that a disproportionally 'large share of internet traffic is related to several large content providers'. The fact that out of many hundreds of millions – and indeed billions – of providers generating or distributing digital content only a handful consume a good half of all traffic makes the entrenched nature of digital communications markets a self-evident matter; and (ii) that the ISPs are not the only participants of the value chain which are capable of controlling the traffic, and that mobile ecosystems have absolute control over 'the iOS and Android operating systems embedded in smart phones'. Additionally, they have the ability to leverage their market power vertically (for abundance of evidence see CMA Mobile Ecosystems Market Study Final Report (June 2022) alongside CMA Mobile Browsers and Cloud Gaming Market Investigation Reference (November 2022)). In light of these findings, it appears that the current hard version of Net Neutrality rules prevents competition and provides unfair advantages in the markets for content delivery (reserving de facto a better regulatory status for the largest CAPs/infrastructure providers vis-à-vis ISPs) as well as in markets for content competition (again reserving a better regulatory status for the same set of the largest CAPs/infrastructure providers vis-à-vis other CAPs).

The very phenomenon of competition on the quality of connectivity with which content is delivered to end users has been marginalised and tabooed. Any instance of commercial traffic management was automatically and unreservedly categorised as harmful and prohibited. The very core of the invisible power of market processes, the very gist of markets' spontaneity, the very essence of the vital energy of economic competition has been

prohibited unequivocally. Such a radical downgrade of the ISP industry to the "dumb pipes" status, assuring non-differentiated traffic delivery on the "first come first served" principle, has facilitated and indeed preconditioned a smooth and comprehensive mono- or oligopolisation of all digital markets by the biggest CAPs.

As with any market process, competition on speed (with which CAPs can deliver their content to their business and end users) is indeed ambivalent and potentially susceptible to mutating into a harmful obstacle to innovation, growth, and user experience. Some regulatory constraints are necessary and the freedom with which ISPs could prioritise certain content of specific CAPs requires smart regulatory limitation and conditioning. Such a smart, balanced regulatory approach however differs substantially from the existing categorical Net Neutrality rules. The current Ofcom consultation manifests the regulatory awareness of the need to refine and modify these bold and absolutist prohibitions. Most of the overarching non-discrimination principles will rightly remain unchanged. The softening of the Net Neutrality rules would not endanger the core ideology of Internet Freedoms. The modified rules – alongside competition law and other existing safeguards – would continue being reliable guardians against any instance of discriminatory treatment or of further strengthening and entrenching the market dominance of the biggest CAPs. However, some softening of the categorical prohibitions, some re-authorisation of commercial traffic management, some rehabilitation of competition on speed is necessary – and indeed inevitable. The question is not anymore if, but how precisely the current Net Neutrality rules should be revised.

In light of the abovementioned arguments, this submission puts forward the following 12 theses:

1) Net Neutrality is a set of ideological postulates aimed at defending the core democratic elements of the architecture of the Internet. Those first-order principles can be observed either in a hard, categorical, absolutist or in a softer, more differentiated way. It is essential to point out that both approaches can be designed in a mode offering full protection for all the foundational principles of democratic Internet governance.
2) The current – hard – version of Net Neutrality is disproportionate. While, indeed, protecting the core principles of democratic Internet governance, it does so in an excessive and unnecessarily intrusive way. A smart softening of the current hard Net Neutrality rules is required by a long catalogue of mutually supporting reasons (comprising the remaining ten theses). Inasmuch as such a softening can (and should only) be done in a way, respecting the core principles of the architecture of the Internet (which have justified the adoption of Net Neutrality rules at the first place),

logically there is no legitimate normative reason for maintaining the hardest of all possible versions of Net Neutrality rules if the softer version can be equally effective in protecting these principles. Furthermore, it is not the ISPs who carry a normative burden of proof for introducing a more proportionate limitation of private economic freedom, it is rather the regulators who have this duty to substantiate the reason for introducing unnecessarily prohibitive market limitations in a situation when a more proportionate alternative is available. This implies that even if no additional advantages from the softening of hard Net Neutrality rules can be demonstrated, such a softening would be required purely on the ground of proportionality. Inasmuch as there are many additional advantages coming from the softening, the current categorical regulatory modality becomes even less conceivable.

3) Either intentionally (and then one may begin searching for a conspiracy) or most probably coincidentally (tacit collusion) the adoption of the hardest version of Net Neutrality rules have facilitated tipping of every imaginable digital market. It is in the inherent interest of each CAP-incumbent in each digital market to maintain the status quo by limiting the ways in which newcomers could challenge their entrenched market position. By prohibiting the mechanism of premium connectivity, each CAP-incumbent in each digital market received an additional – and usually unchallengeable – technological trench against entrepreneurial newcomers.
4) Competition on speed (and more broadly on connectivity) with which content is delivered to end users is an essential element of economic freedom. It is as normal as competition on the speed with which cars drive or planes fly. As with any speed, Internet connectivity is a hazardous element, capable of – and even susceptible to – leading to detrimental outcomes for digital markets. This is the reason why such competition should be as controlled, steered, and limited as any other – and maybe even more than any other – market phenomenon. This is not a reason for prohibiting (humiliating, tabooing) the very essence of commercial traffic management outright. Such categorical prohibition, 'cancelling' of competition on connectivity is the core, direct and intended implication of the hard Net Neutrality rules, as well as indeed the only feature distinguishing the hard and bold from the softer and smart version of the principle.
5) The softer rules can only be introduced in a smart way. All the catalogue of toolkits related to experimental, future-proof regulation can and should be applied to the redesigned Net Neutrality rules. Asymmetric flexibility and regulatory discretion are at the centre of the new approach. Ofcom (or jointly with the CMA/DMU) should be designated with competence to design, finetune, refine, modify and control the concrete mechanisms of how precisely premium connectivity is traded: who should

receive regulatory priority and under what conditions, and who should be prohibited from entering into such premium connectivity agreements and in which cases. The discussion is full of details and nuances, and it is sad to observe how the finite attention and expertise of the relevant stakeholders were wasted on discussing the first-order problems, most of which were reduced to their binary yes/no, good/bad features instead of looking at the nuances of the concrete parameters of the softer rules.

6) The proposed softening of hard Net Neutrality rules goes in line with the overall regulatory atmosphere in the area of digital markets and digital economy. It has been consensually agreed that all digital markets demonstrate systemic mono-/oligopolistic features. These features have been obtained or strengthened in many cases precisely due to a lack of competition on connectivity. New proactive rules aiming to reinforce competition in digital markets are proposed in all mature democratic jurisdictions. The gist of these rules is based on the asymmetric scope of addressees of the rules, which are becoming subject to stronger and more interventionist treatment. Paradoxically, most of the same addressees/gatekeepers are being treated by the hard Net Neutrality rules also asymmetrically – but on the contrary by getting a more preferential, as opposed to more constraining, treatment.
7) The possible ameliorations are universal. The re-legitimised competition on connectivity is capable of generating a new dynamic for all possible digital markets. Any entrenched segment of digital economy can be revitalised with the new blood of competition and entrepreneurial discovery by competitors attempting to offer their services at premium connectivity.
8) The content which commercial traffic management is capable of having an impact on is substitutable. The switch to a content delivered at premium connectivity would only be possible if all other qualitative parameters of the content are equal or comparable. The connectivity alone can never be a sufficient reason for switching if any of the other parameters of the substituting content are worse than the incumbent one: nobody would switch to a faster social network, streaming service, or marketplace solely because the services are faster. They must be at least of a comparable quality.
9) Softening Net Neutrality rules could also contribute to solving a cascade of the issues relevant to the fair share discussions.
10) The softer Net Neutrality rules would operate under the normal+ format, implying that no content and no competitor would be purposefully downgraded as a means of prioritising the premium CAP. A number of adjustable safeguards-requirements could be introduced, steering the freedom of the ISPs to enter into premium connectivity

agreements. Among the most obvious would be an explicit allocation of a certain percentage of traffic which could be prioritised, as well as the parameters of the prioritisation, its duration and others. All these safeguards would be controllable and amendable by the regulator.

11) Some part of the premium connectivity services could be allocated to content of special social significance – like for example local news or services helping to diversify and intensify media plurality and broader societal goals.
12) Inasmuch as premium connectivity can only influence substitutable content, passing on offence – i.e., the situations when the premium CAPs would compensate their costs by charging end users – are statistically insignificant as in zero-price markets it would be very implausible, and the consumers can always return to the status quo ante situation by changing back their choices. This implies that when the softening is done right, consumers cannot be harmed.