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Net(work) Neutrality in Switzerland: Where Do We Stand?

As in other jurisdictions, network neutrality was at the heart of the revision of the Swiss Telecommunications Act in 2019. To begin with, this article aims to expose the position of Switzerland in comparison to other major jurisdictions, the United States and the European Union. Subsequently, it questions the fact that network neutrality is identical to net neutrality with the increasing rise of online platforms, even though the debate on net neutrality often refers solely to network neutrality. This article analyzes in which respect the regulation could and should impose neutrality on online platforms in order to make the Internet more neutral for users.

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1. Introduction

[Rz 1] 12 March 2019 marked the 30th anniversary of the creation of the World Wide Web by Tim Berners-Lee. Since the Internet was developed, its neutrality has been intensely discussed among academia and on a political level. This debate has not ended yet; on the contrary, it has intensified over the years and now concerns multiple layers of the Internet architecture. Indeed, it relates nowadays not only to the foundational infrastructure layer of the Internet, i.e. the network, but has expanded to higher layers, i.e. notably online platforms acting as intermediaries.

[Rz 2] This paper will evaluate where Switzerland stands with regards to net neutrality. It will do so from two standpoints. The first is from a geographic standpoint, by comparing the regulation in Switzerland and in other countries in order to determine whether Switzerland has taken the same path as other major jurisdictions or not. The second standpoint is where Switzerland stands with regards to neutrality itself: is the Internet as accessed by a Swiss web user genuinely neutral or can the content accessed be discriminated or filtered by intermediaries?

[Rz 3] This essay will discuss the concept of neutrality in the Internet architecture, how regulation can affect it and the different regulatory responses that exist in different jurisdictions. It will assess whether the traditional network neutrality itself can genuinely achieve online neutrality or if neutrality in higher layers is also required, while discussing if such neutrality is desirable or not. Following this introduction (1.), I will explain the concept of *network* neutrality (2.) before addressing the relevant applicable law. Recent developments in Switzerland will be reviewed before turning to the situation in the United States and in the European Union. I will then address the *net* neutrality concept (4.) by determining whether *network* neutrality and *net* neutrality are similar notions or not, and explore the recent concept of platform neutrality in relation with net neutrality. Finally, the problem of regulating platforms is addressed from a competition law and from a specific regulatory perspective. The last part is a conclusion of the main points of this article (5.).

2. General Presentation of the Concept of Network Neutrality

[Rz 4] The first to have addressed the issue of network neutrality is Tim Wu, a Columbia Law School professor, in an article called «Network Neutrality, Broadband Discrimination»[1]. Since then, a great deal of literature on that topic has been published and there is no single accepted definition of network neutrality[2]. The general principle behind that concept is that «owners of the networks that compose and provide access to the Internet should not control how consumers lawfully use that network; and should not be able to discriminate against content providers' access to that network»[3].

[Rz 5] Network neutrality is often linked to the end-to-end principle[4]. At its origins, the Internet was created as a «dumb» network, in the sense that its main function is to pass packets of data from one node to another through a network until the destination is reached[5]. The network makes no difference between the type of data transmitted, the sender or the receiver, the content or the address information. It treats all packets equally in accordance with the «bit parity» principle[6]. Accordingly, a neutral network requires that data packets in the Internet should be moved impartially without regard to content, destination or source[7]. The packets take the fastest route, following the «best-effort» principle[8]. However, ends of the network, i.e. the senders and receivers of data packets, can use applications to filter content or discriminate certain types of data packets[9]. Network neutrality concerns solely the core infrastructure of the Internet network.

[Rz 6] Worldwide, there is a fierce, complex debate regarding whether the network should be neutral or not. From an economic viewpoint, being allowed to influence the transfer of data packets has an invaluable potential[10]. Indeed, it allows Internet service providers (ISPs) to apply web traffic management techniques, such as requiring payment to prioritize the transfer of certain data packets, to discriminate some other packets, or to use termination charges for data traffic. It therefore has possible redistributive consequences[11]. In this respect, some argue that network

1 Tim Wu, Network Neutrality, Broadband Discrimination, 2 Journal of Telecommunication and High Technology Law 2003, p. 141 et seqq.

2 An-Shou Cheng/Kenneth R. Fleischmann/Ping Wang/Emi Ishita/Douglas W. Oard, Values of Stakeholders in the Net Neutrality Debate: Applying Content Analysis to Telecommunications Policy, Proceedings of the 43rd Hawaii International Conference on System Sciences – 2010, p. 1.

3 Angele A. Gilroy, Net Neutrality: Background and Issues, CRS Report for Congress 2008, p. 1 et seqq.

4 Carlo Reggiani/Tommaso Valletti, Net neutrality and innovation at the core and at the edge, 45 International Journal of Industrial Organization 2016, p. 16 et seqq., p. 16 ; Simon Schlauri/Michael Vleck, Netzneutralität: Eine Analyse mit Schwerpunkt auf dem geltenden schweizer Kartell- und Telecommunikationsrecht, sic ! 2010, p. 137 et seqq., p. 137.

5 Paul Ganley/Ben Allgrove, Net neutrality: A user's guide, 22 Computer Law & Technology Report 2006, p. 454 et seqq., p. 456.

6 Ganley/Allgrove (n. 5), p. 456.

7 Andrew Murray, Information Technology Law, The Law and Society, 3rd edition, Oxford 2016, p. 26; see also Friso Bostoen, Platform Neutrality: Hipster Antitrust or Logical Next Step ? (Part I), KU Leuven CiTiP blog 12 December 2017, available at https://www.law.kuleuven.be/citip/blog/platform-neutrality-hipster-antitrust-or-logical-next-step-part-i/ (all websites last consulted on 16 April 2019); Rolf H. Weber/Ulrike I. Heinrich, Netzneutralität als aktuelles Regulierungsproblem, in: Astrid Epiney/Markus Kern/Lena Hehemann (ed.), Schweizerisches Jahrbuch für Europarecht/Annuaire suisse de droit européen 2014/2015, Zurich/Basel/Geneva 2015, p. 385 et seqq., p. 386.

8 Schlauri/Vleck (n. 4), p. 137.

9 Ganley/Allgrove (n. 5), p. 456.

10 Weber/Heinrich (n. 7), p. 387.

11 Reggiani/Valletti (n. 4), p. 16.

neutrality is crucial to keep the Internet useful, whereas others posit the opposite. Both sides of the debate have valid arguments to present.

[Rz 7] On the one hand, proponents of network neutrality base their arguments mainly on technological innovation and free speech. Firstly, network neutrality enables new market entrants to benefit from the same infrastructure from ISPs as already well-established companies[12]. It creates a level playing field that balances the competition between market actors[13]. Secondly, maintaining network neutrality allows individuals to express themselves freely within the law and access information and services they want, without paying supplementary fees to ISPs.

[Rz 8] On the other hand, opponents against network neutrality argue principally that it does not incentivize ISPs to invest in Internet infrastructure and improve it, which could lead to shortage as the web traffic increases[14]. If they could monetize the transfer of data packets, an incentive would therefore exist for ISPs to invest. Moreover, transferring data packets in a neutral way would prevent ISPs to maintain a sufficient quality of service (QoS)[15], notably in times of overload of the network. On the contrary, this would be the case in the event it could prioritize the transfer of data according to different types of consumer subscription.

3. Regulations Addressing Network Neutrality

[Rz 9] The debate about network neutrality is not confined to academic or political circles, and regulators among the world are also divided in this respect. Many different approaches have been taken by regulators all over the world, some in favour of network neutrality and some against it. In an empirical comparative study, Rosalyn Layton identified three categories of net neutrality regulations: (i) no rules, (ii) soft rules, which means that net neutrality is regulated through voluntary or non-binding rules made by multi-stakeholder model, codes of conduct, and principles, and (iii) hard rules, where rules are legally binding and made by legislation or regulation[16]. After reviewing the situation in Switzerland, I will focus on jurisdictions that have recently adopted hard rules, but where their substance is fundamentally different: the United States and the European Union.

3.1. In Switzerland

[Rz 10] The debate about network neutrality in Switzerland followed the one in the United States and the European Union and started around 2009[17]. Developments regarding reports published by the Federal Council, discussions by the Parliament and self-regulation until 2015 have been

12 Reggiani/Valletti (n. 4), p. 17; Robin S. Lee/Tim Wu, Subsidizing Creativity through Network Design: Zero-Pricing and Net Neutrality, 23 Journal of Economic Perspectives 3 2009, p. 61 et seqq., p. 67.

13 Ganley/Allgrove (n. 5), p. 460.

14 See Ganley/Allgrove (n. 5), p. 459, who refer to that problem as «copper ceiling».

15 See Weber/Heinrich (n. 7), p. 387.

16 See Rosalyn Layton, Which Open Internet Framework is Best for Mobile App innovation? – An empirical inquiry of net neutrality rules around the world, Aalborg Universitetsforlag. Ph.d.-serien for Det Tekniske Fakultet for IT og Design, Aalborg Universitet, available at https://doi.org/10.5278/vbn.phd.engsci.00181, p. 127 et seqq.

17 Weber/Heinrich (n. 7), p. 399.

well reported by Rolf Weber and Ulrike Heinrich[18]. Instead of repeating these developments, I will focus on more recent developments before exposing the regulation that will apply in a near future. Indeed, network neutrality has mainly been discussed during the partial revision of the Telecommunications Act (TCA)[19] that has been adopted by the Parliament on 22 March 2019.

3.1.1. Project of the Federal Council for a Revised TCA

[Rz 11] In its project, the Federal Council did not insert the principle of network neutrality in the TCA. It stated that no accurate regulation in this respect was needed[20]. It noted, however, that issues exist under the TCA before the revision. Indeed, clients of ISPs cannot know whether the poor quality of their Internet access is due to actions taken by ISPs or to other reasons. This is because clients do not know if an ISP operate limitations and differentiation when they provide Internet access[21]. However, a fair number of differentiated treatments can occur, either for technical or economical purposes[22]. According to the Federal Council, this situation was not acceptable for clients and this issue needed to be addressed in the overhauled TCA.

[Rz 12] To this end, the Federal Council proposed to revise art. 12a para. 2 TCA. The solution to the identified issue involves transparency of the ISPs *vis-à-vis* their clients. Indeed, it provides that ISPs have to «*informer le public lorsque, lors de la transmission, ils traitent des informations de manière techniquement ou économiquement différenciée*». Moreover, art. 12a para. 3 TCA makes sure that the public is informed of the QoS that ISPs provide. Pursuant to art. 12a para. 4 TCA, the type of information that has to be disclosed by ISPs has to be settled in an Ordinance of the Federal Council. As the member of the Federal Council Doris Leuthard said before the National Council, «*der Bundesrat hat in der Botschaft einen Kompromissvorschlag vorgelegt zwischen denjenigen, die Ungleichbehandlungen beim Datentransport grundsätzlich verbieten wollen, und denjenigen, die für die Netzneutralität keine Regeln aufstellen möchten*»[23].

[Rz 13] As a result of such a regulation, it follows that ISPs can legally discriminate the transfer of data packets to web users because the law implicitly acknowledges that different treatment for technical or economic reasons is acceptable and no provision explicitly prevents it. The only requirement when an ISP operates such discrimination is to disclose it. The network neutrality is hence not guaranteed and ISPs are lawfully free to discriminate the transfer of data packets as long as the legal requirements are met.

[Rz 14] This proposal of regulation has been received differently by stakeholders[24]. It has been approved by some stakeholders, whereas others are of the opinion that the TCA should not be revised at all and advocate the status quo. Others, however, argue that network neutrality should

18 See Weber/Heinrich (n. 7), p. 399 et seqq.

19 Loi sur les télécommunications du 30 avril 1997 (LTC; RS 784.10).

20 FF 2017 6185, 6214.

21 FF 2017 6185, 6241.

22 See notably the examples in Office fédéral de la communication (OFCOM), Neutralité des réseaux, rapport sur les travaux, 23 October 2014, available at https://www.bakom.admin.ch/bakom/fr/page-daccueil/suisse-numerique-et-internet/internet/neutralite-des-reseaux.html, p. 23 et seqq.

23 BO 2018 N 1714.

24 See FF 2017 6185, 6226.

be properly addressed in the regulation, as it is the case in other jurisdictions[25]. As discussed below, opinions were equally divergent during the discussions at the Parliament.

3.1.2. Modifications of the Project by the Parliament

[Rz 15] The priority Chamber for this legal revision is the National Council. It first reviewed the project on 27 September 2018. The transport and telecommunication committees of the National Council (NC-TTC), in charge of reviewing the project, argues that «*la révision de la neutralité absolue du Net doit s'accompagner de dispositions légales explicites et détaillées*»[26] and therefore opposes the project of the Federal Council. This was the beginning of intense discussions concerning net neutrality that showed that opinions were diverse among politicians.

[Rz 16] Ultimately, the National Council followed the opinion of the NC-TTC to address the net neutrality issue explicitly in the TCA, by a vast majority (182 votes to 5)[27]. It proposed to adopt a specific provision that will establish the principle of network neutrality in Switzerland. Indeed, proposed art. 12e TCA, entitled «*Internet ouvert*», provides that ISPs «*transmettent des informations sans faire de distinction, sur le plan technique ou economique, entre emetteurs, destinataires, contenus, services, classes de service, protocoles, applications, programmes ou terminaux*»[28]. Nevertheless, they can make exceptions pursuant to art. 12e para. 2 TCA and transfer data in a differentiated way in four specific situations. The first is to respect a legal provision or a court decision (letter a). The second is to ensure the integrity or the security of the network, services provided through the network or through the terminals connected to it (letter b). The third is to satisfy a specific request of a client (letter c). Lastly, it is to fight against temporary and exceptional congestion in the network. However, in this event similar data flows have to be treated identically (letter d). In addition to these requirements, ISPs have to inform their clients and the public when they treat data packets differently for technical or economic purposes, in accordance with art. 12e para. 3 TCA. By the same token, the National Council decided not to adopt art. 12a para. 2 TCA as proposed by the Federal Council[29].

[Rz 17] Subsequently, on 27 November 2018, the Council of States had to vote on the proposition of the National Council. The members of the Council of States agreed on a matter of principle to adopt a provision that would guarantee network neutrality in Switzerland. However, it was proposed to add an art. 12e para 2bis TCA in order to promote specialised services and technological advances. It provides that «*en plus de l'accès à Internet, ils peuvent proposer sur le même raccordement d'autres services qui n'offrent pas l'accès à Internet et sont optimisés pour certains contenus, applications ou services, si : (i) l'optimisation est nécessaire pour satisfaire aux exigences des clients quant à la qualité des contenus, applications ou services concernés; (ii) la capacité du réseau est suffisante pour fournir les autres services en plus des services d'accès à Internet; (iii) les autres services ne peuvent pas être utilisés ni ne sont proposés en remplacement des services d'accès à Internet, et (iv) les autres services ne détériorent pas la disponibilité ou la qualité générale des services d'accès à Internet*

25 See *infra* 3.2.

26 BO 2018 N 1692.

27 BO 2018 N 1715.

28 BO 2018 N 1716.

29 BO 2018 N 1715.

pour les client»[30]. The services that this provision mentions do not provide a typical Internet access, but are optimised for specific content, apps or services[31]. Examples of such services include VoLTE telephony or certain television offers such as IPTV[32]. Unlike a typical Internet access service, these are not multifunctional services and only allow the user to use it for one activity[33]. In conclusion, such provision would hence allow ISPs to have more freedom and favour certain offers instead of being entirely neutral with regard to any type of Internet access.

[Rz 18] Since the two Councils could not reach a common agreement, this proposition went back to the National Council to take position on it. The National Council was not completely in favour of this provision, even though it agreed on the principle. On the session of 5 March 2019, the National Council voted to amend the proposed art. 12e para. 2bis TCA. The members reformulated it as follows: «*En plus de l'accès à Internet, ils peuvent proposer sur le même raccordement d'autres services qui doivent être optimisés pour certains contenus, applications ou services afin de satisfaire aux exigences des clients en matière de qualité. Les autres services ne peuvent pas être utilisés ni proposés en remplacement des services d'accès à Internet et ils ne doivent pas détériorer la qualité des services d'accès à Internet*»[34]. This is a more restrictive provision than the one proposed by the Council of States. Indeed, the exception for specialised services shall be used solely when the QoS of traditional Internet access cannot be satisfactory for such services. Accordingly, ISPs cannot apply this provision in order to offer specialised services with the only purpose to enhance Internet speed and replace standard Internet access by better, faster specialised services[35]. Moreover, the QoS of standard Internet access shall not be impacted negatively by the specialised services.

[Rz 19] Finally, on 7 March 2019, the Council of States agreed to the text proposed by the National Council without any amendment[36]. On 22 March 2019, the TCA was enacted by the Parliament.

3.1.3. Final Text on Network Neutrality as Voted by the Parliament

[Rz 20] After this long and unsteady legislative process, the two Councils decided to adopt art. 12e TCA, which is worded as follows[37]:

30 See BO 2018 E 830 et seqq.

31 BO 2018 E 831.

32 BO 2018 E 831.

33 BO 2018 E 831.

34 See BO 2019 N 33.

35 BO 2019 N 32.

36 BO 2019 E 67.

37 See FF 2019 2589. See the German translation in BBl 2019 2619, 2623 and the Italian one in FF 2019 2275, 2279. My unofficial English translation of this provision is as follows: art. 12e para 1 Telecommunications Act of 30 April 1997 (TCA; CC 784.10) : Internet service providers transmit information without distinction, technically or economically, between issuers, recipients, content, services, service classes, protocols, applications, programs or terminals. Art. 12e para. 2 TCA: They may transmit information differently if necessary to: a. comply with a legal provision or a court decision; b. guarantee the integrity or security of the network, services provided through the network or terminals connected to it; c. respond to an explicit request from the customer, or d. combat temporary and exceptional network congestion; similar data flows should then be treated in the same way. Art. 12e para. 3 TCA: In addition to Internet access, they may offer other services on the same connection that must be optimized for certain content, applications or services in order to meet customer quality requirements. Other services may not be used or offered as a substitute for Internet access services and must not impair the quality of Internet access services. Art. 12e para. 4 TCA: They must inform their customers and the public when, during transmission, they process information in a technically or economically differentiated manner.

- Art. 12e para. 1 TCA : *Les fournisseurs d'accès à Internet transmettent des informations sans faire de distinction, sur le plan technique ou économique, entre émetteurs, destinataires, contenus, services, classes de services, protocoles, applications, programmes ou terminaux.*
- Art. 12e para. 2 TCA : *Ils peuvent transmettre des informations différemment si cela est nécessaire pour: a. respecter une disposition légale ou une décision rendue par un tribunal; b. garantir l'intégrité ou la sécurité du réseau, des services fournis grâce au réseau ou des terminaux qui y sont connectés; c. répondre à une demande explicite du client, ou d. lutter contre des congestions temporaires et exceptionnelles du réseau; les flux de données similaires devront alors être traités de la même façon.*
- Art. 12e para. 3 TCA : *En plus de l'accès à Internet, ils peuvent proposer sur le même raccordement d'autres services qui doivent être optimisés pour certains contenus, applications ou services afin de satisfaire aux exigences des clients en matière de qualité. Les autres services ne peuvent pas être utilisés ni proposés en remplacement des services d'accès à Internet et ils ne doivent pas détériorer la qualité des services d'accès à Internet.*
- Art. 12e para. 4 TCA : *Ils doivent informer leurs clients et le public lorsque, lors de la transmission, ils traitent des informations de manière techniquement ou économiquement différenciée.*

[Rz 21] It is still unclear when this provision will enter into force; it is expected that this will be at the end of 2019 or at the beginning of 2020 at the latest.

3.1.4. Other Discussions

[Rz 22] Besides the discussions of network neutrality as part of the revised TCA, this topic was also discussed as such by the National Council. Indeed, the member of National Council Mathias Reynard has specifically asked by a parliamentary initiative («*initiative parlementaire*») of 1 March 2018 to insert the concept of net neutrality in the Swiss Constitution[38]. He argued that the Constitution should be amended to «*garantir que la loi garantisse l'accès libre, universel, égalitaire et non discriminatoire à tous les réseaux numériques ouverts*». According to Mathias Reynard, as a corollary of freedom of expression and the right to information as well as the freedom of competition, net neutrality deserves to be considered as a constitutionally guaranteed fundamental right.

[Rz 23] However, following the decision of the Parliament to adopt art. 12e TCA that guarantees network neutrality in Switzerland, this parliamentary initiative was withdrawn on 25 March 2019, just three days after the TCA was adopted. Accordingly, there is no longer discussions to insert net neutrality as a fundamental right in the Swiss Constitution.

38 Parliamentary initiative (18.407) of Mathias Reynard entitled «*Inscrire la neutralité du Net dans la Constitution*», available at https://www.parlament.ch/FR/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20180407.

3.2. Some Other Jurisdictions

3.2.1. United States

[Rz 24] In the last few years, network neutrality has been intensely debated in the United States (US)[39]. On 26 February 2015, the Federal Communication Commission (FCC) adopted the 2015 Open Internet Order[40]. It is sometimes considered to be strongest net neutrality rulemaking by the FCC[41]. In this Order, the FCC notably reclassified the Internet in order to be able to enforce the Title II of the 1934 Communications Act common carrier provisions of non-discrimination and no-blocking[42]. Accordingly, ISPs are subject to the common carrier regulations, which prevents them from discriminating data packets transmission. The Open Internet Order went into force on 12 June 2015[43].

[Rz 25] While the 2015 Open Internet Order was a significant step forward towards network neutrality, it was not enforceable for long. On 18 May 2017, the FCC adopted a Notice of Proposed Rulemaking to «restore Internet freedom»[44] and proposed to change the rules that were enacted in the 2015 Open Internet Order[45]. The FCC wanted to embrace a «light-touch» regulatory approach[46]. The reason behind this overhaul is that with network neutrality, there is less incentive for major ISPs to invest their capital expenditures in new infrastructure, which would in turn become a threat for the development of the US.

[Rz 26] This announcement has been fiercely criticized by many stakeholders, whereas it was approved by others[47]. During the open comment period on the proposed «Restoring Internet Freedom», approximately 21.7 million comments were received by the FCC[48]. Despite all the critics, the FCC voted to reverse the 2015 Open Internet Order's rules on 14 December 2017[49]. From a legal standpoint, ISPs would not be considered as a «telecommunication service» pursuant to Title II of the 1934 Communications Act, but would solely be an «information service» under

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39 For an overview of the debate since 2005, see Congressional Research Service, The Net Neutrality Debate: Access to Broadband Networks, Updated 21 March 2019, available at https://fas.org/sgp/crs/misc/R40616.pdf, p. 1 et seqq.; Simone A. Friedlander, Net Neutrality and the FCC's 2015 Open Internet Order, 31 Berkeley Technology Law Journal 2016, p. 905 et seqq., p. 912 et seqq.

40 Federal Communications Commission (FCC), FCC Releases Open Internet Order, 12 March 2015, available at http://www.fcc.gov/document/fcc-releases-open-internet-order.

41 Friedlander (n. 39), p. 923.

42 Congressional Research Service (n. 39), p. 9; for a thorough analysis of the Order, see Friedlander (n. 39), p. 923 et seqq.

43 Federal Communications Commission (FCC), Protecting and Promoting the Open Internet; Final Rule, 80 *Federal Register*, 19738-19850, 13 April 2015, available at https://www.federalregister.gov/documents/2015/04/13/2015-07841/protecting-and-promoting-the-open-internet.

44 Federal Communications Commission (FCC), Restoring Internet Freedom WC Docket No. 17-108.

45 Congressional Research Service (n. 39), p. 10.

46 Congressional Research Service (n. 39), p. 10.

47 See Congressional Research Service (n. 39), p. 11.

48 Pew Research Center, Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates, 29 November 2017, available at https://www.pewinternet.org/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/.

49 Federal Communications Commission (FCC), FCC Acts to Restore Internet Freedom, 14 December 2017, available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1214/DOC-348261A1.pdf.

Title I of 1934 Communications Act[50]. Accordingly, ISPs do not have to comply with by the non-discrimination and no-blocking provisions anymore.

[Rz 27] The 2017 FCC Order went into effect on 11 June 2018[51]. As a result, the 2015 Open Internet Order was revoked and replaced by the provisions of the 2017 FCC Order[52] and, hence, network neutrality in the US was not guaranteed anymore.

[Rz 28] To date, this constitutes the current applicable law in the US. However, democratic leaders of the House and Senate presented on 4 March 2019 a bill entitled «Save the Internet Act of 2019»[53]. Such a bill simply provides to restore the 2015 Open Internet Order of the FCC, that was into effect from 2015 to 2017. Furthermore, several States passed regulations to protect net neutrality since the 2017 FCC Order went into force. It is notably the case of the State of California, which passed such a regulation on 30 September 2018[54]. Following the signature of the law by Governor Jerry Brown, the US Department of Justice sued the State of California to stop the law. It was argued that regulating on ISPs is the sole authority of the Congress, i.e. a federal competence[55].

[Rz 29] In conclusion, network neutrality is currently not legally guaranteed in the US, but the debate is far from over. It is hard to predict the outcome of the legislative saga, and it is likely to be a hot political topic in the next few months and even years.

3.2.2. European Union

[Rz 30] The European Union (EU) has followed a completely different approach to network neutrality than the US. Indeed, hard rules regarding this problem were adopted on 25 November 2015 with the Regulation 2015/2120[56]. Art. 3 (3) Regulation 2015/2120 provides that ISPs «shall treat all traffic equally, when providing Internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used». Accordingly, this provision prevents ISPs to operate discrimination when transmitting data packets from one end to another. Member States that did not comply with this provision could maintain their competing national regulation until 31 December 2016 (art. 10 (4) Regulation 2015/2120). However, since then, network neutrality as provided by art. 3 (3) Regulation 2015/2120 has to be applied without reservation in every Member State.

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50 Federal Communications Commission (FCC) (n. 49).

51 Federal Communications Commission (FCC), Restoring Internet Freedom, Rules and Regulations, 83 *Federal Register*, 11 May 2018, available at https://www.federalregister.gov/documents/2018/05/11/2018-10063/restoring-internet-freedom.

52 Congressional Research Service (n. 39), p. 12.

53 The bill is available at https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/ndocuments/Save%20the%20Internet%20Act%20Legislative%20Text.pdf.

54 See Senate Bill No. 822, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822.

55 See Cecilia Kang, Justice Department Sues to Stop California Net Neutrality Law, 30 September 2018, available at https://www.nytimes.com/2018/09/30/technology/net-neutrality-california.html.

56 Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union; for an overview of the discussions preceding the adoption of this Regulation, see Weber/Heinrich (n. 7), p. 394 et seqq.

[Rz 31] This provision does not prevent ISPs from implementing reasonable traffic management measures (art. 3(3) Regulation 2015/2120). However, such measures have to be transparent, non-discriminatory and proportionate, and not be based on commercial considerations but on objectively different technical QoS requirements of specific categories of traffic. Moreover, such measures shall not monitor the specific content and their duration must be limited to what is strictly necessary. It is also lawful for ISPs to block, slow down, alter, restrict, interfere with, degrade or discriminate data packets transmission for three different purposes: (i) to comply with the law or with court decisions, (ii) to preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end-users, and (iii) to prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally (art. 3 (3) Regulation 2015/2120). Overall, these three possibilities are in substance identical to the one provided by art. 12e para. 2 TCA in Switzerland.

[Rz 32] That said, other exceptions to a genuine network neutrality are laid down by art. 3 (5) Regulation 2015/2120. Indeed, ISPs are «free to offer services other than Internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality». This exception pursues the same aim as art. 12e para. 3 TCA in Switzerland.

[Rz 33] In substance, Switzerland followed closely the developments that happened a few years ago in the EU. Even though the wording is somewhat dissimilar, the difference between the two regulations concerns only details. The main elements and principles of the regulations are identical, which is to be welcomed considering the relation between the EU and Swiss markets.

4. Perspectives Regarding Net Neutrality

4.1. Are «Network Neutrality» and «Net Neutrality» Alike?

[Rz 34] The debate about network neutrality is often referred to as the «net neutrality» debate. If the two terms have the same meaning, it follows that surfing on the Internet is neutral to the user as long as there is no discrimination in the transfer of data packets by ISPs. Hence, the only intermediary that could discriminate access to content providers would be the ISPs. In this situation, a web user would have to know where the content is located, in the sense that he knows the URL address, so that he can reach it directly and access the content. In theory, it is possible: sometimes the web user knows exactly which content he wants to reach and where. In practice, however, it is hardly ever the case, and the web user usually makes use of online platforms to find the URL address where the content he desires to access is located.

[Rz 35] A platform can be defined as «*a business based on enabling value-creating interactions between external producers and consumers*»[57]. Platforms that operate online constitute typically

57 Geoffrey G. Parker/Marshall W. Van Alstyne/Sangeet Paul Choudary, Platform Revolution, How Networked Markets Are Transforming the Economy – and How to Make Them Work for You, New York/London 2016, p. 5.

multi-sided market[58] as they enable two or more sides to directly interact with one another[59]. Each side must be affiliated with the platform in order to participate in transactions with the other side, for example by paying a fixed access fee[60]. Many types of online platforms exist and their functioning as well as their business models are manifold[61]. Their activities are broad and of diverse nature[62]. Examples of diversity of platforms include App stores, search engines, e-commerce platforms or social networks[63].

[Rz 36] Many web users rely on platforms in order to access a great number of services or content on the Internet. Whether to buy or sell goods, search for information or offer and request services, a platform is frequently involved as a matchmaker between the two sides. In this respect, a striking statistic shows that 82 % of EU small and medium enterprises (SMEs) use search engines to promote products, respectively services, online and 42 % of them use marketplaces for their business[64]. Moreover, 90 % of SMEs use online social media platforms for business purposes[65]. Meanwhile, the main search engine Google processes 3.5 billion searches per day[66] and 2.47 billion individuals worldwide had a social network account in 2017[67]. As Jan Krämer and Daniel Schnurr put it, «*the rapid growth and the economic success of platform business models shape how today Internet users can access digital services and content*»[68]. Arguably, based on the prominent role of online platforms in the everyday use of the Internet, it is therefore possible to consider that ISPs are not the only intermediaries that can alter the net neutrality but that online platform operators also have the possibility of discriminating most of the content that is made available to the public at large. In this context, the *network* neutrality would therefore be just a part of the *net* neutrality, the other part being neutrality in the way platforms function.

4.2. Platforms as Other Guardians of Net Neutrality?

[Rz 37] By presenting eight different reasons, Anupam Chander and Vivek Krishnamuthy argue that modern international platforms are all but neutrals[69]. It is indeed possible to identify common discriminatory practice in the way platforms operate.

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58 Jan Krämer/Daniel Schnurr, Is there a need for platform neutrality regulation in the EU?, 42 Telecommunications Policy 2018, p. 514 et seqq., p. 515.

59 Krämer/Schnurr (n. 58), p. 515; Andrei Hagiu/Julian Wright, Multi-sided Platforms, 43 International Journal of Industrial Organization 2015, p. 162 et seqq., p. 163.

60 Hagiu/Wright (n. 59), p. 163. See also Krämer/Schnurr (n. 58), p. 515.

61 Copenhagen Economics, Online Intermediaries: Impact on the EU Economy, October 2017, available at http://edima-eu.org/library/online-intermediaries-impact-on-the-eu-economy/, p. 7.

62 Krämer/Schnurr (n. 58), p. 516.

63 See Krämer/Schnurr (n. 58), 516 et seqq.; Copenhagen Economics (n. 61), p. 7 et seqq.

64 European Commission, Communication from the commission on the mid-term review on the implementation of the digital single market strategy. A Connected Digital Single Market for All, COM(2017) 228, 10 May 2017, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:228:FIN.

65 European Commission (n. 64).

66 Internet live stats, Google Search statistics, http://www.internetlivestats.com/google-search-statistics/.

67 Statista, Number of social media users worldwide from 2010 to 2021, https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/.

68 Krämer/Schnurr (n. 58), p. 514.

69 Anupam Chander/Vivek Krishnamurthy, The Myth of Platform Neutrality, 2 Georgetown Law Technology Review 2018, p. 400 et seqq., p. 403 et seqq.

[Rz 38] Firstly, how the platform presents the other party, i.e. sellers, service providers or content providers, to the users has a significant impact on all stakeholders[70]. The design and practice of the platform may prioritize or give prominence to a third-party instead of another when users enter a search in the platform database. Accordingly, their visibility and accessibility are increased and these third-parties are more likely to become successful. On the contrary, third-parties that are further down in the results will undoubtedly suffer from being ranked lower and will struggle to successfully compete.

[Rz 39] Secondly, platforms can monetize the ranking of the results of a search. Indeed, they often organize auctions, and the highest bidder obtains prominence or priority over other results when a specific search is performed on the platform[71]. Such results are often called promotions or sponsored search advertisements[72].

[Rz 40] Thirdly, platforms can not only act as intermediaries, but also offer additional content or services[73]. In so doing, they compete with other third-parties listed in the results. This so-called «vertical integration»[74] is a concern to competitors, as the platform might favour its own content or services by pushing down the content or services of the rival down in the ranking, by imposing him restrictive conditions or by simply blocking results from rivals[75].

[Rz 41] All these practices, which are non-exhaustive since the design of platforms might include other forms of discriminative behaviour, bias the results that users obtain when using a platform. Nevertheless, databases created by these platforms are, for most users, necessary to reach the desired information as the amount of information available on the Internet is limitless and still growing. For some major platforms, their privileged and pivotal position in the Internet ecosystem entitles them to have a role of gatekeepers in the digital world[76]. Arguably, in order to achieve genuine net neutrality, platforms should also be neutral with regards to how they present the results when a research is made in their databases.

[Rz 42] But what means «neutral results»? A general platform neutrality principle would require that they would present all content in a non-discriminatory way[77]. However, platforms are private companies that are in competition with other markets participants in order to attract customers. It is argued that the presentation of valuable results is what makes them attractive to users, and ultimately determine which platforms are successful or not[78]. Furthermore, filtering and organizing results would even benefit all stakeholders because malware and spams as well as

70 Krämer/Schnurr (n. 58), p. 518.

71 Krämer/Schnurr (n. 58), p. 518.

72 Krämer/Schnurr (n. 58), p. 518.

73 Krämer/Schnurr (n. 58), p. 518.

74 Krämer/Schnurr (n. 58), p. 518; Friso Bostoen, Platform Neutrality: Hipster Antitrust or Logical Next Step ? (Part II), KU Leuven CiTiP blog 14 December 2017, available at https://www.law.kuleuven.be/citip/blog/platform-neutrality-hipster-antitrust-or-logical-next-step-part-ii/.

75 Krämer/Schnurr (n. 58), p. 518 and 524; Bostoen (n. 74).

76 See Orla Lynksey, Regulating «Platform Power», LSE Law, Society and Economy Working Papers 1/2017, p. 9 et seqq.

77 Krämer/Schnurr (n. 58), p. 515.

78 Krämer/Schnurr (n. 58), p. 518.

other undesirable contents could be blocked[79]. Pure neutrality would thus not be economically possible nor useful for stakeholders[80].

4.3. Regulating Platforms

[Rz 43] Rather than advocating for a strict platform neutrality, an intermediary solution that would take the best of both worlds, i.e. presenting organized valuable results in an objective and justifiable manner, would be preferable. The only way to compel platforms to act as such is to legally regulate them. However, as commentators noted, it is a delicate task[81]. Depending on the position on the market of the platform, two types of regulation allow to regulate platforms: general competition regulation and proper idiosyncratic regulation.

4.3.1. Competition Regulation

[Rz 44] Regulating online platforms with competition law has been criticized and been called somewhat pejoratively «hipster antitrust» in the US[82]. As Friso Bostoen explains, this term «refers to the recent strand of trustbusters and academics that express concern over tech giants, supposedly based on the old (ergo hipster) idea that big is bad»[83]. However, recent case law has shown that it might be an effective way to prevent platforms to integrate vertically.

[Rz 45] On 27 June 2017, the European Commission (EC) announced having fined Google EUR 2.42 billion for abusing dominance as a search engine[84]. Following a number of complaints and years of investigations, the EC explained in a 212-pages decision how Google's practices infringe art. 120 of the Treaty of the Functioning of the European Union (TFEU), which prevents companies from abusing their dominant position[85]. The controversial practice concerned the way that the Google's search engine places systematically Google Shopping results at the top of the general search tab. By giving prominent placement to its own comparison shopping service, i.e. Google Shopping, whilst demoting rival comparison shopping services in its search results, Google was

79 Krämer/Schnurr (n. 58), p. 518.

80 Krämer/Schnurr (n. 58), p. 515; Andrea Renda, Antitrust, Regulation and the Neutrality Trap: A plea for a smart, evidence-based Internet policy, CEPS Special Report No. 104/April 2015, p. 2 and 16 et seqq.

81 See for example Michèle Finck, Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy, LSE Law, Society and Economy Working Papers 15/2017, p. 5.

82 See the tweets of Professor Joshua Wright (https://twitter.com/profwrightgmu/status/889603600804179972?lang=en) and Kostya Medvedovsky (https://twitter.com/kmedved/status/876869328934711296), who coined this term that was taken up by a number of newspapers (for example Nitasha Tiku, Do Not Mistake Orrin Hatch for #Hipsterantitrust, 8 March 2017, available at https://www.wired.com/story/orrin-hatch-antitrust-hipster-antitrust/).

83 Bostoen (n. 74).

84 European Commission, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, 27 June 2017, available at http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

85 Carlos Arrebola, Forget the record fine: The real impact of the Commission's Google decision will be its effect on competition law, available at blogs.lse.ac.uk/europpblog/2017/06/28/ec-google-decision-competition-law. On the dominant position of platforms, see Antonio Buttà, Google Search (Shopping): An Overview of the European Commission's Antitrust Case, 1 Rivista Italiana di Antitrust 2018, p. 45 et seqq., p. 51 et seqq.

found to abuse of its dominant position[86]. Indeed, the EC stated that Google «abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service»[87].

[Rz 46] Without further discussing this case and its consequences, it can be noted that traditional competition law can be an effective remedy to compel online platforms to present search results in a way that is as neutral as possible, without leveraging the pivotal position of the platform to favour its own products. Accordingly, vertical integration of platforms can be monitored by the competition regulation authorities. However, this case concerns Google, which is an online platform operating a search engine that, at the time of the investigations, held 90 % of market shares in almost all European Economic Area (EEA) countries and is undeniably in a dominant position[88]. Competition law might be useful with regards to neutrality for that type of platforms, but cannot be applied to platforms that are less dominant on the market. For these, specific regulation would be needed.

4.3.2. Idiosyncratic Regulation

[Rz 47] Regulating online platforms specifically is not a new idea. Already in 2014, the French *Conseil national du numérique* evoked the possibility of imposing platform neutrality[89]. A report launched some ideas for platform neutrality[90]. These include the prohibition of discrimination with regards to suppliers as long as it is not justified by QoS or legitimate economic reasons. Furthermore, online platforms should provide equal access for suppliers who have become their competitors, in particular in respect of rankings and conditions of access.

[Rz 48] When regulating, I argue that it is crucial that the foundational ground of the regulation is based on an explicit theory of harm, that is to determine who suffers from the behaviour of platforms and whether those negative effects outweigh the positive ones[91]. Rather than compelling platforms to be entirely neutral, it would be more advantageous for all stakeholders to require transparency, non-discrimination or/and fairness from the platforms[92]. However, these notions are somewhat vague in themselves, and need to be further analyzed in order to be concretized.

[Rz 49] Transparency means notably that the platform makes a clear distinction with respect to how the search results appear to the users. Accordingly, a distinction must be made between (i) search results that are generated by the algorithm used by the platform, (ii) results that are paid for by advertisers and (iii) results that are favoured thanks to their connection to the platform[93]. This enables transparency towards the consumers side of the two-sided market. However, in

86 See Buttà (n. 85), p. 45; Korbinian von Blanckenburg, Google search abuses dominant position to illegally favour Google Shopping: an economic review of the EU decision, 20 Digital Policy, Regulation and Governance 3 2018, p. 211 et seqq., p. 213; Bostoen (n. 74); Arrebola (n. 85).

87 European Commission (n. 84).

88 von Blanckenburg (n. 86), p. 213.

89 Conseil national du numérique, Neutralité des plateformes: Réunir les conditions d'un environnement numérique ouvert et soutenable, May 2014, available at https://cnnumerique.fr/files/2017-09/CNNum_Rapport_Neutralite_des_plateformes.pdf, p. 27 et seqq.

90 See also Friso Bostoen, Neutrality, fairness or freedom? Principles for platform regulation, 7 Internet Policy Review 1 2018, p. 1 et seqq., p. 8.

91 Same opinion, Krämer/Schnurr (n. 58), p. 524.

92 See also Bostoen (n. 90), p. 8 et seqq.

93 Bostoen (n. 90), p. 12.

order to achieve complete transparency, the platform must also be transparent with the other side of the market, i.e. the suppliers. This could be accomplished by providing to the suppliers the information about the algorithm that ranks the results[94].

[Rz 50] A example of regulation that requires platforms to be transparent exists in France since October 2016 when the «*Loi n° 2016-1321*» was adopted, which Section 3 is entitled «*Loyauté des plateformes et information des consommateurs*»[95]. Its art. 49, which modifies L. 111-7 of the «*code de la consommation*», imposes some obligations to platforms operators, which are defined as «*toute personne physique ou morale proposant, à titre professionnel, de manière rémunérée ou non, un service de communication au public en ligne reposant sur : 1° Le classement ou le référencement, au moyen d'algorithmes informatiques, de contenus, de biens ou de services proposés ou mis en ligne par des tiers ; 2° Ou la mise en relation de plusieurs parties en vue de la vente d'un bien, de la fourniture d'un service ou de l'échange ou du partage d'un contenu, d'un bien ou d'un service*». Such platform operators have to deliver faithful, clear and transparent information to the consumer about three topics[96]. The first is the general conditions of use of the intermediation service that the platform offers and on the methods of referencing, classification and dereferencing of the content, goods or services to which this service provides access. The second is the existence of a contractual relationship, a capitalistic link or a remuneration for its benefit, as soon as they influence the classification or referencing of the content, goods or services offered or put online. The third is the quality of the advertiser and the rights and obligations of the parties in civil and tax matters, when consumers are put in contact with professionals or non-professionals.

[Rz 51] The scope of application of art. 49 *Loi n° 2016-1321* was specified by *Décret n°2017-1435*[97]. It was narrowed down and the transparency obligations only apply to some specific platforms. Indeed, the law only applies to platforms that receive over five million unique visitors per month calculated on the basis of the last civil year (art. 1 *Décret n°2017-1435*). It came into force 1 January 2019.

[Rz 52] Non-discrimination goes a step further than transparency[98]. It implies that the platform treats users equally, and cannot discriminate in favour of its own offering. This means that the platform cannot alter or distort the results provided. However, as already explained[99], favouring specific results at the expense of others is why platforms are useful. This is why non-discrimination has been criticized by commentators, who argue that it would be preferable to compel platforms not to alter or distort results for purposes contrary to the interests of the users or, more objectively, to apply the same underlying processes and methods to ranking rival and proper services[100]. This non-discrimination principle has also been discussed (and criticized) with regards to the commission perceived by platforms[101].

94 Bostoen (n. 90), p. 12.

95 Journal officiel de la République française (JORF) n°0235 du 8 octobre 2016, texte n° 1.

96 Bostoen (n. 90), p. 10.

97 Journal officiel de la République française (JORF) n°0233 du 5 octobre 2017, texte n° 23.

98 Bostoen (n. 90), p. 12.

99 See *supra* 4.2.

100 Bostoen (n. 90), p. 12. et seqq.

101 Bostoen (n. 90), p. 13, who argues that it is a bad idea and that it is preferable to apply the margin squeeze test to the commission of platforms.

[Rz 53] Finally, fairness deals with preventing unfair behaviour of platforms to the detriment of users. It requires that platforms inform unambiguously and in understandable terms of the key elements of their functioning. Along with transparency, fairness is a main element of the Proposal for a Regulation of the EC to regulate business-to-business (B2B) relationships of online intermediation services, i.e. platforms[102]. In order to act fairly, platforms must ensure that all necessary information concerning their functioning is easily available at all times and that terms and conditions are easily understandable by an average user[103]. Moreover, when any modification occurs, users must be informed and noticed properly.

[Rz 54] In my opinion, following these three principles either combined or separately allows the regulation to be efficient. Indeed, platforms can still provide benefits to their users and be competitive. Furthermore, users would be aware of the methodology and algorithms used to provide results and would be able to decide knowingly and conscientiously which platforms to use. It is preferable than imposing neutrality on platforms, because complete neutrality would cancel the positive aspects that are provided by platforms. In this respect, drawing a parallel with the benefits brought by network neutrality would not be entirely appropriate. It is interesting to note that legal scholars have rightly observed that the analogy between ISPs and platforms is not justified also for conceptual reasons[104]. First, one of the main goals of network neutrality refers to media pluralism and freedom of expression, which is not the case for platform neutrality. Second, ISPs and telecom providers in general are natural monopolies, contrary to online platforms[105]. This leads to a difficult switch to a different ISP, due to high switching costs, whereas it is easy to switch from one platform to another, when one is more convenient than another.

[Rz 55] Now that network neutrality is a legal principle in Switzerland, the question arises whether platforms should be specifically regulated or not. In a near future, there will probably be a political debate regarding the topic of platform neutrality. I argue that instead of imposing complete neutrality, the three principles of transparency, non-discrimination and fairness are best suited as a ground to regulate platforms. Nevertheless, other questions have to be answered before concretely considering a specific regulation for platforms[106]. Do only dominant platforms needs to be regulated or instead every platform? Should platforms that provide solely services that list or rank contents, goods or services of third-parties be regulated (for instance Google or Amazon) or should also platforms with more traditional distribution models (such as Spotify or Netflix) be regulated? All these elements must be assessed and discussed in order to determine whether regulation is needed or not. As stated above, it is essential that the regulation must be based on a theory of harm and be adopted only the negative effects of platforms outweigh the positive ones[107].

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102 Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, 26 April 2018, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0238.

103 Recital 14 of the Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

104 Renda (n. 80), p. 15 et seqq.

105 Bostoen (n. 90), p. 7.

106 See Bostoen (n. 90), p. 11.

107 See *supra* 4.3.2.

5. Conclusion

[Rz 56] In Switzerland, the debate was recently especially focused on network neutrality, notably during the revision of the TCA. While the Federal Council did not adopt specific network neutrality regulation, the Parliament was of an opposite opinion and, ultimately, a somewhat detailed regulation was enacted. As a result, network neutrality is now a legal requirement for ISPs, even though it is subject to a few exceptions. This is a completely different vision than the one prevailing in the US where network neutrality has been abandoned very recently, even though the «Save the Internet Act» might restore the previous legal situation in a near future. In the EU, however, the current state of the regulation is in substance similar to the one in Switzerland when the revised TCA will enter into force.

[Rz 57] For most web users, however, net neutrality is not only about neutrality regarding the network layer, but also regarding the platforms layer. Indeed, with the increasing amount of content available on the Internet, the use of platforms to access it is profoundly useful, if not necessary (or «quasi-inescapable intermediaries»[108]). Accordingly, net neutrality *lato sensu* includes neutrality at lower and higher layers of the Internet architecture. Therefore, all intermediaries that can discriminate should be involved in the debate, including notably online platforms. Along with ISPs, platforms are in a sense other guardians of the *net* neutrality.

[Rz 58] Some difficulties, however, arise at the platforms layer. The functioning and usefulness of platforms inherently involves discrimination in presenting and ranking results when a research is undertaken by users. Imposing neutrality on platforms might be counterproductive for many stakeholders, and it is arguable whether such neutrality should be imposed or not. Regulating them is the main option to dictate them a specific behaviour and two types of regulation can be useful for this purpose. The first is competition law, which can prevent a dominant platform to integrate vertically at the expense of its competitors. The second is to adopt an idiosyncratic regulation to regulate platforms. Even though such regulation does not exist in Switzerland at present, some specific rules are in effect abroad, or will be in a near future. This essay contends that platform regulation should not impose complete neutrality because it would annihilate the positive effects of platforms. Rather, three principles should be followed when regulating: impose transparency, non-discrimination and/or fairness on platforms. This would help the web to be more neutral for users.

[Rz 59] Now that network neutrality is an established principle in Swiss law, the debate in Switzerland should switch toward platform neutrality. There is little doubt that this topic will be discussed in a near future as intensively as network neutrality was in the last few years.

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[108] Bostoen (n. 90), p. 10.