

# **The online intermediaries as new gatekeepers of the access to the information**

Thesis of PhD dissertation

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## **I. Resume of research tasks**

Many new types of services have emerged with the transformation of the ecosystem of the online content distribution which serve as an intermediary between the consumers and the producers of the information. They enable the internet users to navigate on the 'ocean of information', to find easily the tailored fit and adequate information, they create new business models. They are the foundation of the Internet. The emergence of these new players, of course, is a great opportunity for both content producers and users seeking information, but it is not to be overlooked that these operators are increasingly gaining control on what users can access and find on Internet.

The actors are new, but the concern with them is old: do these service providers enjoy too much and, above all, unlimited power to decide what information and content we can access, thereby affecting not only our economic choices or our taste but even our political opinion? Should the State intervene actively in order to ensure freedom of expression on the Internet, as it did in the case of audiovisual media services?

To conclude, the purpose of my dissertation is to examine the ways in which the new, unregulated gatekeepers of access to information contribute to the exercise of freedom of expression and, at the same time, present real threats they may incorporate. I will therefore consider whether regulatory intervention is possible and justified and what tools are available.

## **II. The short description of performed examinations, the method of collection of material**

Online intermediary service providers cover a very wide range of services. Of course, within the scope of the dissertation, I can not undertake to analyze all types of them. The selection was based on the following criteria:

- a) a service that is a platform for a two-sided market, playing an intermediary role in accessing information over the Internet;
- b) is not purely technical service, i.e. it exercises directly or indirectly control on what information it provides access to;
- c) it does not, however, exercise - in terms of media law - editorial activity in respect of content transmitted, stored or indexed, that is to say, it is not a media service.

On this basis, I will analyze four types of online intermediaries:

1. Internet access providers;
2. Search engines;
3. over-the-top linear media service aggregators;
4. Application environment editors.

Before discussing each type of service in detail, I clarify, in chapter II, the concept of intermediary service, and I put a special emphasis on delineating media services from intermediary services, as well as explaining the economic and constitutional basis for state intervention on the Internet.

The first analyzed platform is the Internet access service. The most important providers of the network layer of the Internet are those who provide the data transfer, which is essential input for all online services. At the same time, these providers are usually "traditional" broadcasters, mobile operators, who are often in conflict with online service providers (such as chat and online video services) that use their network with their services. In the last 15 years, this conflict of interest has often led to the fact that network operators have been negatively or positively discriminated against certain content by abusing their role as a gatekeeper. However, this practice is contrary to one of the paradigms of the Internet, namely to the principle of net neutrality.

The essence of this principle is that Internet access providers can not make a distinction between the data transmitted on their network, i.e. traffic management practices must be neutral from the transmitted (i) content, (ii) application, (iii) terminal equipment connected to the network, and from the (iv) sender's (v) and the recipient's IP address. In Chapter III, I intend to show and compare the European and American approaches. Particular emphasis is placed on the issue of positive discrimination, i.e. special services and zero rating offers.

Chapter IV is also related to the Internet access providers. The principle of net neutrality depends not only on the type of business policy that the Internet access provider pursues in its own network. The creation and quality of the online content and the user's connection also depend on the conditions under which service providers exchange data traffic, under what

conditions public Internet data exchange centers functions, which play an increasingly important role in recent times. If there is a dispute between two service providers and, as a result, the data exchange is not undertaken or it distorts competition, it may affect the user in the same way as if the internet access provider blocked it in the access network. There is no difference from the point of view of the user. Recently, due to the growing number of online media consumed, the market and the established trade practices are transformed, accompanied by numerous conflicts. Therefore, I will briefly present the basics of the functioning of this market and then present the potential regulatory and competition challenges that emerge in the face of market conflicts and regulatory approaches so far.

Chapters V-VII. describe the gatekeepers of the application layer of the Internet. Among them, the most exciting topic is perhaps the question of search engines (Chapter V). In this context, I will only look at this type of service in the context of the freedom of expression. Today's inevitable player in access to online content raises exciting legal and regulatory issues in many ways. After describing the risks associated with search engines, I first try to find out if the search engine provider is a subject of freedom of speech or rather it is an "intermediary" with limited liability (and limited protection). In order to illustrate the complexity of the issue, I compare the different conceptions of European and American legal practice and literature, arguing that the so-called organic search results can not be considered as 'speech', but rather as a technical service that does not enjoy the protection of the First Amendment, nor the protection of Article 10 of the European Convention on Human Rights. Finally, I will present the proposals of the European Union and of the Member States aimed at regulating the search engines.

In Section VI., I will analyze a new platform service that is not widely researched yet, but it is a source of many market conflicts and therefore, in my opinion, it is indispensable to address the issue. The focus is on over-the-top service providers who agree on broadcast media content with linear media service providers and who offer these television channels in bundles without agreeing with media content distributors who provide the transmission of signals. There are two reasons behind the theme selection. First, this new service type functions as a gatekeeper, as an intermediary service provider, as it provides a platform for access to content and thus influences the kind of media services we consume. Secondly, it is a new type of service that extends the framework of the current legal system and can not be explicitly covered by the media regulation or electronic communications regulation. This is not only a competitive disadvantage for "offline world's content distributors" but the application of media law is also jeopardized by the fact that the access of viewers to public service broadcasting is not assured in the case of these services. The question is, of course, whether the must-carry rules are still legitimate in the age of the Internet.

Finally, the fourth online intermediary analyzed is the application platform. Thanks to mobile operating systems and televisions connected to the Internet, users increasingly access information through an application icon. Application gathering, organizing and ranking service providers are called application environment editors. In the value chain of dissemination of the media content, the platform operator is a new gatekeeper. Google, Apple is a decisive player here, whose access to the online application database can be vital to content providers.

Regarding my research methodology, I considered the application of the interdisciplinary approach to be extremely important when processing this topic. I believe that the purely legal approach to any social phenomenon would be misleading and self-serving, especially in the

case of the Internet. That is why I have put great emphasis on the fact that the basics of the various issues are being approached from other disciplines (technical and economic sciences).

I have also tried to apply a horizontal approach within the law, meaning that I did not only examine a specific issue from a legal point of view, but I tried to look at it for all related legal areas (media law, electronic communications law, competition law) without losing focus the relationship of freedom of expression with online intermediary service providers.

My dissertation is a systematic work, because I have dealt with the topics discussed on a broad subject, based on an independent systematic approach. On the other hand, it can be considered as a summary work based on the processing of Hungarian, European and American literature dealing with the topic.

In addition to that, I have also relied on European and American jurisprudence, as well as on national, European and American organizations responsible for electronic communications and media, who are often pioneers in this field.

Finally, in each chapter, I have specifically highlighted how the issue was handled in the United States, given that the Internet has "no frontier" so the same issues emerge in law enforcement, but the solution is often different, because of our different (legal) culture.

### III. Summary of the new scientific results of the PhD dissertation

#### A. *The theoretical basics of the regulation of online intermediaries*

Online broadcasters have a revolutionary impact on the media system just like the emergence of commercial media service providers had in the 1960s. Despite the fact that in the age of the Internet we can no longer talk about the scarcity of transmission capacities, user attention is a new bottleneck. The online media service providers play a key role in allowing users to access the selected content. However, their choice is influenced in many cases by the online intermediaries, in most cases motivated by their economic interests. However, these activities can not be included in the scope of the media regulation and their methods of filtering and selecting content are often unobtrusive.

The analyzed intermediary service types can not be subject to the same treatment, the market failures are different, which calls for service-specific rules. However, it can be stated in general terms that the view that the Internet is an extraneous area for law is not acceptable. On the contrary, the state has not only the ability but also the duty to intervene to assure the exercise of freedom of expression in an age where a large group of private market players are the main depositors and controllers of the media system.

#### B. *Internet access providers and the question of net neutrality*

In the United States, the FCC ruled from 2002 on a legal trap set up by itself, from which, after several attempts, could only break out in 2015 and introduce a coherent and rigorous regulation. However, this proved to be very short-lived since the republican administration abolished the Open Internet Order in December 2017, providing the Internet access providers with the opportunity to discriminate between the contents transmitted over their network. In the European Union, as a result of a compromise reached in 2009, no ex ante regulation has been introduced on this matter as the legislator entrusted, just like the FCC does, that abuses could be avoided by indirect means such as boosting competition, increasing transparency and facilitating the change of operator. However, the EU legislator's approach has been disproved by empirical data. As a direct consequence of this, the EU has adopted the TSM Regulation, which in many respects resembles the US Open Internet Order, which was adopted almost simultaneously but has since been withdrawn.

In my view, the European Union's approach is the right way. As we have seen, the tools of the so called 'ex post approach' (boosting retail level competition, enhancing transparency, low level of switching costs) can not be sufficient given the strong opposition of Internet access providers, the typically oligopolistic market structure, low levels of consumer awareness and the continued high service switching costs.

I agree with the intention of the European Union, but I criticize it as well at many points. Firstly, the TSM Regulation does not regulate a number of issues sufficiently clearly: there are no clear rules on the special services or on the permissibility of zero rating. This creates uncertainty, which is reinforced by the fact that rules have been adopted in a regulation which does not need to be transposed into the legal systems of the Member States, leaving fewer options for clarification.

Another risk for the protection of the open Internet is the rule that allows different types of OTT services (eg. music applications and voice services) to be "treated differently" by Internet access providers. This may lead to a misleading use of the rule by internet service providers, thereby disrupting the principle of net neutrality. It would have been worthwhile to follow the US model introduced by the Open Internet Order, according to which such service-type discrimination is prohibited.

In my opinion, the principle of net neutrality can not be "untouchable" either. From time to time, as a result of technological advances, it has to be revised, as the Internet is constantly evolving. Precisely not the Internet, but the expectations it poses for us, is that our whole society is depending on the Internet. There are online services that can not be allowed on the so-called best-effort-based operation that does not guarantee the quality of data transmission. It is enough to think about e-health, e-bank, etc. services that can no longer accept spontaneous data loss but require guaranteed service quality. This is equally true for online media service providers such as Netflix, which will only be able to compete with classical broadcasters if its high bandwidth service is available in excellent quality.

The latter, on the other hand, suggests that Internet access providers providing infrastructure and bandwidth should be allowed to agree OTT players who are ready to pay for guaranteed bandwidth. Such "specialised" or "managed" services, moreover, provide answers to the long-standing problem of Internet access providers who need a new source of revenue to cover their costs due to exponentially increasing data traffic. Consequently, in my opinion, the Internet will sooner than later become two-speeded, where open and "managed" Internet will coexist. It is the responsibility of the regulation that the latter will not endanger the former but have a positive impact on each other's development.

### *C. Internet access providers and the IP interconnection markets*

The wholesale market for the data exchange of ISPs is not in the focus of sectoral regulation, it is basically based on cooperation between the parties. The reason for this is that in previous years the system could operate without significant market failures. However, due to the exponential growth in data traffic and the competitive pressures caused by OTT service providers on the content market, this is no longer true, there are abuses that may harm both the ISPs, the content providers and consumers. That is why I believe that the important regulatory challenge for the future will be to ensure the proper functioning of IP data exchange markets.

A potential problem is that Internet access providers try to force CDN providers, content providers and ISPs into a paid private peering agreement. Two ways of doing so are basically possible: (i) rejecting free peering offers at the public peering point; (ii) not paying for the bandwidth available at the public peering point, which would be sufficient for the other party to access the subscribers of these service providers. The remuneration used in private peering agreements may put the OTT content providers at a competitive disadvantage vis-à-vis content provided by the Internet access providers. As regards the vertically integrated Internet access providers, the European Commission has already recognized this risk as described in the dissertation in the Liberty Global, Ziggo fusion cases.

The other potential threat may arise when a provider rejecting free peering abuses its dominant position when pricing peering. In this case, determining the relevant market is the key issue. If

there is no substitute alternative to a peering agreement with a given service provider, the provider has 100% market share in the given market. However, if the OTT service provider seeking access to the subscribers is able to access similar services, through international transit services for example, the market (depending on the number of transit providers available) can be considered a competitive market, so the abuse of a dominant position can not be identified.

#### *D. Search engines*

Search engines are an indispensable pillar of the information society, since they enable us to navigate on the Internet's 'information sea'. Despite their many advantages, they also pose a risk to freedom of expression and freedom of access to information. By their roles, they are gatekeepers who have the ability to decide what content we have access to. Numerous examples show that, in addition to organic search results based on relevance, Google may often subjectively manipulate search results, favoring certain content in positive or negative terms. In addition, search engine providers increasingly align search results, from our habits, even from our political convictions. This "filter bubble" is endangering the idea of "public forum" and "deliberative democracy", as the freedom of citizens of the republic needs to know the various topics and opinions.

In deciding whether state intervention is justified in order to reduce these risks, it is first necessary to clarify exactly what the search engine service is: an editorial activity similar to a media service or a simple technical service that is comparable to the hosting service. In other words, "do machines speak"?

In my view, the answer to this question is that the organic search results can not be considered as speech. With respect to the content listed, the algorithm maker does not have any prior information, especially if we consider that "relevance" is personalized, that is to say that the listed information depends on the person searching for the information. In our view, one can only formulate an opinion (protected by the freedom of speech) in relation to something that he has come to know before his opinion is established. In my opinion, we can consider speech the results which are consciously manipulated by the search engines, in order to prioritize or negatively discriminate against specific content from organic search results. Another question is whether we consider this to be acceptable, as it possibly deceives the search user who believes it will be based on objective, relevance-based results.

The US courts, alongside numerous criticisms of American legal literature, are of the opinion that the search engine, when listing the search results, issue an opinion, thus they are entitled to the extensive protection afforded by the First Amendment. Moreover, according to the Communications Decency Act, the search engine provider can not be held responsible for the unlawful nature of the listed search results. Google abuses of this legal environment, defining its nature based on the nature of the dispute. Unfortunately, European case law is not much more consistent either. The EU and the Member States' courts treat search engines as intermediaries, but as a limit to the "right-to-be-forgotten" rule, search engine providers have the power to decide on a given information that the public interest in their publicity is more important than the individual's personal data protection. Neither does the Court of Justice of the European Union, nor the Data Protection Regulation that will enter into force in May 2018,



provide a point of reference. This is, in my view, an inconsistent decision to force this passive, technical service provider into an active editorial role.

Lastly, the role of search engine search engines, manipulated search results, and dangers of filter bubbles raise the question of whether it is justified and, if so, what interventions would be appropriate for the state. There is currently no specific regulation for search engines, but horizontal legal areas such as competition law, data protection and copyright law apply to them. In my view, a very broad ex ante control is not justified, but there are two areas where self-regulation tools could reduce the risks. The first is the requirement of transparency, meaning that users can understand how information is filtered, formed and personalized. The other area where it would be reasonable to move forward is the area of education. Users should be sensitized to potential risks and properly trained, for example by deactivating personalization of search results, thus reducing the risk of filter bubbles.

#### *E. Over-the-top linear content aggregators*

There are a number of new business models, new services on the Internet that challenge the current statutory framework written for the "offline" world. For example, the case of over-the-top services that aggregate and sell linear media services can not be considered as media distributor activity, although the service can essentially be a substitute to it. In our view, the reason behind this is that the separation of content and transmission has not been implemented consistently at both EU and national level. The concept of media content distribution activity requires the simultaneous existence of two separate types of services: content aggregation, i.e. the selection of media services and the transmission of the signal, i.e. electronic communications service. The online content distribution can happen without the provider assuring the transfer of data on the Internet.

Legislative differences on substitutable services are, in my view, not only a breach of the interests of subscribers, but also distort competition, are against the principle of level playing field, that is to say, that the same services must fall under the same rules, regardless of the technology and mode of transmission used. This is not, however, a novelty in the European Union since, in 2002, one of the fundamental principles of the electronic communications regulation is the principle of technology neutrality. I think it is time to adapt this already recognized approach to the technological development of the last sixteen years.

I think two way of reforming regulation are conceivable. The first is to modify the legal notion of electronic communications service, which, given the fact that it has been defined in the Framework Directive, requires an EU level decision. However, in this respect, the bodies responsible for EU legislation have so far not shown any intention to modify the Framework Directive in this way. The other option is that the must-carry rule is transposed from the electronic communications directives (Universal Service Directive) to the media directive, currently under review. Thus, must-carry rules could apply to other services than electronic communications services. Unfortunately, however, the ongoing review of the AMS Directive does not go in that direction either.

#### *F. Application environment editors*

Thanks to mobile operating systems and televisions connected to the Internet, content is increasingly accessed through an application icon. I call application-gathering, organizing and ranking providers as application environment editors. This concept is my suggestion, as I believe that it is appropriate to form a common concept for all this type of service given the root of the problems that arise. From the point of view of content providers, these platforms are inevitable actors in accessing the public. Although they have a clear prior control over the content made available on their platforms, in my view, the activity does not make them comparable to a media service editor, but rather to a media service distributor.

For this reason, the most important issue in terms of freedom of expression for application environments is the question of how to ensure objective, transparent access to content. In that regard, I would point out that although there are two legal instruments (electronic program guide and must-carry) in EU law, these can not be applied since they address only electronic communications services. The application environment editors can only be classified as 'information society service' within the scope of the Electronic Commerce Directive. The solution could be the extension of must-carry and EPG rules to these kind of platforms as well by including them in the AMS directive.

The application environment editors also raise also the question whether a must-be-found rule should be introduced - like the must-carry rule imposed on media service distributors - to make access to public broadcasters's content compulsory. In this regard, I examined the essential elements of the must-carry regulation and whether this regulatory instrument for the creation of external pluralism is still capable of achieving its purpose in its present form. In my opinion, the introduction of a must-be-found rule can be justified to ensure that content of public interest is easy to find, and the must-carry rule loses legitimacy in the near future where everything is consumed online.

#### IV. List of publications in the subject matter of the thesis

##### IN ENGLISH

1. Attempts and the regulation of network neutrality in the United States and in the European Union The roads towards the ‘two speed’ internet, in.: András Koltay (ed.): *Media Freedom and Regulation in the New Media World*, Wolters Kluwer, 2016.
2. Towards a Single Market for Telecoms: Critical assessment of the measures proposed by the European Commission related to authorisation, spectrum assignment and net neutrality, *European Network Laws and Regulation Quarterly*, 2014. jan.
3. Net Neutrality and Competition Law: New business models and changing regulatory approach in the European Union, *US-China Law Review*, társszerző: Dömötörfy Borbála, 2013.

##### IN HUNGARIAN

4. A keresőmotorok és a szólásszabadság kapcsolata – Megközelítés és szabályozási javaslatok az Európai Unióban és az Egyesült Államokban, *Iustum Aequum Salutare*, 2018/1., *megjelenés alatt*
5. A felhő alapú szolgáltatások és a személyes adatok védelme – az új európai adatvédelmi rendelet tükrében, ELTE ÁJK – Igazságügyi Minisztérium „Az Alaptörvény VI. cikkének értelmezési kérdései” munkacímű projektje keretében, várható megjelenés: 2018.
6. A hálózatszemlegesség rendeleti szabályozása az Európai Unióban és az Egyesült Államokban, in: Koltay András – Török Bernát (szerk.): *Sajtószabadság és médiajog a 21. század elején* 4. Wolters Kluwer, 2017., 121-147.
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8. OTT, Fttx és hálózatszemlegesség – A hálózatszemlegesség kérdése az IP adatkicserélés piacán, in: Tóth András (szerk.): *Technológia jog – új globális technológiák jogi kihívásai*, Károli Gáspár Református Egyetem, 2016.
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11. A must-carry és must-offer kötelezettségek európai uniós szabályozása, in.: Koltay András- Nyakas Levente (szerk.): *Összehasonlító médiajogi tanulmányok a "közös európai minimum" azonosítása felé*, Médiatudományi Intézet, 2014.
12. Médiakoncentráció-szabályozás az Európai Unió tagállamaiban, in.: Koltay András – Török Bernát (szerk.): *Sajtószabadság és médiajog a 21. század elején 1.*, Wolters Kluwer, 2014.
13. A Telefónica kontra Európai Unió Bizottsága ügy ismertetése – Az árprés megítélése (ár)szabályozott piacokon, *Versenytikör*, 2014., vol. 2.
14. Elektronikus hírközlés, in.: Christián László (szerk): *Az információs társadalom jogi vetületei: alkalmazott jogi informatika*, PPKE JÁK, 2013.
15. A médiaszabályozás alapjai, (társszerzők: Christián László – Koltay András – Lapsánszky András), in: Christián László (szerk): *Az információs társadalom jogi vetületei – alkalmazott jogi informatika*, PPKE JÁK, 2013.
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17. A digitális átállás jogi háttere, *HTE MediaNet kiadvány*, 2013. szeptember
18. Connected TV – új szabályozói kihívások a horizonton, *Infokommunikáció & Jog*, 2013/52-53. szám
19. Joghatósági kérdések az interneten elkövetett személyiségi jogi jogsértések esetén, *In Medias Res*, 2012/1.
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