Net neutrality policymaking:

A comparative study of the UK and the USA

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Abstract

Net neutrality is a hotly debated and contested policy for broadband Internet access provision. In principle, net neutrality prescribes no discrimination by the type or size of data packet exchanged over the Internet. This principle has fostered innovation and economic growth. The non-discriminatory principle ingrained in Internet architecture has also made it the ultimate platform for convergence of technology, business and service.

However, the content, businesses and services that the Internet supports, particularly rich content such as online audio-visual services, are pushing the existing Internet network infrastructure to its limits. The imbalance of growing demands for bandwidth and relatively static supply of network capacity has sparked a policy debate over network management principles for Internet access provision. The interdependent yet competing interests of network and content providers and all levels of convergence taking place on the Internet make net neutrality policymaking extremely challenging.

To explain emerging net neutrality policies in the US and UK, this research examines the net neutrality policymaking process based on the understanding that the process is both structured and actor-driven. Treating policymaking as a communicative process, it identifies as the research data the formal communication and policy actors' accounts of their informal communication during the policymaking process. An analytical framework that emphasises the interaction between structural factors and policy actors is then applied to both sets of data.

This research argues in support of the position that net neutrality policies, like other polices, are communicative, structured and actor-driven. The challenges in developing net neutrality policy and policy measures result from the convergence of transmission infrastructure and content, and the interdependent yet competing values and interests underpinning the provision and consumption of these services.

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List of Abbreviations

ACA	American Cable Association
ACT	Association for Commercial Television in Europe
APA	Administrative Procedures Act
BBC	British Broad Casting Corporation
BEREC	Body of European Regulators for Electronic Communications
BERR	Department for Business, Enterprise and Regulatory Reform
BSG	Broadband Stakeholder Group
BSkyB	British Sky Broadcasting Group
BT	British Telecom
CCIA	Computer and Communications Industry Association
CDA	Critical Discourse Analysis
CDT	Centre for Democracy and Technology
CEO	Chief Executive Officer
DCMS	Department for Culture Media and Sport
DG	Directorate General
DSL	Digital Subscriber Line
EBU	European Broadcasting Union
EC	European Commission
ECTA	European Competitive Telecommunications Association
EDRi	European Digital Rights
EFF	Electronic Frontier Foundation
EP	European Parliament
EU	European Union
EUROISPA	European Internet Service Provider Association
FCC	Federal Communications Commission
GSMA	Groupe Speciale Mobile Association
ICT	Information and Communications Technology

IP Traffic	Internet Protocol Traffic
IPTV	Internet Protocol Television
ISPs	Internet Service Providers
ISPA	Internet Service Providers Association
ITI	The Information Technology Industry Council
LLU	Local Loop Unbundling
MBG	Mobile Broadband Group
MEP	Member of the European Parliament
NCTA	National Cable and Telecommunications Association
NPRM	Notice of Proposed Rulemaking
NRA	National Regulatory Authority
OECD	Organisation for Economic Co-operation and Development
Ofcom	Office of Communications
Oftel	Office of Telecommunications
ORG	Open Rights Group
OTT	Over the Top Service
PEIS	Political Economy of the Information Society
PSB	Public Service Broadcasting
QoS	Quality of Service
SMP	Significant Market Power
TCP/IP	Transmission Control Protocol/Internet Protocol
UKCTAUK	Competitive Telecoms Association
VoD	Video on Demand
VoIP	Voice over IP

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Chapter 1

Introduction

Net neutrality is a broadband network management principle which technically provides non-discriminatory access to network infrastructure. By design, this network management principle embodies the traditional communication infrastructure policy objective of non-discriminatory access. However, net neutrality has become increasingly contested as a principle and policy objective due to: 1) the imbalance of demand for and supply of broadband network capacity, 2) the competing commercial interests of broadband access service providers and their users. The controversies around net neutrality policy development and the significance of broadband infrastructure for the economy warrant an investigation into how this policy is made.

As a network management principle, net neutrality generally implies no discrimination by the type or size of data packet exchanged over the Internet, resulting from design features of the protocol suite that hold together the Internet (a large collection of computer networks). Net neutrality is the current management principle for flows of communications across the Internet, implemented via Transmission Control Protocol/Internet Protocol (TCP/IP). The key features of the TCP/IP protocol suite include route flows of IP traffic (from end to end on a 'first come, first served' basis which provides no guarantee for quality of service) and on a 'best effort' basis providing no delivery guarantee (Tanenbaum 2003: 56).

Under this principle, communication flows across the Internet, a communications platform layered on the existing telecom network infrastructure, have been non-discriminatory, fair and equitable. The values of non-discriminatory, fair and equitable access to Internet service, guaranteed by the net neutrality principle, comply with the traditional regulatory objectives for the provision and operation of the physical telecom networks (Garnham 1996: 284). This management principle has made the Internet the ultimate platform for the convergence of technology, corporations and services to foster investment and innovation.

'Cyberspace is regulated by its code' (Lessig 2006: 79); for the Internet, 'the code', or the ICP/TP, is comparable to law or Internet regulation. In this case, net neutrality is an equivalent of

the traditional infrastructure regulatory measure to ensure and manage access. Therefore, attempts to change the existing management principle of the Internet imply attempts to change the law. This change would alter the existing arrangements among network proprietors, Internet users and the communications market structure.

Given the significance of the Internet, an essential infrastructure supporting the economy, the abolition of the net neutrality principle could intensify conflicting interests between broadband providers and users. Here, the term *broadband providers* refers to providers of broadband Internet access service. Users comprise both individuals and businesses that rely on the Internet to provide and consume online services. This research emphasises content businesses or content providers due to the inter-relationship between the broadband network and content. According to Noam (2008: 12), the transmission infrastructure sets limits on content. Content providers include broadcasters, online media and applications developers.

The conflicting interests include broadband providers' and some commercial content providers' preference for exclusive and proprietary access to network and content versus users' preference for equitable and non-discriminatory access. These users comprise both individuals and content providers (e.g., broadcasters, online media and applications developers). The interdependent yet competing interests of broadband providers and content providers make net neutrality a contested principle and objective because traffic discrimination would serve a different set of interests, values and objectives.

This relationship between broadband providers and users underpins a part of the changing communications system and has contributed to another round of communications policy evolution. The net neutrality policies being developed in the US and UK serve as examples of this evolution. The key contributors to these changes include neo-liberal ideology and convergence. Neo-liberal ideology emphasises limited state interference with communications product and service provision (Crouch 2011: 17). Convergence is a phenomenon that brings together the previously distinct communications sectors, industries and services (Iosifidis 2011a; Lax 2009). Both reshape the communications system from policy to organisation, product and service levels. These elements are inter-related as they all drive one another. Neo-liberalism, convergence and the changes they bring to bear in the communications system make policy development in response to broadband access service provision challenging.

The neo-liberal emphasis on freedom from state interference in private provision of communications services, in this case broadband access service, creates a dilemma in regulation, which, according to Freedman (2008: 14), 'often' is a 'legally binding' tool for implementing policy objectives. The concept limits the state's ability to oblige broadband providers to comply with its policy objectives. Convergence introduces competing policy priorities among the objectives, values and interests underpinning the previously distinct communications sectors. As a relatively recent phenomenon, convergence requires a new policy to guide and shape the emerging convergent communications order. A policy, in this research context, is based on Freedman's definition of media policy (ibid.) and thus refers to the establishment of the objectives, values and interests that will shape the 'structure and behaviour' of this new communications system.

Given the challenges of developing communications policy and regulations in response to this changing environment, this research examines net neutrality policy development. Its objective is to explain how net neutrality policies are developed in the US and UK. Although the policies target the communications infrastructure service provision, the convergence of technology, corporations and services taking place on the Internet makes these policies crucial for content provision and innovation. This research emphasises dilemmas in developing net neutrality policy that result from the interdependence of the broadband network, a communications infrastructure, and content and competing policy and regulatory criteria. The research findings indicate a way to bypass these dilemmas and continue Internet support for content innovation and economic, social and political welfare aspects related to broadband Internet access.

Much literature on communications policy treats policies as given and pays little attention to agencies and interests that also shape and complicate communications policies, especially now that the separation between infrastructure and content is fading due to convergence. To span such gap in the literature, this research takes a critical policy study approach to explain why the net neutrality policies in the US and UK take the shape they do and how they have been developed. To account for both institutional factors and agencies, this research bases its inquiry on the understanding that policies, in this case net neutrality policies, are products of a competitive, political and controversial process (Freedman 2008: 4). This process is structured by 'institutional, economic, technological and governmental' forces and driven by policy actors in pursuit of their goals, values and interests (ibid.). As such, policymaking involves a power exercise to inscribe a set of objectives, values and interests into the communications system regulations. In line with the concept of an argumentative

turn (Fischer and Gottweis 2012; Fischer 2003), this research perceives that power in the policymaking process is exercised through communication. Thus, it treats policymaking as a communicative or discursive process. Through communication, a mutually satisfactory agreement on policy problem definition, solutions, objectives, values and interests to be inscribed into the communications regulatory system is reached.

Following such understanding of policies, this research identifies both formal communications and policy actors' accounts of their informal communications during the policymaking process as part of the research data. Formal communications include policy documents issued as part of net neutrality policy consultations on broadband access provision principle and oversight. These documents are classified into three groups according to the stage of consultations: consultation documents, responses to consultation and policy outcomes. Consultation documents are those issued by the responsible state policy actors with an intention to define the policy problem and propose solutions. Consultation responses are comments from relevant industries on the discussion introduced in the consultation documents. Policy outcomes are the policy measures adopted or proposed. Informal communications comprise interview data that offers policy actors' accounts of their formal and informal policy engagement.

In examining how net neutrality policies are shaped, this research presents a comparative study of the UK and US cases. Since the UK, as an EU member, is bound by the European Community Act (1972) to transpose EU legislation into UK law, the British government, the communications regulator, Ofcom and UK/EU-based policy actors also engage in the policymaking and legislative process at the European supranational level. In studying the UK case, this research, therefore, considers net neutrality policy development at the European level. It emphasises the implications of EU policymaking on national policy and policy actors' engagement.

The research approach to data analysis combines three concepts to explain the exercise of power in policymaking. These are a) the dialectical policy network, b) the argumentative turn and c) the framework for analysing practical reasoning and an application of critical discourse analysis (CDA). The first concept, the dialectical policy network (Marsh and Smith 2000), provides a meta-framework for examining all the factors and actors and the relationships that shape net neutrality policies. The second, the argumentative turn (Fischer and Gottweis 2012; Fischer 2003), serves as an analytical framework for the exercise of power in policymaking. This meso-level analysis for power exercise in policymaking is shaped by the relationship and interaction among factors

according to the dialectical policy network concept. Third, the framework for analysing practical reasoning (Fairclough and Fairclough 2012) based on CDA (Fairclough 2003) serves as a supplement and tool to operationalise the argumentative turn.

As a supplemental tool, the Faircloughs' framework (2012) addresses the micro-level analysis of discourse. The combination of these concepts is grounded in a common understanding between the argumentative turn and critical discourse analysis in that they both constitute and are constituted by social constructs and the perceived reality. Here, discourses refer to representations of perspectives, concepts and ideas that are shaped by other factors, perspectives, concepts and ideas and intended for reshaping the existing discourses or constructing new ones. This definition of discourses is based on the meaning employed in the argumentative turn (Fischer and Gottweis 2012:10) and the Faircloughs' framework (2012: 82).

The research analytical framework built on these concepts contributes a methodology that emphasises the interaction between structure and agency. The three concepts compensate for the limitations of one another and enhance each other's strengths. The argumentative turn is employed in the interaction between structure and agency and power play in policymaking. The dialectical policy network makes up for the under-discussed agency's or policy actors' contributions to institutional or structural changes in the ideational approaches: the argumentative turn and critical discourse analysis.

The research structure comprises the literature review of communications policies and industry development (Chapter 2), the concepts and approaches to the study of power in policymaking (Chapter 3), research methodology (Chapter 4), research findings (Chapters 5 - 7) and the conclusion (Chapter 8). The literature reviewed in Chapter 2 introduces the competing principles for managing the Internet network and its capacity as research problems in the context of communications policies and industry development. Chapter 3 describes the ontology and epistemology of this research's critical approach to policy analysis and discusses the approaches used to examine net neutrality policymaking. Chapter 4 details the application of the conceptual and analytical framework discussed in Chapter 3. Chapters 5, 6 and 7 present the virtual conversation between the findings from two inter-connected sets of data: policy documents and interviews. Together, they reveal that net neutrality policymaking involves both formal and informal processes in which interactions between structure and agency and power concentration are observable.

Chapter 8 concludes the thesis by explaining net neutrality policy outcomes apropos the relationship and the interaction between structure and agency involved in the policymaking process. The thesis provides empirical evidence that critiques the policymaking process, which is under-researched in communications policy, and underlines the implications of the politics involved for the policy outcome and industry development. Regardless of the final policy outcomes, this critique will remain relevant as they are based on the decision-making process, not the decisions. From this explanation, implications of the policy outcomes for online content are drawn. These implications constitute guidelines for policy recommendations.

Chapter 2

Convergence, Communications Policy and Net Neutrality

Much literature on communications policy has taken an institutionalism approach, portraying communications policy as a result of an institutionalised process directed by the state. However, Iosifidis (2011a) and Freedman (2008:82 - 97) argue that today's communications policy formation is no longer confined within the state and its institutions. The policymaking process has become increasingly complex, pluralistic and competitive as it involves more non-state actors from both the national and supranational levels, being shaped by various factors and actors.

This chapter examines institutionalised or structural factors that shape communications policy and the industry itself. These include ideas, ideologies and the phenomenon of convergence. They form part of the structural factors in Marsh and Smith's dialectical policy network (2000), a framework for analysing power exercise in policymaking to be discussed in Chapter 3. Emphasis is placed on neoliberalism and convergence as key influences that have resulted in a shift from a sector-specific policy of media and telecommunications to a convergent policy of communications. The chapter begins by discussing the forces that contribute to the emergence of convergence. It then continues to conceptualise convergence and explain how it contributes to communications policy change and the contested objective of net neutrality. The chapter concludes with a proposal to answer a set of research questions in contribution to the existing net neutrality and communications policies.

2.1. Build-up To Convergence: The influence of ideologies

As a form of technological advance, convergence may be depicted in a deterministic way. However, Parsons (2003: 2) and Winston (1998: 1-5) argue that technological changes are shaped and constrained by the social, economic, scientific and political environments in which these changes take place. Similarly, Golding (2000: 179) argues that convergence, in the context of communications, 'should be read as an organisational and economic phenomenon' and a result of institutional ideologies, corporate strategy and structure. Likewise, (Iosifidis 2011a: 170 - 71) asserts that convergence results from a series of organisational changes of private entities in search of

new business and revenues and driven by globalisation, privatisation, deregulation and liberalisation. These organisational changes, particularly horizontal and vertical corporate consolidations, would not have been possible without the support of deregulatory policy and regulation. Such changes are, according to Michalis (2014: 17) and Iosifidis (2011a: 8), products of neoliberalism, which is a political and economic ideology introduced in response to the 1970s global economic crisis.

This ideology advocates competition as a means to keep the balance between demand and supply for products and services with no or limited state intervention (Crouch 2011: 17). In other words, neoliberalism advocates a free market. However, free market here is a relative term and complex to grasp. It does not mean, per se, a near-perfect market competition among multiple enterprises resulting in a broad range of consumer choices. Neoliberal ideology, according to Crouch (2011), actually promotes a *freer* market (or increased flexibility) for private corporations to increase their economic efficiency and productivity with an emphasis on the overall outcomes of economic growth. This agenda has been critiqued due to the resulting increased market power of major corporations, the shrinking plurality of providers and real consumer choices (ibid.) which may require state intervention to free up the subsequent grid-lock of competition .

The adoption of neoliberal ideology has had a deep impact on the communications industry from policy to product and service development levels. On the policy level, neoliberalism results in deregulation, a reduction of state interference with private operations or as McChesney (2000: 6) puts it: 'minimising the role of non-market institutions'. Similarly, Hesmondhalgh (2007: 109 - 10) uses the term 'deregulation' to refer to 'programmes of privatisation and regulatory change' that minimise interference from non-market institutions. Hesmondhalgh notes that sometimes the term liberalisation is preferred to emphasise freedom of expression and freedom from state interference. Hesmondhalgh (2007: 110) also introduces another term 'marketisation', which features three key processes: privatisation of government-owned enterprises and institutions, lifting of restraints on business activities in pursuit of profit and expansion of private ownership.

The common traits of deregulation, liberalisation and marketisation include reduced interference from non-market institutions and a relaxation of constraints on private activities. These terms differ primarily in their emphasis. By using the term 'deregulation', the emphasis is placed on actions

taken to remove or minimise non-market interference with private activities. The term 'liberalisation' highlights the result of the actions (deregulation), which is freedom from state interference and control. The term marketisation emphasises the neoliberal socioeconomic construct in which the market and the non-market coexist in a way that the latter supports the former.

The implications of deregulation, liberalisation and marketisation in the communications industry include the privatisation of state-owned enterprises, a shift in the public interest focus (from social equity to market efficiency) and less support for Public Service broadcasting (Iosifidis 2011a: 70 - 72). This shift toward neoliberalism has resulted from the previous economic crisis, the emerging political awareness that technologies (particularly electronics and information and communications technology) serve as the key driver of economic growth and (for Europe) the failure of the Keynesian model of socioeconomic management to cope with the crisis (Michalis 2007: 65 - 67). The key legislative acts that embody such neoliberalism ideology and that have resulted in deregulation and liberalisation in the communications sectors on both sides of the Atlantic are the US Telecommunications Act (1996), the UK Communications Act (2003), the 2003 EU legal framework for electronic communications and the 2009 revised Electronic Communications framework. This legislation has enabled both horizontal and vertical integration in communications enterprises.

Title III of the US Telecommunications Act (1996), for example, is aimed at stimulating cross-platform competition among services by allowing cable operators to provide telephony services and allowing phone companies to provide video services (Aufderheide 1999: 69 -70). Similarly, Part 2 of the UK Communications Act (2003) regulates the electronic communications network and delivery infrastructure with an aim to promote competition by introducing new entrants to the market, including ones from different communication sectors (Doyle and Vick 2005: 77). The relaxation of existing rules means less interference from non-market institutions with private corporate operations. Neoliberalism has also contributed to globalisation by relaxing or abolishing restrictions on the cross-border provision of communications products and services in order to achieve 'an open, borderless world economy' (Iosifidis 2011a: 101). The shift to neo-liberalism and its implications for policy will be discussed further in section 2.3.2.

Neoliberalism affects the communications sectors in both Europe and North America. However, privatisation does not apply to the US communications sector. The absence of privatisation in the US results from the institutional differences between the US and Europe. Unlike Europe and the UK, the key communications sectors in the US, telecom and media (radio, television), have always been private. The private ownership and provision of such services in the US indicates a strong influence of 'natural liberalism' (Hartz 1991: 5- 14). This term refers to the liberal American way of life, which Hartz believes to have resulted from the 'lack of a genuine revolutionary tradition', 'a feudal' and 'a socialist' tradition (ibid: 5-6). According to this notion, US liberalism is not freedom from authority, but a value (freedom) that is 'instinctive in the American mind' (Hartz 1991: 62). This understanding of liberalism explains the varying degrees of market freedom in policy and regulatory precedents in the US, UK and Europe. These are policy precedents that the literature on net neutrality policies (Powell and Cooper 2011; Wallsten and Hausladen 2009; Cave and Crocioni 2007; Chirico et al. 2007) holds accountable for varying responses to net neutrality concerns, yet without explaining why the policy precedents differ. To span this gap in literature, Hartz's 'natural liberalism' can be applied (1991).

Hartz's concept of American liberalism (1991) underlines the relationships between the state and its citizens in three ways: 1) Given the absence of a tradition of revolt against pre-existing principles such as class distinctions (ibid.: 5), state interference with private operations is unpalatable for Americans; 2) State intervention is only welcomed as a means to facilitate private operations. Thus, the relationship between the state and its citizens in America is responsive. In this case, state intervention, as a mechanism of the free market, is employed mainly to ensure competition; 3) The American version of liberalism has resulted in prioritisation of private interest over the public good because the ability of private entities to operate freely is considered to be good for the public.

In Hartz's work (1991: 3), feudalism refers broadly to medieval establishments and social constructs featuring centralised decision-making power within the ruling class. Feudalism in this sense nurtured a paternal relationship between the state and its people in Britain and Europe. Hartz refers to socialism as an 'ideological phenomenon arising from principles of class and the revolutionary liberal revolt against them' (ibid.: 6). Hartz (1991: 6) uses socialism loosely to convey what resembles Jones's description of a utopian version of socialism (1981: 139) , an early collective movement against pre-existing moral, religious, social and political principles. The broad objective of this movement, according to Cole (1953: 2-5), is to achieve happiness and well-being for all instead of the privileged few.

Traces of feudal principles, in which the paternalistic relationship between the state and its people is grounded, can be seen in past traditions of state-owned telecommunication and media and the long continuation of public service broadcasting (PSB) that, according to Iosifidis (2011a) and Michalis (2007), never existed in the USA. Such feudal history and its remaining vestiges from past state ownership and continuing PSB traditions imply greater tolerance of state interference in social and economic life among British and European people than in the minds of Americans. Hartz's socialist spirit (1991: 6), however, does not apply to communications service provision whether by state, public or private entities. The British and European PSB, for example, was born out of a paternalistic vision to organise broadcasting service provision and use the medium to serve particular national, social, cultural, economic and political objectives (Humphreys 2007: 97; Reith 1924: 17), not to revolt against any pre-existing theories or order. Hartz's reference to socialism (1991: 6), therefore, cannot be used to explain the varying degree of freedom from state regulatory intervention in telecommunications and broadcasting service provision in the UK, Europe and the USA.

The social market economy is a more relevant concept to explain the varying degrees of the deregulation of communications sector at market and policy levels across the Atlantic. Curran and Seaton (2010: 374-78) hold the concept accountable for the survival of PSB and conservation of some cross-media rules in the UK. Here, the social market refers to the school of thought that favours markets over state control, but recognises the limitations of the free market to uphold social and democratic values as well as some economic values, such as choice. Therefore, to social market liberals, a level of control is needed to make up for market failures. The weight of social market ethos against neoliberalism reflects the paternal characteristics of the relationship between the state and its citizens that is rooted in feudal and socialist traditions in Europe and the UK. Both traditions, unlike those in the US, have resulted in prioritisation of the collective good and social and democratic values over private interests.

The difference in the degree of free markets in the US, UK and Europe is a recurring theme in communications policy across the Atlantic. A combination of Hartz's American version of liberalism (1991: 5 - 14) and Curran and Seaton's account of social market influence on communications policy (2010: 374-78) offers an insight into the different degrees of free market in the US and the UK. These ideologies will, therefore, form the comparative analysis of the net neutrality policymaking process in Chapters 5 – 7.

The literature reviewed in this section demonstrates that ideologies have profound implications for the communications industry at all levels. Although the degree of free market in communications in the US, UK and Europe varies, the influence of neoliberal ideology on policy has changed the market environment. This transformation is seen at the organisational level, as evident in business mergers and acquisitions. The same transformation also drives technology advancement. Therefore, this research agrees with Iosifidis (2011a), Golding (2000), and Winston (1998) that convergence is a result of a convolution of technological advances, neoliberal ideology, waves of deregulation, liberalisation, privatisation and globalisation that have reshaped the communications market and the relationships between communications proprietors. These changes require further amendments to existing policy and regulations.

2.2. Convergence: Concept and implications

This section progresses from the ideology that drives convergence to a discussion of the technical and functional aspects of convergence to conceptualise and identify its implications for media and communications. These implications may then lead to further policy changes. The connection between neoliberalism and convergence discussed in the previous section and the convergence phenomenon and its implications featured in this section demonstrate that neoliberal ideology forms economic and political structures that shape policies and policy actors' behaviours. Neoliberalism, therefore, forms a parameter for assessing policy and examining a policymaking process. Its function as perceived by various approaches for studying policymaking will be discussed in Chapter 3.

2.2.1. Conceptualising convergence

Apart from the ideological influences discussed in the previous section, digitisation of communication data is another key driving force for convergence (Iosifidis 2011a: 170; Lax 2009: 170; Michalis 2007). Convergence, itself, is a progressive phenomenon. It can be captured in many ways. Earlier attempts to portray convergence show that it centres on the consequences of technological developments in the way people communicate, the fading boundaries between different media and the shift from passive to active audiences. Toffler (1980: 279 - 80) portrays technological advances as enabling the creation of more diverse and customised life-style products and services beyond what the market deems profitable to produce. Similarly, Jenkins (2006) uses a consumer perspective to describe convergence, focussing on how convergence has had an impact

on the media and consumers. This research argues that the picture of convergence captured by these approaches is incomplete.

The technological and industrial convergence, which continues evolving and prompting further changes, is under-discussed in these approaches. This research adopts the later attempts to conceptualise convergence introduced by Iosifidis (2011a) and Lax (2009) as they offer a more complete and updated picture of convergence in terms of its origins and the changes this phenomenon brings to the communications sector. They conceptualise convergence as the coming together of technologies, media, communications services and communications industries that takes place on three levels: technology, industry or organisation and market or culture forms (ibid.*)*. To account for the change convergence introduces to the relationship between content producers or publishers and users, Iosifidis (2011a: 180) includes 'publisher-user' convergence in his definition of convergence.

According to Lax (2009: 170), digital technology enables technological convergence. The technology refers to an electronic system that generates, records, processes, receives, transmits or displays information represented in discrete values within specific ranges. This processing system removes the fundamental difference between types of data (e.g., images, text, and sound) produced. When this computing technology merges with telecommunications technology (such as Internet protocols: a system for relaying datagrams across network boundaries that enables internetworking among various end points), any form of data can be exchanged on any distribution platform. Computing and telecommunications advances also allow for media products to be digitised and sent across various distribution platforms and viewed on multiple devices.

Therefore, technological convergence relevant to the communications sector is the integration of computing, telecommunications and media in both the technical and functional senses (Iosifidis 2011a: 172). The former refers to the ability to distribute any form of media via any infrastructure. The latter refers to the multiple functions a viewing device (e.g., television, mobile handsets, tablets and computers) can manage. This level of convergence also implies the interrelationship between transmission infrastructure and content (Michalis 2014: 76). According to Noam (2008: 20 - 21, 30), the former sets limits on the latter. This interrelationship is the root of the net neutrality debate and policy (discussed in section 3.4).

Industry convergence (Iosifidis 2011a: 174) or corporate convergence (Lax 2009: 170 - 72) refers to organisational changes in terms of organisational structure. Convergence at these levels improves efficiency and competitiveness in the provision of communications service. The organisational changes are seen in both horizontal and vertical mergers between firms providing products and services from within and across the same production process. Examples include the vertical merger between Time Warner (audio-visual content production) and AOL (distribution network) in 2000, the British satellite broadcaster, BskyB's acquisition of Easynet (the broadband provider) in 2005, Comcast's (cable network) acquisition of NBC Universal (broadcaster) in 2011 and Liberty Global's takeover of Virgin Media in 2013.

Organisational changes allow businesses to reap the benefits from available technologies by providing a wider range of communications services. Examples of such service provisions include Sky's triple-play services (comprising satellite broadband offered by, for example, Rural Broadband and Broadband Wherever, pay-TV and telephone services) and Virgin Media's quadruple-play services, offering cable broadband, pay-TV, telephone and mobile services. The reasons behind these mergers, as documented by various authors (Iosifidis 2011a; Bagdikian 2004; McChesney 1999), are economically oriented. The rationale for convergence at this level is 'to exploit the opportunities offered by technological convergence' (Iosifidis 2011a: 175). According to Iosifidis (1999), McQuail and Siune (1998) and Murdock (1990), the trend towards merger and acquisition in America, UK and Europe picked up significantly following the rounds of deregulation and liberalisation of the communications sector in the 1980s and became more prominent in the 1990s. Examples of such trend include both the removal of regulatory barriers that had prevented cable companies from offering telecommunications services and the ban on telecommunications companies from supplying broadcasting service, as summarised in Table 1.

Table 1 Examples of neoliberal legislation

Jurisdiction	Year	Legislation	Effects
USA	1996	*Telecommunications Act, Title III*	Allows cable operators to provide telephony service and allowing phone companies to provide audio-visual service
UK	1984	*Cable and Broadcasting Act*	Allows cable companies to provide telecommunication service, breaking down the duopoly in the Telecom market
	1990	*Broadcasting Act*	Allows telecom operators to offer broadcasting service
	2003	*Communications Act*	Allows cross-media ownership
EU	2009	*Revised Electronic Communications Framework*	Enables horizontal and vertical integration in communications enterprises.

Market convergence (Iosifidis 2011a: 180), or convergent culture forms (Lax 2009: 172), refers to integrated communications product and service provision. This level of convergence results from a combination of technological and industry convergence. The former is the enabler; the latter is strategic. At this level, there is evidence of cross-sector product and service provision as well as cross-sector business mergers. This cross-sector integration includes convergence of content and services, of telecom and broadcasting services and of IT and broadcasting (Henten et al. 2002: 14 - 18). The most obvious dimensions of convergence at this level are those in content and services and in telecom and broadcasting (ibid.). Convergence between services implies distribution of the same content through various technical platforms, such as the Internet, telecom networks or traditional broadcasting channels. It is cross-sector in the sense that this availability of media content on multiple technical platforms has made the boundary between computing, telecom, broadcasting and other media services less visible (ibid.: 16). Distribution of content through various channels allows media corporations to exploit the economy of scope that technological convergence offers.

To do so, media corporations need to find a way to convert and compress their content to fit various distribution technologies. This need continues to drive further technological developments to achieve even more efficient digital coding and decoding of audio-visual content. Examples of these developments include mp3, WMA and MPEG-4 for audio and MOV, AVI, WMV, MPEG and FLV for video. Convergence between telecom and broadcasting is evident in telecom providers venturing into the broadcasting market. One example was the launch of British Telecom's (BT)

first television channel, BT Sport, to compete with Sky Sports in August 2013 (BBC 2013). A more recent instance is the US telecom giant Verizon's talks with AOL about a takeover or a joint venture (Spanier 2015).

In addition, Iosifidis (2011a: 180) adds 'publisher-user' or producer as another level of convergence. This notion refers to a growing trend of users becoming producers of content, contributing to traditional media producers and distributing their home-made content through channels such as *YouTube* and other social media networks. This level of convergence is powered by technological advances. It changes the relationship between media producers, providers of soft technology or transport software (such as Google) and individual users, who were previously passive audiences.

The developments discussed in this section demonstrate that convergence has a chain effect that drives further changes in the communications sectors. These changes include evolution in content delivery technology, culture forms, corporate or organisational structures, user (audience) behaviour and the relationship between service providers and between service providers and users. Such changes have implications for the environment and development of this sector and will further the call for policy and regulatory reform. The possible effects of convergence on users, markets and further technological developments will be discussed in the following section. The implications for policy will be discussed in section 3.3.

2.2.2. Implications

Based on the concept of convergence introduced by Iosifidis (2011a) and Lax (2009), this section identifies the implications of the changes convergence brings to the communications sector. Emphasis is placed on cross-sector integration of content and services and on telecommunications and broadcasting taking place on the Internet. The rationale for this emphasis is that these types of integration taking place on the Internet are the most prominent trends in the communications sector (Castells 2007; Henten et al. 2002). They contribute to the on-going net neutrality debate. Grouped into three key themes according to the receiving end of their impact, they have led to discussions of the policy changes seen in section 3.3.

Implications for users

According to Lax (2009: 176), discussions of the implications of convergence started from the positive technological impact of convergence on users. It was treated as a tool to enable freedom and individual expression. The discussion continues to date but with heavier emphasis on the growing use of technological advances for personal expression, social and democratic participation and social networking (ibid.). For example, Nieminen (2009: 40) discusses the democratising and empowering influence of the Internet, a product of the convergence of computing and telecommunications. His thesis embodies technological optimism and an idealistic perspective of convergence. It highlights the potential of the Internet to recreate a) the public sphere and b) conditions and space for reason-based expression of public opinion (Harbermas 1962 cited in Iosifidis 2011a: 31). The recreation of the public sphere is enabled by the abundance of sources of information, the ability to interact with the information and share it with others (Nieminen 2009: 40 - 41).

However, Iosifidis (2011b) and Castells (2007) argue that the great amount of information available does not guarantee the quality, accuracy or usefulness of the content. Similarly, Baker (2002) remarks that the absence of 'spectrum scarcity' due to the abundance of content distribution platforms does not guarantee the non-economic values of access. Likewise, Iosifidis (2011a), Castells (2007) and Baker (2002), argue that the profusion of communication channels and information does not guarantee quality of communication. The systematic mass surveillance programme, *Prism*, exposed by Edward Snowden (Ball et al. 2013; Gellman and Poitras 2013), highlights the abuse of technology advances and the underside of the covert market, which undermine users' privacy.

Acknowledging all the benefits, limitation and a threat against users' privacy of technology and market convergence, this research supports Garnham's (1996: 286) suggestion that the communications policy for convergence needs to ensure that access to communications infrastructure, plurality, quality and diversity of services is equitably available to all users. It further argues that the management of Internet traffic that supports deployment of packet-sniffing technology allowing access to personal data needs to be carefully monitored. Infrastructure regulation to prevent network proprietors from abusing their network control to discriminate against access or any-to-any interconnectivity remains relevant in the age of convergence. Net

neutrality fits within this set of criteria. The regulation is needed to prevent market-entry barrier creation to the detriment of providers and users of network dependent services. This is what net neutrality is designed to do.

Implications for the market

Technological convergence and industry convergence have resulted in market convergence. This chain of convergence can be seen in both positive and negative lights. The benefits of convergence are evident in the technological optimism of the new digital economy presented by theorists such as Anderson (2009a; 2009b), Downes (2009) and Jarvis (2009). These theorists claim that digital technology and the Internet have eliminated the (spectrum) scarcity and limited distribution channels of the analogue world. This solution to physical scarcity has led to an age of abundance, fragmentation of audience, new business models and consumer behaviours that challenge monopoly or oligopoly control over the communications, and particularly the media, market.

According to Anderson (2009a; 2009b), Downes (2009) and Jarvis (2009), the abundance of storage space and distribution channels has given users a wider range of choices. Digital technology and convergence, according to Downes (2009: 38 - 40), reduces transaction and distribution costs and thus supports new market entrants. The near-zero marginal cost allows for a new economic model of 'free' to emerge and challenge the old monopolies or oligopolies with unbeatable price competition (Anderson 2009a: 92). Another factor that is a perceived challenge to the monopoly and gatekeeper control over supply of content is the emerging culture of the user collaborative exchange of information for purchasing and other general decision-making in daily life (Jarvis 2009: 76). Overall, the key thesis of these theorists is that digital technology and the Internet, a convergence of computing and telecommunications, has removed scarcity of storage space, limited distribution channels and gate-keeping control over content supply and innovation. By doing so, they have replaced the centralised control of the old monopolies and oligopolies and empowered consumers or users with an abundance of choice.

However, political economists such as Freedman (2012), Mansell (2012) and Garnham (1990) argue that this abundance and the emerging digital economy, as projected by the above-mentioned theorists, does not necessarily result in the end of monopoly and market concentration in the creative industry. Garnham (1990: 160) points out that the cost of production or innovation is greater than the cost of distribution. The production costs still need to be compensated for even

when the distribution costs drop to a near-zero sum thanks to digital technology and the Internet. He also identifies a need for corporations to re-create an artificial scarcity to maintain price control by establishing monopolistic distribution channels and commodifying audiences in exchange for advertising revenue (ibid.: 161). To minimise the risks from popular demand, businesses have a tendency to create a 'cultural repertoire' which may hinder diversity of choice (ibid.).

Like Garnham (1990), Mansell (2012: 121) suggests that as information is still exchanged in the marketplace, be it virtual or physical, private companies have strong incentives to nurture information scarcity through, for example, pay-wall business models, proprietary standards and limited interoperability. Business incentives for sustaining and recreating artificial scarcity encourage a tendency towards monopoly and market concentration. Similarly, while acknowledging the impact of digital technology and the Internet on creative industry, Freedman (2012) argues that the technological opportunistic view that abundance and the 'niche' and 'free' economies will eliminate monopoly and market concentration is flawed. He argues that the abundance of information, decentralised distribution and the digital economy portrayed by Anderson (2009a, 2009b), Downes (2009) and Jarvis (2009) are abstracted from the economic and social relations of capitalist and neo-liberal society based on supply-demand logic and the need for capital accumulation.

Given the environment in which creative products are produced and exchanged, monopolies or oligopolies, bottlenecks and artificial scarcity are apparent in the new digital economy and so is the tendency toward market concentration. Market concentration is likely to encourage proprietary standards, a notion that Michalis (2014) deems desirable for businesses in both the content and infrastructure branches of communications. Therefore, the abundant digital economy portrayed by Anderson (2009a, 2009b), Downes (2009) and Jarvis (2009) is not likely to eliminate scarcity and tendency toward concentration. Neither is the concept of 'commons', which refers to a resource for joint use or equal enjoyment by a number of people and is thus held as being 'free' (Lessig 2002: 19). It will, at best, pose as competition against the traditional monopoly or oligopoly control over the market.

In addition to the arguments put forward by these political economists, Doyle (2002) explains that the tendency for concentration in the creative industry results from a characteristic of the industry that is derived from economies of scale and scope. This characteristic also applies to other branches

of communications. The meaning is that businesses in this industry benefit from expansion both horizontally and vertically in terms of profitability and efficiency gains. Efficiency gains lower market entry costs and can be achieved by exercising market power to negotiate cheaper resources, shared production and transmission resources and exploitation of electronic communication platforms. These gains contribute to greater profit. Horizontally and vertically integrated businesses also benefit from market power, which allows them to exclude rival companies, (to an extent) set consumer prices and maximise both economies of scale and scope from their market share. For media companies, large market share means greater revenue from advertising. For these reasons, there is a great tendency for concentration in the communications market despite the abundance of distribution channels and content.

In line with the political economists and Doyle (2002), academics have documented the increasing trend of mergers and acquisitions within the same and cross- communications sub-sectors, resulting in market concentration (Iosifidis 2011a: 175). This tendency toward concentration is a negative effect of convergence at the organisational and industrial levels. Bagdikian (2004) reports that the merger trend has expanded in scope outside the traditional media market into the Internet, concentrating the US media industry in the hands of the powerful few. These include Time Warner, Disney, News Corporation, Bertelsmann and Viacom (formerly CBS). McChesney (2005) remarks that media-market concentration is global and criticises the intensifying market concentration for its threat to local culture through foreign investment injections into local media. Noam (2009: 6) indicates that merger trends are not unique to the media branch of communications, but are greater in number in the information and telecommunications branches (though the gap is closing). He also notes that there is more concentration among electronic and digital media branches than those that are less electronically and digitally dependent. Noam (ibid.: 6) further comments that this trend is likely to continue and that future media are likely to comprise 'a few relatively focused integrator firms' that supply various combinations of smaller specialist productions. He highlights that most of the industry convergence and concentration is taking place on the Internet platform. This remark resonates with Castells' account of corporate media's new strategy to merge (2007: 252). An example of this is the merger of NewsCorp (media conglomerate) and MySpace (an online social media network) in 2006.

Iosifidis (2011a: 46 - 66) indicates that communications market concentration is present both in the US and the UK and affects both the telecom and media (print, broadcasting and radio) branches. He further suggests that such concentration undermines the public interest, which has been the core

value for regulation in both telecom and media. It is so because market concentration undermines competition and thus business incentives to continue creating new products and services (Noam 2009; Castells 2007; McChesney 2005). Market concentration also restricts consumer choice and may exclude content that is good for the public, but falls out of the range of programmes that the market deems profitable to produce. This situation, according to Doyle (2002), hinders media plurality and diversity. According to Van Cuilenburg and McQuail (2003), the plurality, diversity, choice and public good value of certain types of content all constitute public interest. The market's covert cooperation with intelligence agencies exposed by Mr Snowden serves as fresh evidence that the market can undermine users and public interest in data privacy.

The threat of market concentration against plurality, diversity, innovation, privacy breach and public interest is central to the on-going discussion on the future network management principle for the Internet, known as the net neutrality debate. The concern for these values led to suggestions of regulatory intervention in response to convergence. Examples of such efforts are seen in the former FCC Chairman Genachowski's open Internet speech (2009: 7), Ofcom's approach to traffic management and net neutrality (2011) and the open Internet speech (2014: 2) of Vice-President Kroes (European Commissioner responsible for European Digital Agenda). These efforts are geared toward preservation of the open Internet in support of innovation and diversity. Given these policy responses, this research examines how net neutrality policy, an infrastructure policy concerning access, is formulated.

Implications for infrastructure or technological development

Technological convergence of computing and telecommunications has opened up new content access and distribution channels. It enhances media viewing flexibility and affords new revenue streams to communications businesses. Examples of market or service convergence taking place on the Internet include online gaming, voice over IP (VoIP), video calling, web, e-mail and data, file sharing and Internet video (OECD 2012: 167). Of these services, Internet video is predicted to show the most significant and continuous growth. In 2010, Internet video traffic accounted for 40% of the total global consumer Internet traffic and is predicted to rise continuously to 62% by 2015 (ibid.: 66). Corresponding to this trend is the OECD Communications Outlook (2013: 180) which indicates that the Internet has become another broadcasting distribution channel. The report refers to IP delivered audio-visual services as over-the-top service (OTT).

Reinforcing the OECD report on continuous growth of OTT is the pressure broadcasters are facing from plans in the UK (Ofcom 2014a) and Europe to reallocate the 700MHz band spectrum, which is currently used by terrestrial broadcasting networks, to wireless and mobile broadband across Europe by 2020 (European Commission 2014). In its consultation, Ofcom (2014a: 4) anticipates IP delivered technology to be complimentary for free-to-view-TV, with a complete switchover after 2030. The European Broadcasting Union (EBU) also reports that European broadcasters and studios are exploring IP-delivered media (2015).

The available OTT service currently includes two broad types of services: managed IP delivered audio-visual services and those delivered via the open (or unmanaged) Internet. The use of the term OTT to refer to such services is seen in academic papers and industry reports, such as the work of Michalis (2014), OECD reports (2013; 2012) and Accenture (2011). Given their significant growth, OTT services are the key drivers of IP traffic. The Internet-delivered audio-visual service is, therefore, used in this research as a case to illustrate the implications of convergence for infrastructure and technological development.

Simpson and Greenfield (2009), Simpson (2008), Wilkinson (2008) and Anderson (2007) provide a clear technical classification of the currently available OTT services based on types of delivery networks and content. According to these authors, IPTV is live or pre-recorded professionally produced television content transmitted through a private IP network which allows the quality of the service to be managed. This private IP network differs from the public Internet in that it is an additional service to that of the open Internet and uses a different management principle which allows the content transmission to be managed (EBU 2011: 20). Both the private and open Internet, however, are carried by the same physical network infrastructure. Examples of these services include BT TV and AT&T's Uverse.

The IP VoD or VoD service is professionally produced pre-recorded content including, for example, films and traditional television programmes, transmitted via the public Internet. Examples of VoD services include Hulu, Netflix, and Amazon LoveFilm. Internet TV is similar to IP video on demand, but its range extends to include streaming of live television content. Examples of such services include BBC iPlayer and ITV Player. This service, unlike IP VoD, includes live or pre-recorded programmes and uses a different protocol to transport the content and thus provides a linear and non-linear viewing experience. Internet Video differs from the IP VoD and Internet TV services mainly in content type and quality.

Unlike other services, Internet Video is user generated. Thus, the content of this service is much smaller and consumes less bandwidth in transmission. Also, this user-generated content is not subject to broadcasting content regulations and standards because they are not produced for mass distribution the way traditional broadcasting materials are, although some user-generated content is viewed by millions. A summary of the OTT service classification is provided in Table 2.

Table 2 Classification of OTT Services

Type of OTT Services	Type of delivery network	Type of content	Type of service	Examples of services
IPTV	Private managed IP network	Professional TV broadcast content, Films and TV series	Live and on-demand	• BT TV (UK) • AT&T's Uverse (US)
IP VoD or VoD	Unmanaged public Internet	Professional TV broadcast content, Films and TV series	On-demand only	• Hulu (US) • Netflix (US) • Amazon LoveFilm (US)
Internet TV	Unmanaged public Internet	Professional TV broadcast content, Films and TV series	Live and on-demand	• BBC iPlayer (UK) • ITV Player (UK)
Internet VDO	Unmanaged public Internet	User-generated content	On-demand only	• User-generated content distributed via platforms such as YouTube

Based on the descriptions of such online video services, the emphasis of this research is placed on audio-visual services delivered via the unmanaged public Internet. The rationale for this emphasis is in the type of network these services rely on, the capacity requirement and the complex set of social, democratic, public interest and economic values attached to the services. IPTV is also considered as a factor that can undermine the capacity of the physical network infrastructure that carries both managed and unmanaged IP services if its development is unregulated.

As the OECD statistical record (2012) suggests, Internet TV and IP VoD are the key drivers of Internet traffic. According to Cisco's Global IP traffic 2012-2017 (Cisco 2013), the IP traffic generated by the consumer sector has always been significantly higher than that generated by

businesses. The report also predicts that by 2015 up to 62% of consumer IP traffic will be bandwidth-intensive audio-visual content delivered by Internet. Such content weighs heavily on existing network infrastructure. It can, therefore, be inferred that convergence has contributed to new services that are increasingly overwhelming the network. This highlights an imbalance of growing demand for bandwidth and static supply of network capacity, which has sparked the net neutrality debate.

However, from the perspective of the Political Economy of the Information Society (PEIS), the network capacity problem and the subsequent net neutrality debate are not purely technology driven. According to Garnham (2011), telecommunication networks and services have been developed for business use. They are, therefore, funded by businesses. Domestic use, such as consumer Internet access to Internet TV content like BBC iPlayer, has expanded because of the economies of scale in the provision of such services to businesses. This domestic use, which now drives IP traffic growth and contributes to the network capacity problem, is viewed as a cross-subsidy from business use (ibid.). However, mutual interest in this cross-subsidy model is now waning: businesses generate much lower IP traffic and, therefore, spend less on IP network services, while domestic use continuously generates more IP traffic yet brings much less revenue to network proprietors than business users do. Given such circumstance, network proprietors now have both the means and the incentives to provide content over their networks or charge content providers for using their networks to access viewers to maximise their return on investment. These incentives conflict with the interests of content providers in maximising their economy of scale and scope through expansion of their content outlets.

As an OECD report (2013) suggests, the Internet has become the key alternative broadcasting distribution platform. Its greatest benefit to content providers lies in the low market-entry barrier as the Internet, by design, allows content providers to access viewers without being subject to discrimination or access fees imposed by network providers or ISPs. Thus, an economic argument can be made that the network proprietor desire to change the existing Internet protocol will undermine content provider interests (Economides 2011). The attempt by network proprietors to provide content or to charge content providers for access to viewers (access tiering) is likely to result in market concentration in both the physical and content layers.

Both the vertical merge and fees imposed on content providers, if allowed, will enhance major network proprietors' market strength through control of their networks. According to Economides

(2011), small network providers and ISPs may not be able to compete due to inferior resources; they may find the cost of access to viewers too high and would, therefore, be forced to exit the market. In addition, since Internet TV content is simply traditional broadcast content, the economics of the content sector applies. As a result, neither the vertical merge between network proprietors and content nor access tiering is conducive to content innovation and diversity.

The implication of convergence for infrastructure and technology development is an imbalance between available network capacity and the growing demand for bandwidth. This situation has always existed and will persist. Network proprietors' preferred response to this problem has been to introduce new services that prioritise certain IP traffic over others and charge for prioritisation or guaranteed delivery. This, according to the Political Economy of Information Society (PEIS) perspective (Garnham 2011: 53), conflicts with content providers' interest in the non-discriminatory nature of the Internet's current management principle. This principle gives them the advantage of a low market-entry barrier. The supply-demand imbalance is, therefore, as much a technical issue as it is economic. Given the importance of the Internet, this conflict of interest has led to attempts to change the existing communications policy. However, since the convergence of broadcasting and telecommunications involves a multitude of stakeholders with competing interests, the development of such policy is challenging.

The legacy of cross-market sector convergence also results in what Garnham (1996) refers to as a regulatory dilemma due to different regulatory criteria underpinning telecommunications and media. The former is based on economics; the latter is based on political and cultural goals (ibid.: 284). Built on the chain effect of neo-liberal ideology, convergence and subsequent regulatory challenges, this research examines the net neutrality policymaking process emerging in response to convergence.

2.3. Communications policy: the UK and US cases

This section moves to detail the objectives and development of communications policy emerging in response to the ideologies and convergence discussed in the previous sections. It provides policy and regulatory context for the development of net neutrality policy concerning access to communications infrastructure and how that access is managed. The specific details and development of net neutrality policy will be discussed in section 3.4.

2.3.1. Communications policy and its objectives

Communications policy, according to Iosifidis (2011a), Michalis (2007), Van Cuilenburg and McQuail (2003), Napoli (2001) and Aufderheide (1999), involves two interconnected aspects: distribution infrastructure or carriers (e.g., telephone, telegraph, cable, and satellite) and content (e.g., voice, images, text and audio-visual). In the context of Internet policy and regulation, the Internet infrastructure is built on physical telecommunication infrastructure, but is not always legally treated as telecommunications services. In the US, for example, the FCC previously classified the Internet access service as an information service not a telecommunications service (FCC 2014: 9). Such action means Internet service could not be subject to common carriage rules. However, the regulator reverted to its original decision in 2015, making Internet access service a public utility subject to common carrier regulations under Title II of the 1934 Communications Act in 2015 (FCC 2015a). In the UK and Europe, the existence of the Local Loop Unbundling (LLU) mandate implies that Internet service in the UK and Europe is treated as a telecommunications service. Content refers to media content in various formats (e.g., TV broadcast, images, text and audio).

According to Iosifidis (2011a) and Van Cuilenburg and McQuail (2003), both aspects of communications have been regulated toward the goal of public interest. The definition of public interest or what constitutes public interest varies across time and jurisdictions, depending on political, social, technological and economic contexts and aspects of communications (infrastructure or content). Iosifidis (Iosifidis 2011a: 25 - 27) identified three variations of public interest, based on concepts offered by Downs (1962) and McQuail (1992). One such variation equates public interest to 'the will of the people' (Downs 1962 cited in Iosifidis 2011a: 25). This variation of public interest was adopted by the US regulatory agency, the Federal Communications Commission (FCC), in 1980s and interpreted as 'popular interests' (Iosifidis 2011a: 25). Another variation conceptualises public interest based on absolute standards and values with no regard to individual preference, for example, the system of public service broadcasting (PSB). The other sees public interest as a common interest that is shared and agreed upon by the whole society through a decision-making process of political institutions (Iosifidis 2011a: 26).

Corresponding to McQuail's (1992: 3) definition of public interest as benefits that extend beyond individual intersts, Van Cuilenburg and McQuail (2003: 184) identify three broad objectives of public interest: political welfare, social welfare and economic welfare. These include democracy,

freedom of communications for political welfare, social and cultural benefits for social welfare, and innovation, employment and profit (or revenue) for economic welfare. Building on McQuail's definition of public interest, Iosifidis (2011a: 27) defines it as 'collective cultural, political, social and informational benefits to society, which serve both the democratic processes of political participation and cultural, social and economic well-being'.

The definitions of public interest offered by Iosifidis (2011a) and Van Cuilenburg and McQuail (2003) are based on the same core values. Iosifidis' definition of public interest (2011a: 27) is used in this research as one of the parameters for its assessment of the net neutrality policy process for the comprehensiveness of the term. Iosifidis' definition of public interest clearly identifies and covers all the values underpinning contemporary communications policies and relates them to the function of the communications sector in society. The broad objectives and values of public interest suggested by Van Cuilenburg and McQuail (2003: 184) are used to explain the dilemma in regulating the convergence of telecommunications and media. According to Iosifidis (2011a), Michalis (2007), Van Cuilenburg and McQuail (2003) and Garnham (1996), telecommunications and media emphasise different objectives and values of public interest. The former prioritises the economic welfare objective while the latter prioritises political and social welfare objectives.

As for specific regulatory criteria to serve the public interest in telecommunications and media, the core sector specific regulatory criteria are similar on both sides of the Atlantic. According to Iosifidis (2011a), Michalis (2007), Napoli (2001), Aufderheide (1999) and Garnham (1996), the common regulatory criteria for the telecom sector in the US, UK and Europe are universal, non-discriminatory, fair and equitable access to the infrastructure at a reasonable and affordable price. These economic criteria also contribute to social welfare, but cannot fully deliver all the social and cultural benefits of communications. The common and core regulatory criteria for media content in these jurisdictions are two-fold (ibid.). One is structural regulation of ownership control to ensure a plurality of sources. The other is content regulation to ensure provision balance and a variety of programme types for a range of audiences, including minorities and people with special needs (ibid.). These regulatory criteria remain salient to date. However, the emphasis and interpretation vary depending on the political, economic, social and technological contexts in different periods as communications policy changes in response to the environment in which it is applied. These changes will be discussed in section 2.3.2. Since the 1990s, the different regulatory criteria for telecommunications and media content have competed against one another as convergence has

become a dominant trend. These competing regulatory criteria, resulting in a convergence regulatory dilemma, will be discussed in section 2.3.3.

2.3.2. History of Communications policy and regulation: The US, UK and Europe

As stated at the beginning of this chapter, communications policy emerges from a combination of factors. Policy and regulatory precedents form two of these factors. This section, therefore, reviews how communications policy and regulations have evolved since the 1940s in comparison to market developments over the same period. The historical record of communications policy evolution highlights the degree of path-dependency and shifts to a new policy objective and, thus, serves as a means to explain net neutrality policy development.

Van Cuilenburg and McQuail (2003) summarise the development of communications policy in the US and Europe in three phases: 1) emerging communications industry policy (mid-19th century to the beginning of the Second World War), 2) public service media policy (1945 − 1980s/1990s) and 3) new communications policy paradigm (1990s onward). Michalis (2007) documents the development of Europe's communications policy, starting from the 1940s. Aufderheide's (1999) record of the development of communications policy in America captures the key changes since 1934. The work of these authors highlights differences and similarities in communications policy across the Atlantic.

In this comparison, the UK will be included as part of Europe because, based on Michalis's record (2007), communications policy in both the UK and other Western European countries started to develop based on Keynesian ideology. In an attempt to defend its national communications policies once it joined the EU, the British government tried to influence these policies at the European level. However, the UK is bound by the European Communities Act (1972) and EU communications legislation overrides that of the UK. However, there are regulatory areas where the UK differs from the rest of Western Europe. In such cases, the exceptionality of the UK context will be highlighted. Otherwise, it will be included as part of the European context.

According to Michalis (2007), Van Cuilenburg and McQuail (2003) and Aufderheide (1999), the key difference between European and American communications policy is rooted in histories that define the relationship between the state and its citizens, as Hartz (1991: 5 - 14) observes, and the social market concept (Curran and Seaton 2010: 374 - 78). This history and the social market

influence resulted in different foundations for communications provisions in the US and Europe. Communications services in Europe and the UK were originally provided by the state, while in the US such service provision has always been private. During the 1940s and 1960s, Europe, under the influence of Keynesianism, believed in state intervention as a tool for generating productivity and viewed telecommunications and broadcasting as public services 'to be produced and distributed by institutions' (Michalis 2007: 34). The US, on the other hand, started under the influence of corporate liberalism and subsequently fostered large and stable industries (Aufderheide 1999: 14 - 18). Corporate liberalism refers to limited state interference with private operations beyond imposing service obligations such as universal service. This approach, ironically, endorsed a monopoly provision of telecom and broadcasting services by private entities. Despite different ownership models in Europe and the US, both services were heavily regulated for access and universal service (Van Cuilenburg and McQuail 2003: 191).

The tradition of public service provision in Europe, particularly in the UK, makes public service broadcasters (PSB), such as the BBC, ITV and Channel 4, dominant content providers, catering for a wider range of the viewing population, as evident in the channel share in all homes from 1982 to 2012 (Ofcom 2014b: 187). Despite a decline of PSB channel share, the report shows that the collective shares of all the main PSBs stood at 52% in 2012. In the US, non-commercial broadcasters serve 'the specialty audience' that falls outside private broadcasters' economic interest (Aufderheide 1999: 21). They are funded by private memberships, donations and grants.

The differences in communications history between Europe and the US has resulted in different degrees and speed of development of free market: neoliberalism emerged in the 1960s as an alternative to the European Keynesian economic approach and the US 'New Deal' programme, which emphasised regulation towards equality. The historical records of Michalis (2007) and Aufderheide (1999) show that, along with the emergence of a neoliberal thesis concerning free markets, there came the emergence of political awareness of technological advances, particularly in the field of electronics, and their importance to the economy. The first policy decision that marked the shift away from state monopoly in communications in Europe is the European Court's ruling that the PSB monopoly over television 'constituted…a breach of the principle of free movement of goods' (Michalis 2007: 88). The ruling also conceptualised television broadcasting as a type of telecommunications service to be transmitted via a new telecommunication transmission technology (cable) that signalled a change in policy towards free market competition.

The US shared a similar experience when the FCC's ruling in 1972 'made cable a viable independent service' and allowed cable operators access to the broadcast market (Aufderheide 1999: 21). In this respect, cable service bears evidence of service or market convergence as a result of technological convergence. Technological advances and policy changes seen in the case of cable service provided both means (technological advances and convergence) and incentives (service or market convergence) for industry convergence. The political awareness of the importance of technology to the economy materialised and turned European and American policymakers' attention towards information and communications technology (ICT) (Michalis 2007: 102). While Europe adopted its technology-push initiatives in the 1980s and pursued internal market liberalisation, with external trade protection (ibid.: 130), the US, having fully developed its communications sector technologically and commercially since the 1970s, advocated a series of deregulatory and liberalising activities (Aufderheide 1999: 21). One difference between Europe and the US during this period was that deregulation and liberalisation in Europe at the time meant a reduction of state power, but in the US it meant a reduction of corporate control in order to allow new entrants into the market to foster competition.

By the mid-1980s, neoliberal pro-market policies became dominant following the 'path-breaking case' of British Telecom (BT) in Europe (Michalis 2007: 143-44). The case featured a complaint by Telespeed Services Ltd against BT for its abuse of market power lodged with the European Commission's (EC) Directorate General (DG) for Competition. The Commission found against BT and maintained that 'the coopetition provisions of the EU Treaty may override a member state's international obligations' (ibid.: 144). This decision ended the history of European state monopoly of telecommunications and, for the first time, the Commission exercised its power to support competition against a state monopoly. In that same year, the British government announced a plan to privatise BT. The plan was completed in 1984 following the enactment of the Telecommunications Act. This Act removed BT's monopoly in the telecommunications sector and marked the establishment of a non-ministerial government department, Office of Telecommunications (Oftel) to promote competition in the telecom market. Within the same decade, Britain opened up the television broadcasting market on all technological platforms including cable, satellite and terrestrial (Michalis 2007: 158). Meanwhile, under neo-liberal influence, the FCC significantly minimised its regulatory role and made facilitating new market entrants its objective for granting license renewals and based decisions on whether or not to intervene in private operations on a company's competitive impact (Aufderheide 1999: 26 - 27).

Deregulation, privatisation and liberalisation have since permitted cross-sector service provision allowing businesses to fully exploit the potential of new technologies. From this development, convergence emerged as a theme at the technological and service levels. Policies on both sides of the Atlantic and regulations introduced in this period reflect a shift from social equity to economic efficiency. However, the emphasis on economic values and, thus, degree of free market differ among Europe, the UK and the US. This difference is most obvious in the broadcasting sector due to political and social values that cannot all be quantified.

Despite deregulation, reduced funding, market tests and challenges that may restrict European PSBs' competitiveness, PSB services continue with the BBC, while the UK PSB is doing exceptionally well (Iosifidis 2011a). This is evident in the domination of UK PSBs in channel share in all homes (1982-2012) and in their share in multichannel homes in 2011-2012 (Ofcom 2014b: 186, 200). As for the US, the shift is in relaxation of rules to allow commercial broadcasters more flexibility in their service provision for increased profit and the re-interpretation of public interest for broadcast service (ibid.). This shift in US policy, according to Feintuck (2004: 24), highlights a 'near exclusive emphasis' on private interest, which has resulted in 'failure to serve the "public interest"' in the democratic value of equality among citizens. Compared to Europe, institutional restructuring due to deregulation does not apply to the US because telecom and broadcasting services have always been supplied by private entities.

The communications policy development, reviewed in this section, demonstrates that technological, market and policy changes are all interconnected. The emerging technology at the time, cable, provided businesses in both telecom and content sectors with means to offer cross-sector services. Liberalisation then endorsed such practice. Since then, convergence from these levels began to grow. It has intensified since the emergence and commercialisation of the Internet in the late 1980s and early 1990s.

2.3.3. The Internet and Convergence: A new policy paradigm for communications

The Internet itself is a product of technological convergence between computing and telecommunications. Its technical capacity supports further communications service development and usage that implicates convergence, enabling access to telecommunications and broadcasting services and transmission of voice, data, images, words, music and audio-visual content. The

Internet is regarded as the ultimate communications service and platform featuring open access, flexible forms of communication and the capability to carry any type of content, be it voice, data, audio or audio-visual (Aufderheide 1999: 38). Backed by policies supporting corporate and service convergence, the Internet realises its full technical potential as a communication platform in the way that cable TV networks could have. With such potential and convergence supporting policies, the Internet, has challenged the traditional operation of telecommunications and broadcasting. It closes the gap between two distinct communications sectors: telecom and broadcasting (Iosifidis 2011a: 187). Communications services have since become increasingly convergent now that technological barriers that had separated service provision have been removed.

Like cable, the Internet is changing the communications landscape by supporting convergence. These changes have resulted in another shift in communications policy on both sides of the Atlantic. Ahead of Europe, the US has anticipated convergence since the 1930s and created the FCC, a convergent regulator to oversee both telecom and broadcast branches of communications. When the Internet boomed and convergence became an important trend in communications, the FCC dominated the development of the US Telecommunications Act (1996), which covered both telecommunications and broadcasting regulations. The objective of the regulation is competition (Aufderheide 1999: 61 - 79). As for infrastructure, Title I mandates local phone companies to resell their services at wholesale rates and also in piecemeal (or unbundled) form to allow for new market entrants and promote competition in the last local service (ibid.).

Title III endorses cross-sector service provision, allowing cable operators, as gatekeepers of television programming, to offer telephony service and allowing phone companies to offer audio-visual service (Aufderheide 1999: 61 - 79). Title II endorses cross-media ownership and relaxes its scrutiny of public trustee obligations for broadcasters (ibid.). All these provisions are aimed at promoting competition and choices of communications services as these are in the public interest. The Telecommunications Act (1996) reflects a further relaxation of rules that previously prevented, for example, cross-media ownership and cross-sector service provision in favour of competition. Title III reflects a favour for facilities-based competition in telecommunications services and the legislative intention to break down the monopoly in the telecom market. However, the relaxation of media ownership control resulted in more industry consolidation.

A similar policy and regulatory trend has also been observed in Europe and the UK. During the first half of the 1990s, the EU communications policy (the Information Society) focused on liberating

Europe's telecommunications market (the EU policy). During the latter half of the 1990s, the policy focus shifted to the Internet as a means to improve economic growth in competition with the US (Michalis 2007: 193). The EU regulatory objective for communications has also shifted to competition to facilitate harmonised regulations across technology platforms in Europe (ibid.: 191 - 215). Regulations have been aimed at stimulating Internet network infrastructure building, or broadband rollout, by fostering competition. One example is the EU regulation that mandates Local Loop Unbundling (LLU). This regulation is enforced in all member states, including the UK. It has been applied to operators that are defined by the national regulatory authority (NRA) as having significant market power (SMP).

The SMP is a condition under the 2002 regulatory framework for electronic communications networks and services that is used to justify regulatory intervention to impose certain obligations on undertakings that have significant market power to rectify a market failure (European Commission 2002). Undertakings are deemed to have SMP when they are found to hold, whether individually or jointly with others, positions of economic strength, thus affording them the power to behave 'to an appreciable extent independently of competitors customers and ultimately consumers' (ibid.). The NRAs are responsible for identifying undertakings with SME following the European Commission's guidelines on market analysis and significant market power (Commission Guideline 2002/C 165/03). The LLU regulation requires telecommunications operators to open their network infrastructure to competitors, allowing them to install new equipment (e.g., a Digital Subscriber Line or DSL) and offer broadband Internet service to consumers (Michalis 2007: 194).

In addition to the LLU regulation, the 2002 EU regulatory framework for electronic communications was introduced to further liberalise the telecom market and support the technologically convergent communication environment (Michalis 2007: 210). The key feature of the framework is its heavy reliance on competition rules. The 2002 EU framework has been reformed and became the 2009 revised regulatory framework for electronic communications, comprising the Framework Directive and four specific directives. These include: authorisation, access and universal service, privacy and electronic communications directives. The revised framework is designed to further liberalise the telecommunications market, promote competition and stimulate investment. In this framework, net neutrality is for the first time defined as a regulatory objective for access (European Parliament and the Council Directive 2009/140/EC).

The reliance on competition rules has also influenced the broadcasting branch of communications. Examples of that include the narrowing definition of state aid for PSBs, merger and media ownership rules that facilitate cross-media ownership and the sale of live-event coverage rights to broadcasters (Wheeler 2004, 2010). In addition, there is the Audio-visual Media Services Directive (European Parliament and the Council Directive 2007/ 65/EC) which revises the 1989 Television without Frontiers Directive and aims to keep pace with viewing pattern changes as a result of technology advancement and convergence. It extends content regulation, such as protection of minors, prevention of racial hatred and prohibition of surreptitious advertising, to non-linear audio-visual services (EUROPA 2008). Despite the commitment to competition, EU policy reserves some of the traditional content regulation to ensure media plurality and cultural diversity. This reservation of the traditional content regulation allows member countries to impose quotas on broadcasters' programming to protect and promote European content.

In the UK, the British government proposed in its 2000 Communications White Paper that both institutional and normative regulatory convergence legislation was needed in order to keep pace with the advent of the Internet and convergence (Iosifidis 2011a: 194). Following this recommendation, the government proposed the Communications Bill of 13 July 2001. This Bill became the Communications Act (2003). According to Smith (2006), the rationale for reform is that technological and market convergence has rendered the traditional policy and regulation, based on different distribution technologies, outdated.

The Communications Act (2003) established the Office of Communications (Ofcom) as a convergent regulator charged with overseeing both the content and the conduit. Similar to the US Telecommunications Act (1996), the UK Communications Act (2003) relaxed certain media ownership rules to allow for cross-media ownership. It can be interpreted that this provision enhances broadcasters' competitiveness because by allowing businesses to expand horizontally and vertically, the law allows businesses to benefit more from efficiency gains, as described in section 3.2.2. As for the oversight of telecom operations, universal service and access remain key objectives for regulations in the Communications Act (2003) as these goals support competition and vice versa.

In practice, the regulator's (Ofcom) interpretation of its duties prescribed by the Act demonstrates an inclination toward prioritisation of *consumer interests* (private interests of individuals, e.g., programme or service choices) over *citizen interests* (benefits beyond that of private interests, e.g.,

the social, democratic and political values attached to broadcast content) (Livingstone et al. 2007; Harvey 2006). According to Harvey (2006: 69), this is evident in Ofcom's adoption of the term '*citizen-consumer*,' which 'linguistically and philosophically' subordinates '*citizen*' to '*consumer*'. Ofcom's interpretation of its duties, as reflected in its word choice – '*citizen-consumer*' - reinforces the dominance of the consumer sovereignty theory and 'of the relative and adjectival significance of the citizen' (ibid.).

Similarly, an analysis of Ofcom's discourse by Livingstone et al. (2007: 629) indicates that the regulator uses *citizen* and *consumer* as binary terms, but fails to recognise that, in practice, *citizen* and *consumer* interests do not neatly align. They also point out that there remains no clear mapping of both citizen and consumer interests within Ofcom's specific policy tasks or available policy tool, which is competition (ibid.). Livingstone et al. (2007) and Harvey (2006) are concerned that Ofcom insists on using competition as a means to protect and promote the interests of citizens and consumers as they are not convinced that competition is the most effective mechanism for serving the regulatory objective for audio-visual production.

The reliance on market mechanism is also highlighted in the rhetoric of competition and choice concerning the plurality of sources and diversity of content and viewpoints which are to be sustained by market mechanism and limited regulatory intervention (Freedman 2008: 76 - 77). Since consumers and their choices (media products) are parts of the market and their purchasing decisions are what businesses compete for, the prioritisation of consumer interests and rhetoric of choice clearly indicates a shift to competition regulation for both telecom and broadcasting.

Communications policy development since the emergence of the Internet on both sides of the Atlantic highlights a common shift toward competition regulation and facilitation of service convergence. In addition to technological changes, the move toward the pro-market approach in communications policy in the US, UK and Europe results from neoliberal pressures that have gradually transformed the whole communications environment (Freedman 2008; Flew 2007; Harvey 2006; McChesney 2000). This includes the state's role in shaping the communications environment, market structure, service provision and content production. Neoliberalism has reset the role of state to that of market facilitator through waves of deregulation, privatisation and liberalisation (Freedman 2008: 47-53). Neoliberalism has also reinterpreted the core principles of communications policy, free speech and public interest. Free speech is reinterpreted as freedom

from restrictions for corporations to provide communications products and services as they see fit. As such, freedom gives people choices and thus freedom to communicate while public interest is reduced to choices (Freedman 2008: 54-79).

However, the degree of reliance on market mechanisms vary. EU and UK communications policies and regulations are more conservative than those of the US in terms of market liberalisation, particularly in the area of broadcasting regulation. The policy and regulatory developments in these regions demonstrate convergence at both institutional and substantive levels. The institutional convergence is evident in the establishment of convergent regulatory authorities like the FCC in the US and Ofcom in the UK to oversee both telecommunications and broadcasting. At the substantive level, communications policies have responded to convergence and the blurring boundaries between technology platforms by endorsing cross-sector service provision. Therefore, communications policy has become convergent in the sense that sector-specific barriers to cross-sector and cross-media service provisions have been removed to facilitate market convergence. Competition has become a favoured regulatory mechanism across all communications sectors.

In terms of regulatory criteria, universal service and access remain salient in the infrastructure regulation in the US, EU and UK. However they are to be sustained by market mechanism and minimal regulatory intervention. Certain specific content regulation to ensure plurality of source and content diversity remains in place in addition to competition regulation. However, the increasing reliance on competition regulation is causing concern that the social and cultural values of media content may fade away, as competition rules alone are not sufficient to sustain these values (Iosifidis 2011a: 209). Recognising such concern, this research argues that although social and cultural goals prevail, the balance between the competition and social and cultural objectives weighs differently across these jurisdictions.

EU regulation appears the most protective and supportive of social and cultural values compared to those of the UK and the US. Title II (Broadcasting Services) of the US Telecommunications Act (1996) shows the greatest reliance on competition and continued aggressive deregulation. It permits cross-ownership of broadcast and cable systems and provides broadcasters with greater security in maintaining their licenses and more spectrums (Aufderheide 1999: 67). The Act maintains the quid pro quo condition that subjects broadcasters to public trustee obligations in exchange for their continued financial viability (license), but does not specify what these obligations are or extend them (Aufderheide 1999: 67 -68). Since the Act has not changed the basic terms of

broadcasting policy, the US version of public service remains subject to the Public Broadcasting Act (1967), which labels such service as 'non-commercial cultural service' (ibid.: 21). Based on this definition, public radio and TV broadcasting in the US, unlike that in Europe, has evolved into platforms for specialty audiences and civil activities with limited cultural presence (ibid.). In contrast to its objectives and subsequent deregulation, the Act reinforces media concentration and continues to shelter oligopoly in the media sector.

Communications policy since the commercialisation of the Internet reviewed in this section demonstrates a gradual change toward promotion of market competition and dependency on policy precedents. Such precedents are based on the values of access, universality, public interest, competition, choice, plurality of sources and diversity of media content and cultures. The changes in policy measures and path dependency, in terms of values underpinning the previous and present communications policies, form a parameter for assessing the development of the net neutrality policy in the US and the UK. Communications policy from the 1990s onward indicates co-ordination between infrastructure and content policy. The policy also reflects a heavy emphasis on the economic values of communications almost to the exclusion of others since virtually every value can be put into economic terms.

Since the 80s, infrastructure access policy and regulations in the US, UK and EU have aimed at facilitating cross-sector and cross-media service provision rather than promoting social and cultural values attached to broadcast content. The liberalisation of the telecom branch of communications and the limitation of the market in supplying public good have raised concerns over the protection of social and cultural values attached to broadcast content that is migrating to the Internet. In response to changes in the communications market and concerns over market limitation, communications policies on both sides of the Atlantic continue to evolve. One of the emerging policies is the net neutrality or open Internet policy, which aims at ensuring that access regulations for the Internet support these values and provide sufficient range and quality of services compatible with the needs and demand for information.

2.4. Net neutrality policy: US and UK

Building on the history of communications policy and regulation in the US and the UK, this section conceptualises net neutrality as a policy objective. It addresses the lack of clear and unanimous

definition of the term and the multitude of values (e.g., fairness, civil liberty and economics) involved (Cave and Crocioni 2007: 670) which make conceptualising net neutrality difficult. The multi-dimensional character of net neutrality also makes the formulation of this policy complex. Based on the scope of a net neutrality definition, this section explores net neutrality policy development to date.

2.4.1. Conceptualising net neutrality: a struggle for control

Amongst a variety of net neutrality definitions, the inventor of the web describes it as:

> '*If I pay to connect to the Net with a certain quality of service, and you pay to connect with that or greater quality of service, then we can communicate at that level.* That's all. It's up to the ISPs to make sure they interoperate so that that happens. Net Neutrality is NOT asking for the internet for free. Net Neutrality is NOT saying that one shouldn't pay more money for high quality of service. We always have, and we always will. There have been suggestions that we don't need legislation because we haven't had it. These are nonsense, because in fact we have had net neutrality in the past -- it is only recently that real explicit threats have occurred' (Berners-Lee 2006).

The Berners-Lee definition suggests the core characteristic of the protocol suite (ICP/IP) that holds the network of computers together. His definition is the simplest and purest reading of net neutrality. However, there are many dimensions to this deceptively simple definition. Each of these dimensions embodies a complex set of values and interests that sometimes compete with one another.

Treating it as a policy issue, Marsden (2010: 1) portrays net neutrality as a problem of consumer and media policy based on the implications of the 'neutral principle' for users, comprising content providers and end-users (individuals). Similarly, Cave and Crocioni (2007) present it as a problem of market failure as a result of deregulation and liberalisation of the telecom sector. These authors indicate that the degree of access regulation for Internet broadband is significantly lower in the US than in Europe. They deem that heavier access regulation in Europe results in more competition in the retail Internet access market and thus limited incentives for Internet service providers (ISPs) to discriminate against unaffiliated ISPs or content (Cave and Crocioni 2007: 670-71). Therefore, the authors do not think that Europe needs extra or specific net neutrality regulations to guard against

detrimental Internet access discrimination. The authors' thesis shows that different regulatory policies and precedents in the US and Europe, including the UK, are among the factors that determine whether there is a need for a new policy and what the policy should look like, based on the problem it is meant to solve.

Economides (2011, 2008), Sidak (2006) and Yoo (2005, 2004), irrespective of their notions on how the Internet network should be managed, frame net neutrality as an economic and social welfare problem that reflects a conflict of interest between Internet service providers and Internet users. These users include content providers (businesses) and end-users (individuals) who consume both the Internet access service and the content service delivered via the Internet. The authors' rationale for taking different positions on net neutrality regulations is used by policy actors to justify their positions and regulatory options in their responses to net neutrality consultations in the US, UK and Europe. These competing rationales and interests will be examined in this research as factors that shape net neutrality policy. The conflicts of interest are best illustrated using Benkler's layered model of a communications system and the level of control in each layer (2006).

Table 3 Benkler's layered model of a communications system and the level of control in each layer

Layered model of communications system	Level of control
Physical layer: includes all hardware infrastructures across which communications travel (e.g., computer networks, cables, copper cables, computers and other devices).	*Controlled:* This control is in conflict with 'code' in the logical layer.
Logical layer (or code layer): runs the hardware infrastructure. In this context, it is, for example, the Internet protocol that defines how communications travel from one end to another.	*Free (of control) by design:* due to the TCP/IP which is the current protocol suite governing today's Internet.
Content layer: includes, in this context, messages (e.g., text, audiovisual, TV content) and applications that are exchanged over the network.	*Some controlled & some free:* The conflict between control at the physical layer and the freedom at the logical layer has direct consequences on the neutrality of the network and content and vice versa.

The model highlights the network proprietor's incentives and struggles to control the logical layer (the ICP/TP) of the Internet in order to benefit from the position of gatekeeper. Network proprietor control over the physical layer and attempts to control the logical layer conflict with

those controlling content as content providers are interested in low-cost distribution channels while network proprietors are interested in content that will attract more traffic to their networks. According to Economides (2011, 2008), Sidak (2006) and Yoo (2005, 2004), control over these layers also discourages innovation and investment. Underpinning the economic structure of net neutrality is the network capacity problem, which is as much a technical problem as it is an economic problem, involving investment and profit margins.

Since the capacity problem involves two interconnected elements, network and content, Lee and Wu (2009: 61) present net neutrality as an issue spanning a complex set of economic, social and political issues. This broader perspective is based on the classification of the Internet network as a public information network. This implies that the duty of network proprietors is to serve the public in addition to the commercial interests or demands of Internet users. Net neutrality is, therefore, a social issue because the neutrality of the Internet network (or the lack of it) affects the access of speakers (content providers) and audience (those obtaining information or content via the Internet) to one another. Network management principles (neutral and non-neutral), therefore, affect the fundamental human right of free speech between speakers and audience to exchange information. Net neutrality is an economic problem because it involves a conflict of interests between network proprietors and content providers (ibid.). The issue is political because it involves the state's role in defining and ensuring fulfilment of private companies' duties to the public by virtue of their importance to economic and social welfare (ibid.). This, according to Marsden (2010: 2) involves establishing the 'rules of the road for Internet users'.

Combining all the dimensions of net neutrality discussed in this section, this research casts net neutrality as an infrastructure policy problem concerning management of access control to the ultimate convergent communications platform, the Internet. It deems that net neutrality policy, therefore, comprises four interconnected dimensions: social, economic, technical and political. These aspects have served as a justification for regulation as they are in the public interest. Net neutrality, policy and regulations will determine the relationship between providers of a public information network and their duties towards users as businesses, individuals and the public, taking into consideration the convergence of communications at all levels. However, since the Internet, by design, is an embedded technical self-regulation, there have been minimal regulatory interventions on this platform. For this reason, additional Internet regulations, such as net neutrality, is contested.

2.4.2. Net neutrality policy approaches

Academics such as Economides (2011), Marsden (2010), Lee and Wu (2009), Sidak (2006) and Yoo (2005, 2004) have proposed different regulatory approaches. One supports an *ex-ante* or a preventative mandate of the net neutrality principle (Economides 2011; Lee and Wu 2009). This approach refers to regulatory intervention to prescribe the non-discriminatory principle of net neutrality based on anticipated changes in the industry. Another approach rejects regulation in support of network management flexibility or network diversity (Sidak 2006; Yoo 2005, 2004). Still another is a compromise between the two extremes (Marsden 2010). Justifications for these proposals are summarised in Table 4.

Table 4 Net neutrality approaches and relevant interests

Approaches	Justification in relation to relevant values and interests
Net neutrality mandate: banning all kinds of discrimination	Protects and promotes the interests of speakers (content providers) and audience (consumers and citizens who obtain information via the Internet) in freedom of speech to impart, access and consume information of their choice as well as one that carries 'public good' or democratic values.
A balanced approach (Marsden 2010: 15): approving net neutrality abolition to an extent that it does not harm innovation, competition or free speech	Accommodates both the need for network upgrade investment incentive to alleviate network capacity problem and the interests in freedom of speech protected by the net neutrality mandate.
Network diversity: allowing network proprietors to experiment with different revenue models on both the consumer Internet access and content provider sides of the market	Protects and promotes innovation within the network and network owner and ISP rights to monetise their network infrastructure in order to generate network upgrade investment incentives.

According to Table 4, concerns of market failure in the network circle and its impact on content as a result of traffic discrimination are the core justifications for both the neutrality mandate and the balanced approaches. According to Marsden (2010: 29 -55), negative discrimination by degrading or 'throttling' consumer access to lawful content has already taken place in both the UK and US. Examples of this practice include BT's admission to have been throttling BBC and Google YouTube services by cutting video streaming from 8 Mbps to 896Kbps between 5pm and midnight under it's 'fair use' policy and Madison River communications in the US blocking a rival VoIP service (ibid.). Such practice, if allowed to prevail, would result in an anti-competitive effect and long-term

consequences for the economics of the Internet (including innovation and freedom of expression). The lack of transparency in broadband provider traffic management affects consumer access to their preferred content and the range of Internet access services.

'Negative' discrimination affects not only the interests of consumers, but also the economic interests of content providers. Garnham (2011: 53), and Marsden (2010: 29) highlight the incentives of network proprietors to deploy positive discrimination, for example, charging fees for better quality of service (QoS). This type of discrimination may allow broadband providers with significant market strength to discriminate against content providers with less market presence (Marsden 2010: 101-04). This situation, according to Economides (2011), may result in market concentration at the content layer and subsequent social welfare losses. These social welfare losses refer to plurality of sources and diversity of content, the core principles of media regulation.

The balanced approach (Table 4) proposed by Marsden (2010) recognises the benefit of choice and varieties of services positive discrimination can bring to both network proprietors and content providers. It aims to guard against the adverse effect of both types of discrimination while allowing new services to develop based on a degree of positive discrimination. Net neutrality advocates (Economides 2011; Lee and Wu 2009; Wu and Lessig 2003), on the other hand, perceive that both negative and positive discrimination through price and non-price mechanisms may incur too much cost for content providers to offer the service and thus result in them exiting the market.

In addition to guarding against the adverse effects of both types of discrimination, net neutrality advocates Lee and Wu (2009: 66) justify their support for a net-neutrality mandate as a direct subsidy for content creation and innovation and as a remedy for market failure in the production of creative work. This includes broadcast content delivered via the Internet. They reason that a subsidy, or zero pricing, for content providers' access to viewers may encourage the production of creative and innovative content outside the range of that which the market deems profitable. In proposing this approach, advocates focus on promoting competition among content and application providers through the continuation of the low market entry barriers which the current Internet architecture provides (Lee and Wu 2009; Wu and Yoo 2007).

Network diversity proponents, such as Sidak (2006) and Yoo (2004, 2005), advocate broadband provider flexibility to experiment with different revenue models and traffic management principles (Table 4). These practices include charging content providers fees for access to Internet end-users

and prioritising certain traffic over other traffic. Sidak (2006), taking a consumer-welfare approach, claims that it is unfair for end-users to shoulder all the costs incurred by network-provider's infrastructure upgrades when content and application providers also profit from end-users' access to their content online. Yoo (2004, 2005) reasons that network diversity enhances competition in the network and the consumer Internet access market and increases consumer choice as well as innovation within the network circle, a notion that had long been overlooked. He also argues that the net-neutrality mandate may harm time-sensitive content innovation, which could be supported by the employment of different network protocols, and competition among different network platforms (Wu and Yoo 2007: 576).

In line with net diversity advocates, it can be argued that a net neutrality mandate in support of online content innovation is better provided directly through public service funding across all media platforms. Such concept of content subsidy has already been proposed by Jakubowicz (2010: 9 -18) and Humphreys (2008) . However, this research argues in support of net neutrality advocates that, even with the direct content subsidy for multiple-platform public broadcasting, the argument of Lee and Wu (2009) for net neutrality as a content subsidy still stands. Content subsidy without net neutrality would result in public funding for content creation being stretched to cover access costs to new distribution platforms such as the Internet. Thus, both multi-platform content subsidies and net neutrality should co-exist.

In addition to direct content subsidies, discrimination against unaffiliated content can be addressed through the imposition of a must-carry obligation on broadband providers. However, such obligation across the Atlantic has not yet been extended to cover on-demand or non-linear TV broadcasting delivered over the Internet (Leal 2014: 512; Baramidze and Kapanadze 2012: 10 - 11). Moreover, such obligation is likely to conflict with the network proprietors' interest in flexibility to manage their network assets as they see fit and experiment with different models of service provision. The must-carry obligation is, therefore, likely to be rejected by broadband providers in the same way as the net neutrality mandate because the obligation will use up network capacity without monetary gain for broadband providers.

In proposing regulatory solutions to the capacity problem affecting users' access, both net neutrality (Economides 2008; Lee and Wu 2009; Wu and Lessig 2003) and net diversity advocates (Sidak 2006; Yoo 2005, 2004) base their arguments on welfare economics. In support of a balanced

regulatory approach, Marsden (2010) explored both the legal and economic aspects of net neutrality. Given the emphasis and objectives of these authors' arguments, politics among stakeholders and policymakers naturally fall outside their purview.

Still within the context of the communications policy debate, Michalis (2014: 81) presents net neutrality as three core interrelated debates: 1) the responsibility for future network upgrades and content investments, 2) the way in which value and revenue is distributed in the Internet value chain and 3) emerging Internet dependent business models. By examining the online video distribution value chain, the author indicates that network and content are interdependent in that content relies on network infrastructure to carry it to end-users while networks need content to attract end-users to use their service (ibid.: 76). Therefore, she argues that broadband providers' preference for proprietary technology solutions and business models can and are 'threaten[ing] universal, equitable, easy and affordable access to content' (ibid.: 77). This argument adds commercial and political perspectives to Noam's technical description of the symbiotic relationship of the transmission medium and the content in which he asserts that networks set limits to content (2008: 20 - 21, 30).

Michalis (2014: 82) and Noam (2010: 10) indicate that the inter-relationship between network and content has implications for policy. Noam (2010: 7 - 10) states that competition, which has successfully been used in regulating telecom 2.0, is not likely to be sufficient for regulating today's telecom 3.0 as more mass media content occupies the existing Internet network because competition, as a goal and means to ensure access to communications infrastructure, is not sufficient to maintain the social and cultural objectives of broadcasting regulations. Michalis' analysis (2014: 82) of Europe's latest net neutrality regulatory proposals indicates that their endorsement of specialised services provision, which refers to network proprietors' agreement with content providers or end-users to prioritise or ensure delivery of certain content over other, can undermine content innovation and civil freedoms. Similarly, Leal (2014: 513) finds that the EU net neutrality approach fails to increase legal certainty for development of online content, applications and services. A finding of Leal (2014: 513) and Michalis (2014: 82) echoes the concerns raised by net neutrality advocates such as Economides (2008, 2011), Lee and Wu (2009) and Wu and Lessig (2003). In developing these positions on contemporary communications infrastructure policies, both Michalis (2014) and Noam (2010) focus on reading technology and market development impact on policy and vice versa. The politics that shape policy were not in these authors' purview.

Powell and Cooper (2011) assess the advocacy impact on the net neutrality policy debate in the US and UK using frame analysis. Their research highlights 'local culture and regulatory precedents' as determining factors for policy discourses in the US and the UK (ibid.: 323). Their analysis reveals three key discursive themes: free speech and democracy, innovation and investment and competition and market forces Powell and Cooper (2011: 316). The most important and contested of these is free speech, which is connected to the value of and interest in access. However, their article has not taken into consideration the dynamic of these policy actors and how they devise strategies to shape policy. These gaps in literature merit research attention. A summary of the various aspects of and key arguments about net neutrality reviewed in this section is in Table 5.

Table 5 Aspects of and arguments about net neutrality

Aspects of net neutrality	Position on net neutrality regulation	Objective	Thesis
Economic aspect	Pro-net neutrality regulation (Economides 2008; Lee and Wu 2009; Wu and Lessig 2003)	Justify net neutrality regulation	Regulation is needed to guard against the detriment of discriminatory access to content and end-users.
	Against net neutrality regulation (Sidak 2006; Yoo 2004, 2005)	Reject net neutrality regulation	Regulation risks jeopardising future network upgrade investment and innovation.
Legal and economic aspects	Middle way or regulatory light-touch (Marsden 2010)	Regulatory proposal	Regulation needs to support both network proprietors' need for upgrade investment incentive and users (content providers and end-users) free speech right.
	Inclination toward net neutrality regulation (Michalis 2014)	Policy analysis	An infrastructure regulation that endorses discriminatory access has serious implications for content and civil freedom.
Political	N/A (Powell and Cooper 2011)	Frame-analysis	Local culture and regulatory precedents are determining factors for political discourses and outcome.

The multi-dimensional aspects of net neutrality and the debates reviewed in this section indicate the inter-relationship between policy, technology and market changes. They also illustrate the symbiotic relationship between network infrastructure and content and the co-relationship between communications infrastructure and content policies. Such relationships, according to Garnham (1996: 286), suggest convergence of telecommunications and broadcasting at all levels, a situation which may complicate policy and regulation. The development of Internet infrastructure access policy is likely to be challenging as it involves multiple stakeholders, often with competing interests.

Given the challenges in regulating convergence, this research contributes a critical policy approach to examining the net neutrality policymaking process. This approach allows for explanations of the politics, policy actors' interactions with one another, and their interactions with policy precedents and ideologies that also shape policy. These factors, however, are often understated in existing communications and net neutrality policy literature. Much of the existing literature discussed in this chapter focuses more on the institutionalised aspect of policy such as policy precedents and economic, political and social ideologies.

2.4.3. Net neutrality policy response

Building up to the analysis in Chapters 5-6, this section provides historical background to net neutrality development. According to Cave and Crocioni (2007: 670), the attempts to create net neutrality policy develop from a debate which originated in the US on whether and how access to the Internet should be managed. The debate led to a public consultation to codify the rules to preserve the openness of the Internet or the neutrality principle, based on the FCC's 2005 Internet Policy Statement (2009: 3). In December 2010, the FCC released the report based on the consultation. It prescribed four important principles: 1) preserving the open Internet, 2) transparency, 3) no-blocking and 4) no-unreasonable discrimination. These principles were published in the Federal Register on 23rd September 2011 (FCC 2011).

The FCC's rules were challenged by Verizon. On 9th September 2013, the United States Court of Appeals for the District of Columbia heard oral arguments between the FCC and Verizon over the FCC's authority to regulate broadband Internet access service. The judgement on *Verizon. v FCC* (2014) 740 F.3d 623, announced on 14th January 2014, affirmed the FCC's authority to regulate Internet access and upheld its decision to preserve Internet openness as well as the transparency rule. However, the court vacated the no-blocking and no-unreasonable discrimination rules (ibid.). The current FCC Chairman, Tom Wheeler, released a statement confirming that the regulator is committed to enforcing the transparency rule and fulfilling the no-blocking objective (Wheeler 2014).

On 15th May 2014, the FCC launched a new net neutrality consultation in response to the 14th January 2014 court ruling (2014). The consultation presents a proposal to develop the strongest enforceable rules for the Internet through the reclassification of broadband service as a public utility under Title II of the 1934 Communications Act and to codify two open Internet rules: transparency

and no-blocking of legal content. The proposal also asks whether paid-prioritisation should be banned. On 26th February 2015, the FCC voted in support of the reclassification of broadband service as a public utility and the prohibition of blocking, throttling and paid prioritisation of Internet traffic (Ruiz and Lohr 2015). The development of the net neutrality policy in the US to date shows strong commitment towards competition, particularly in the content branch of communications. Here, competition is a neo-liberal communications policy objective. The new rules serve as the means to achieve the traditional infrastructure regulatory objectives of competition, non-discriminatory access and freedom of communications.

In Europe, the open Internet was officially recognised as a broad policy and regulatory principle during the development of the 2009 reformed Electronic Communications Package. The term 'open Internet' refers to the non-discriminatory nature of the Internet as managed subject to the net neutrality principle. According to Marsden (2013:152), the 'open Internet' is used in Europe in order to avoid 'the political rows that characterised the use of the term *net neutrality* in the United States'. Previously, research into Europe's competition and regulatory framework rendered unnecessary additional and specific provisions to guard against traffic management and discrimination due to differences in existing policies, regulations and market structure between the US and EU (Cave and Crocioni 2007; Chirico et al. 2007). However, in 2009, the open Internet became a policy objective for national regulatory authorities (NRAs). Under Article 8(4) (g) of the revised Framework Directive (European Parliament and the Council Directive 2009/140/EC) NRAs are obliged to 'promote users' ability to access and distribute information and to run applications and services of their choice' . The revised Universal Service Directive (European Parliament and the Council Directive 2009/136/EC) highlights Europe's preference for the user-centric approach as a means to implement the open Internet policy objective.

As part of the on-going policy process, the European Commission launched a broad public consultation on '*The open Internet and net neutrality in Europe*' (2010) after the 2009 revised Electronic Communications Package became effective. This consultation focused on the principles of access, transparency, competition, innovation, investment and discrimination through traffic management. However, according to Marsden (2013: 152), the consultation did not reflect the degree of inclusion of the various ideas presented in the consultation responses. A bias toward 'business constituencies' was evident in the imbalance between the huge number of industry speakers representing pro-discrimination interests, the single civil society stakeholder (BBC) and consumer

groups invited to speak at the subsequent European Parliament (EP) and Commission joint hearing on net neutrality and open Internet in November 2010 (Marsden 2013: 153). Subsequently, the Commission launched another consultation on '*Specific aspects of transparency, traffic management and switching in an Open Internet*' (2012b). The results of these consultations form the net neutrality provision in the European single market proposal for electronic communications (COM (2013) 627 final) to update the 2009 reformed Electronic Communications Package, popularly referred to as the Connected Continent proposal.

The proposal went through a review and amendment process. Its latest amendment was presented to the European Parliament on 3rd April 2014 where it was passed (BBC 2014). This amendment provides a clear binding definition of 'net neutrality': equal treatment of traffic 'without discrimination, restriction or interference, independent of the sender, receiver, type, content, device, service or application' (Del Castillo Vera 2014: 33). It permits provision of 'specialised service', defined as services and applications requiring an enhanced or assured service quality, on condition that '[service providers] ensure that enhanced quality service does not cause detriment to the quality of Internet access and that the traffic management measures required to implement this arrangement 'do not discriminate between competing services and applications' (ibid.: Recital 49). This latest net neutrality regulatory development at the EU level generally shares similar principles in to those established in the US 2015 open Internet rules (FCC 2015a). The proposal still needs to be approved by the Council of the European Union. If approved, the legislation will override member countries' national laws on this subject.

In the UK, interest in the open Internet policy principle developed in 2006 as a result public awareness of and concerns over ISP blocking and throttling of the BBC's iPlayer traffic, which was launched in that same year (Marsden 2010: 99). The BBC iPlayer is a streaming of live and on-demand TV broadcast content via the Internet. According to Marsden (2010), the service created a huge controversy due to its network capacity requirement and the fact that the service was subject to peak-time IP traffic congestion. The formal open Internet policy and regulatory development process started as the 2009 revised Electronic Communications Package was due to be transposed into national law (Ofcom 2010). In response to its responsibility prescribed in the revised Framework Directive, Ofcom launched the traffic management and net neutrality consultation (2010). Ofcom's emphasis on its consultation document aligns with that of the Commission.

The British government also assigned the Broadband Stakeholder Group (BSG) to facilitate an industry-led development of the open Internet code of practice to guide Ofcom's self-regulatory approach. In March 2011, the UK government organised a private net neutrality summit and invited two consumer groups to the forum, indicating the slowly changing attitude of telecom policymakers and government that 'society organisations are outsiders to the telecom economic discussion and raise intractable problems' (Marsden 2013: 153). In July 2012, BSG published the voluntary Open Internet Code of Practice on behalf of signatory ISPs. It was subsequently updated in May 2013 (BSG 2014). As updated, the Code binds signatory ISPs to three principles: 1) access to all legal content, 2) no discrimination against content providers on a commercial rivalry basis and 3) transparency.

The first and second principles signify that signatories to the UK open Internet code agree that discrimination is only permitted when required by law to filter illegal content. Positive discrimination (e.g., prioritisation and guaranteed quality of service (QoS) is only permitted when such exclusive contractual agreements between network proprietors and content providers is equitably made available to all interested parties. In other words, discrimination on a commercial basis to target specific content or network providers is deemed unacceptable. The third principle indicates that signatories agree that end-users should be clearly informed of the traffic management that affects their Internet access.

The code is to be read in conjunction with the Traffic Management Transparency Code, updated in June 2013. The transparency code commits signatories to providing Internet users with more information about the management practices used in the network in order to maximise everyone's benefit and support customers' adherence to their contract terms. The transparency code also sets out an agreed set of guiding principles for ISP communications with their customers regarding traffic management practices. These principles include: comprehensibility, appropriateness, accessibility, up-to-date information, comparability, and verifiability.

The UK's latest net neutrality policy and regulatory development correspond to the core principles of the EU Connected Continent. The only difference between the net neutrality policy in the UK and the EU is the policy measure. The UK implements net neutrality principles using self-regulation guided by a voluntary code while the Connected Continent proposal aims at regulation. If the proposal were to be approved, the regulatory approach will override the UK's current self-

regulation. Compared to the latest development in the US, the EU Connected Continent proposal, awaiting final approval from the Council of the European Union, and the UK approach provide weaker protection for Internet openness than the new open Internet rules the FCC adopted on 26th February 2015.

According to Powell and Cooper (2011), Wallsten and Hausladen (2009), and Cave and Crocioni (2007), the differences between regulatory approaches and principles among the US, EU and UK lie in their policy and regulatory precedents. These key differences include the US abolition of the common carriage obligation and the EU's Local Loop Unbundling (LLU) mandate, which also applies to the UK (Wallsten and Hausladen 2009; Cave and Crocioni 2007). Common carriage is a legal obligation imposed on public networks in exchange for the right to use public property as a right of way and other privileges (Marsden 2010: 33). The LLU mandate obliges incumbent operators or major telecom providers (BT and Kingston in the UK) to lease its local network (the copper cables connecting homes to the telephone exchange) to other companies so that companies other than the network owner (e.g., BT) can offer Internet access service to homes. These policies and regulations result in different market conditions in the UK and the US. Those in the former are based on intra-platform competition, while those in the latter feature inter-platform competition.

With intra-platform competition, the UK faces a limited variety of network infrastructure, but appears to enjoy sufficient competition within the existing network infrastructure (DSL). This is evident in the fact that in 2007 DSL commanded about 80% of the UK broadband market and almost 70% of those lines are retailed by ISPs other than the incumbents (BT and Kingston) Wallsten and Hausladen (2009). The US, on the other hand, emphasises competition among various platforms for broadband service provision (e.g., digital subscriber lines (DSL), cable and fibre optics) and suffers market concentration on all facilities-based platforms (ibid.).

In support of this claim, Wallsten and Hausladen (2009) point out that in 2007 cable broadband commanded approximately 52% of the US broadband market while DSL had about 43% of the market, though less than 20% of the telephone lines are leased to retailers to provide Internet access services. For this reason, the net neutrality policy in the US focuses primarily on discrimination policy for network providers, while the UK, consistent with the EU approach, focuses on protecting the neutrality of the network through its LLU or network sharing regulation and the ability of consumers to choose among retail ISPs (Wallsten and Hausladen 2009:91 -98). These

differences in net neutrality policies in the US, EU and UK demonstrate the influence of institutionalism, including path-dependency.

A review of net neutrality policies across the Atlantic indicates that the US is the most advanced in its development of net neutrality rules although these rules remain subject to legal challenge. A specific net neutrality regulation at the national level in the UK is yet to be put in place. Neither is there an enacted net neutrality regulation at the EU level. According to Marsden (2013: 155), 'net neutrality regulation to date has relied mainly on a series of declarations and merger conditions'. An example of that is the enforcement of net neutrality in the merger conditions for the failed 2011 AT&T Wireless and T-Mobile merger (Frieden 2011).

The net neutrality literature examined here and in the previous sections often portrays the policy as a result of precedents or applies economic, social and political ideologies to justify particular policy approaches. As to how these institutionalised factors interact with policy actors to formulate policy remains under-discussed. To complement the existing literature, the following questions are addressed:

1. How is net neutrality policy in the US and the UK shaped?
2. What is the structure of the relationships among different actors in the net neutrality policy network?
3. How are conflicting interests, values and goals negotiated within the net neutrality policy network?
4. How do different regulatory traditions and market structures influence the network management principles applicable to broadband Internet networks in the US and the UK?

A framework to provide answers to these questions is discussed in Chapter 3.

Chapter 3

Policy, Power and Policy Analysis

The review of literature on communications and net neutrality policies in Chapter 2 indicates that policy is an evolution of ideas, ideologies, decisions, actions and interactions among various actors. However, the literature only discusses this evolution as a series of social events and value systems that define the present and future reality that such policies intend to create. The political element involving the exercise of power to advance and inscribe the ideas and ideologies which shape values, interest, actions and interactions between structure and agency into these policies are under-discussed.

In contribution to the communications and net neutrality policy literature, political theories of power and approaches to study the exercise of power in a political process are examined to develop an analytical framework to explain the mobilisation of ideas and ideologies in the net neutrality policymaking process. The advancement of ideas and ideologies through discourse circulation is an exercise of power to continue or challenge hegemonic ideology, in this case neoliberal, and shape industry practices accordingly. Such exercise of power is shaped and restricted by broader political systems. To provide the political context for this analysis, literature on political systems, process and practices in the US, UK and EU are also reviewed.

3.1. Theories of power

Since policy results from a complex web of decisions, actions and interaction between structure (the environment) and agency (individuals and businesses present in the environment) and shaped by ideas and ideologies, policymaking involves the exercise of power (actions and non-actions) to promote and inscribe certain ideas and ideologies into the future reality being developed. This concept of policy and policymaking connotes a relationship between the state and individuals. Theories of power, therefore, evolve with the increasingly complex relationship between a state and its people or a state and other states and include conflict resolution and power balancing within a state due to the social, political and economic activities in which individuals engage themselves when following certain ideas and ideologies. This evolutionary aspect of power theories is seen in

Hurrell's explanation (2007) of the continuing dominance of pluralist concepts of power in modern and international societies. Based on their evolutionary nature, this section reviews power theories to identify the theory most concurrent with the power structure in the contemporary social, economic and political contexts in which the net neutrality policy process is situated. It then continues to assess approaches to study power and build a framework for analysing the net neutrality policymaking process in the US and the UK based on this theory.

3.1.1. Notion of power: The foundation of power theories

Theories of power, which will be discussed in sections 3.1.2 and 3.1.3, are built on the notions of power or how power is perceived. These notions remain contested. According to Lukes (2005: 61), power, as discussed in daily life and scholarly work, includes: the location and extent of power, power balance or asymmetry, exercise of power and power resistance, indicating that power is relational. All these aspects of power are present in a policymaking process as the process involves both the ability to exercise and the actual exercise of power for policy actors to achieve their desired outcome.

The three competing notions of power include the ideas of power as ability, as domination and as a binary of ability and domination. The idea of power as an ability is captured in Locke's recognition (1979: 115) that a man develops knowledge based on his experience. This recognition indicates an ability to conceive and receive an idea based on his surroundings and experience, which may change but, agreeing partially with Lukes (2005: 69), not to resist changing environment or experience. The portrayal of power as domination is echoed in the work of Vedaev (1997 cited in Lukes 2005: 74) and the work of pluralist social behaviourists, such as Dahl (2005, 1961), Polsby (1980) and Truman (1971). Spinoza (1958: 273) presents power as a binary of ability as naturally given to exist and to act and a state in which one falls under the influence or control of others.

Siding with Spinoza (1958: 273), Lukes (2005: 69 - 74) proposes that power is a binary of ability or potentiality and domination, in which the latter is a sub-concept of the former. Similarly, defining power as domination restricts the scope of power only to its overt exercise, observable through achievement of compliance vindicated in a decision or action taken. Lukes (2005: 70) argues that a single focus on power as domination is restrictive. Like the weakness of Locke's definition of power, Vedaev's concept of power as domination risks falling for what Lukes (ibid.) refers to as

'exercise fallacy' and limits the scope of power to the observable domination manifested only in actions or policy decisions. An example of such fallacy includes the work of classical pluralists, such as Dahl (2005, 1961), Polsby (1980) and Truman (1971), whose work focuses on actions taken by individuals, interest groups and enterprises to secure compliance. This perception of power results in a one-dimensional perspective.

According to Bachrach and Baratz (1970), this perspective of power is blind to the actions taken to erect barriers for entries of rival ideas and interests to the policy process. The other fallacy for treating power solely as domination is what Lukes (2005: 70) calls 'vehicle fallacy', which results from the equation of power with resources of power, for example, wealth and status. Examples of power theories based on this fallacy include elitism and Marxism, which associate domination with one source of power. The binary concept of power, on the other hand, broadens the scope and approaches to study power. The ability or potentiality dimension, as defined by Spinoza (1958: 227), allows for consideration of resistance against power. As Foucault (1979: 95) stated: 'where there is power, there is resistance'. In the context of a policy process, this dimension of power supports detection of a variety of mechanisms to address resistance in order to secure compliance.

Breaking away from such restrictive definition of power, Lukes (1974, 2005) and Bachrach and Baratz (1970) present more rounded perspectives. Bachrach and Baratz (1970) assert that power has two dimensions. One is the overt exercise of power recognised by behavioural social scientists, such as Dahl (2005, 1961) and his followers. The other is the covert dimension, which involves suppression or exclusion of ideas, values and interests that challenge the ideas, values, and interests of the decision-makers (Bachrach and Baratz 1970: 44). This perspective supports the examination of the mobilisation of bias as a means to exclude or suppress rival ideas, interests and values, which is the most prominent form of power exercise in policymaking. Given the pervasive influence of neoliberal ideology evident in the communications and net neutrality policy literature reviewed in Chapter 2, neoliberal ideology is the most prominent bias that policy actors mobilise in support of their claims for action.

Lukes (1974, 2005) proposes a third perspective of power. This perspective critiques both the behavioural focus of Bachrach and Baratz's two-dimensional view (1970) and the pluralists' one-dimensional view of power for being inadequate because they focus only on power to secure compliance in the face of observable conflicts. Lukes (2005: 28) argues that there exists a '*latent conflict* which consists of a contradiction between the interests of those exercising power and the *real*

interests of those they exclude'. Luke's third dimension of power compensates for Bachrach and Baratz's assumption that absence of grievance denotes genuine consensus. It does so by examining the 'latent conflict' which is the actual interest of those excluded that may conflict with those exercising the power. This view of power allows for analysis of more subtle and complex mechanisms for silencing competing demands from becoming a political issue or even being presented (Lukes 2005: 40). This perspective of power lends its support to an examination of the use of an ideology, capitalism, to suppress natural resistance from materialising and is observable in the exploitation of those with inferior power, such as that of the proletariat by the bourgeoisie.

Similar to Lukes (1974, 2005) and Bachrach and Baratz (1975, 1970), Foucault's theory of power has presented a binary perspective (1987: 11, 19). It comprises the strategic games between liberties, which involve attempts to determine the conduct of others, and the state of domination, which refers to a fixed constraint and inequality that limit the liberty of individuals. Although this view of power focuses on the domination aspect, it recognises actions and decisions taken by the governed. For this reason, the 'Final Foucault' (1987), which conceptualises power based on its exercise to both achieve and resist dominance, is flexible enough to support investigation of various techniques to achieve and to resist compliance. The 'strategic' aspect of power relations between the governed and the governing can be interpreted to support investigation of the mobilisation of bias introduced by the work of Bachrach and Baratz (1975, 1970) as a means to shape others' conduct. It can also be extended to support investigation of Lukes' third face of power: the 'latent conflict' in terms of actions taken to avert or prevent competing demands, interests or values from materialising.

The concepts and perspectives of power reviewed in this section form the basis of theories of power. The strength and weaknesses of these concepts will be used to evaluate the theories of power and the approaches to study power in a political process in the context of today's democratic state.

3.1.2. Concentrated power

The main variations in theories of power lie in the perception whether power is concentrated or fragmented. This section reviews the theories of power that perceive power in the state as being concentrated. The common traits among these theories are their determinism, detection of

inequality and their view that power is concentrated among a small group of people. However, they differ in their view on the sources of power.

Elitism, according to Bottomore (1993: 1), evolves from the term 'elite' used in the seventeenth century to denote 'commodities of particular excellence'. The term was later extended to cover 'superior social groups, such as prestigious military units or higher ranks of nobility'. The term increased in popularity in Europe in the late nineteen century and in the 1930s in Britain and the US following the introduction of the sociological theories of elites in the work of Vilfredo Pareto (1915-19: 1422 - 3 cited in Bottomore 1993: 1 - 2). Pareto's work highlights inequalities in all areas of social life. He asserts that there are two classes in the population: the non-elite, who are governed and the superior class of those elites who govern and those who influence those who govern (Pareto 1915-19: 1423 - 4 cited in Bottomore 1993).

In Pereto's definition (1915-10: 1429 - 30 cited in Bottomore 1993: 3), the ruling elites comprise those in position to exercise political power, such as aristocrats, the military and commercial aristocrats or plutocrats. Later, Mosca (1939: 50 cited in Bottomore 1993: 3) provides a systematic distinction between the 'elite' and the masses, still reiterating the inequality in society. Mosca's thesis (1939: 50, 53 cited in Bottomore 1993: 3) is that political functions and power are monopolised by a group of organised minorities to increase the benefit power brings to them; the majority (the masses) is rendered powerless because each individual that forms the masses stands alone. In his examination of the composition of elites in modern democratic society, he acknowledges competition among the ruling elites for votes from the governed class (Mosca 1939: 258 cited in Bottomore 1993: 4). This acknowledgement shows that, to Mosca, there is one source of power.

The common view of these classical elitist theorists that there are many sources of power differentiates elitist theory from the Marxist theory of power. Pareto's and Mosca's work provides two bases on which later elitist theorists further develop the theory in compliance with social and political development. These are the concepts of class and the variety of sources of power that allow a group of the organised minority to achieve the compliance of the masses.

According to Hill (2013: 38), bureaucrats are the new ruling class in the twentieth century, which features the establishment of corporations, trade unions and political parties due to the administrative systems designed to shoulder the growing responsibilities of the state from the

nineteen century onward. In this system, bureaucrats are the ones carrying out administrative tasks. Hill's argument (2013: 38) is built on notions put forward by theorists such as, Meynaud (1965), Ellul et al. (1964) and Weber (1947). Weber (1947) argues that the administrative importance of the bureaucrats allows the possibility for power to be shifted to officials (bureaucrats) responsible for administrative tasks. Weber's remark shows that elitist theory has evolved to recognise a more complex power relationship in modern democratic society.

In the same way, Meynaud (1965) and Ellul et al. (1964) indicate that power concentration persists in modern democratic societies and that the source of power lies in technical expertise. Thus, power is concentrated among the technical experts. This view is echoed in the work of a critical pluralist theorist, Heclo (1978: 105 - 06), who cautions that although power in the capitalist democratic state is fragmented, the influence of experts on government and policies is increasing. The difference between Heclo (1978) and the modern elitist theorists is that the latter focus on sources of power, thus falling for what Lukes (2005: 70) calls 'vehicle fallacy', while critiques of classical pluralism like that of Heclo (1978) emphasise the exercise of power, hence falling for Lukes's 'exercise fallacy' (2005: 70). The common recognition of power concentration in government indicates the extent to which the elitist theory remains relevant to today's democratic society.

Similar to elitist theory, the Marxist theory of power emphasises the separation among social classes, exhibits a degree of determinism and stresses the 'vehicle' for the exercise of power or sources of power. The two theories diverge because Marxist theory identifies economic resources and the capitalist mode of production as the determining sources of power. The theory also casts the state, which in elitist theory is the ruling class, as a passive agent acting in the interests of the bourgeoisie, which is the class that commands the capitalist mode of production. This view is expressed in Marx's writing: 'The executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie' (cited in McLellan 1971: 192). Influenced by Marxism, Miliband (1969) analysed the state role and operation in capitalist society. He found that there is a continuation of wealth concentration among a small fraction of the population and suggests that the state in the capitalist society remains an instrument for domination of the bourgeoisie.

This situation, Miliband (1969) noted, resulted from the fact that: 1) the bourgeoisie and the executives in the state institutions all come from the same background and are therefore likely to act in one another's interest; 2) the bourgeoisie can apply pressure on government through personal contacts, networks and associations representing business interests; 3) the state's power is constrained by the objective power of capital. The emphasis on the capitalist mode of production as the sole source of power undermines Marxist theory's relevance to the increasingly complex capitalist democratic society. Nonetheless, (Hill 2013: 41) argues that the theory remains relevant to the extent that the ownership of the capitalist mode of production is a significant source of power though it is not the only source of power in the state. In other words, Marxist theory remains a relevant theory of power in today's capitalist democratic society because it is built on an ideology that shapes the economic system that forms and contributes to the functioning of the society.

Globalism as a theory of power portrays the government of a nation state as a receiver and respondent to power, demands, interests and problems beyond its border. Like Marxist theorists and globalist theorists, such as Dryzek and Dunleavy (2009), Hay (2002), Cox (1987) and Wallerstein (1979) see economic growth as a significant source of power and a determiner for government action or non-action. These theorists maintain that global economic development and the expansion of transnational economic institutions form another set of pressures on national states in their policymaking activities and introduce additional sources of power beyond national borders (e.g., transnational economic institutions and supra-national institutions) to the national policy development process. This concept of power resembles that of Marxist theory and, therefore, portrays the state as a passive supporter of capitalist actors in the policy process.

However, according to Hill (2013: 47), these theorists do not speak of the power of capitalist economic institutions with the same degree of determinism as that of Marxist theorists. They describe such economic influence in connection with the political influence from organised pressure groups and supra-national institutions. Together, these forces influence national governments as they are held accountable for the economic success or failure of nations, which are interconnected with the global economy. This view indicates recognition of the autonomy of the nation state.

Hay (2002: 259), for example, portrays global economic forces as either additional pressures or economic and political power over nation states or 'a most convenient alibi,' allowing for national governments to evade their responsibilities to create changes that might be difficult to legitimise.

Another opinion of the lesser degree of determinism compared to Marxist theory is in Dryzek and Dunleavy's description (2009: 315) of the influence of the global economy:

> 'The more a state becomes integrated into the global economy, the more it has to worry about the relations of international markets to its policies. And markets worry only about what is good for business, not for social justice, human rights or environmental protection. Friedman (1999) calls this a 'golden straight jacket', golden because this integration allegedly fosters the generation of wealth'.

In this argument, although the capitalist logic of wealth generation is cast as a driving force, it is not the sole determiner of state action or non-action. The argument indicates the increasing influence of transnational markets on national governments. It does not imply a total domination of capitalist logic on state decisions concerning its internal and economic affairs. Instead, their argument, like Hay (2002), implies a degree of autonomy in nation state decisions. Nonetheless, globalism's focus on capitalist economic influences as reflected in Dryzek and Dunleavy's work prevents (2009) the theory from fully accounting for non-economic sources of power and the impact of national socio-economic contexts on state decisions, actions and non-actions. Such emphasis also limits the scope of power to the overt exercise of power connected to resources, which is oriented mainly toward economics.

In spite of differences in the level of determinism and the range of sources of power, a common theme that emerges from this body of literature is power inequality rooted in an institution or a group of institutions. The emphasis on the domination aspect of power condemns these theories to what Lukes (2005: 70) calls 'vehicle fallacy'. This fallacy restricts the epistemology of these theories only to the overt dimension of power and limits their capacity to realistically explain a state's decisions and actions to its people. In this research, such decisions and actions refer to policy formation during the policy process. The relevance of these theories to modern capitalist democratic societies and policy processes taking place in these societies is, therefore, restricted to the sources of power as the means and incentives for its exercise.

3.1.3. Fragmented power

Against the concentrated power theories, pluralists argue that power in the state is fragmented. The pluralist concept of power is closely connected to the concept of representative democracy for, according to Hill (2013: 27), classical pluralists believe in the plurality of power as evident in the growth of pressure groups alongside formal government institutions. This concept indicates the way in which power is obtained and maintained in the capitalist democratic countries. It implies that, unlike elitist and Marxist theories of power, pluralists argue that power is dispersed. Dahl (2005, 1961), Polsby (1980) and Truman (1971) contend that power is widely distributed due to the plurality of individuals, interest groups, and enterprises actively competing to influence government decisions, actions and non-actions. Policies and regulations are one of the results of these decisions and actions. The other key argument made by pluralists is that no one agent or institution dominates all matters of concern in society. This argument runs in sharp contrast to elitist and Marxist theories, which assert that power is concentrated within the ruling class.

Classical pluralist theory acknowledges that power signifies inequality, which is the key argument made by elitist, Marxist and globalist theorists. However, classical pluralists do not equate resources with power. They relate resources with ability to exercise power, which indicates that classical pluralists recognise the binary notion of power –as both abilities and domination – as defined by Spinoza (1958: 273). Such recognition allows this theory to capture more complex and more sophisticated power relations that involve a large scale of participants, each with varying capacity to exercise power over the others. Therefore, unlike the elitist and Marxist theories, pluralists, according to Hill (2013: 69), portray the state or government as a neutral institution and agent that other agents or policy actors seek to influence and control. Pluralists' portrait of power relations in the state is one of a political marketplace in which individuals, interest groups and enterprises compete to advance their concerns. The level of influence each actor has in shaping government decisions and policy is dependent on resources.

In spite of its recognition of the binary notion of power, classical pluralists emphasise exclusively the domination aspect of power. This exclusive emphasis, according to Lukes (2005: 70), subjects the classical pluralist power theory to the 'exercise fallacy', which limits their epistemology of power to 'the causing of an observable sequence of events'. This means that the classical pluralist theory can only detect one dimension of power, coercion, while Bachrach and Baratz (1975, 1970) and Schattschneider (1960) argue that there are two aspects of power. One, according to Dahl (2005,

1961), is overt. The other is covert and progressive, which refers to the mobilisation of bias through utilisation of an existing bias within the political system, such as precedent, rule or procedure, or reshaping and strengthening the mobilisation of bias as a whole (Bachrach and Baratz 1975). This results in non-decision making or non-action. The epistemology of the classical pluralist's theory of power is also blind to Lukes' third aspect of power (2005: 28), which refers to the manoeuvring of social forces, institutional practices and individual decisions to suppress potentially unwanted issues. Such manoeuvres can also occur even without observable conflict (ibid.).

According to Lukes' critique (2005) of Dahl's work (1961), the blind spots in the research of classical pluralist theorists make it oblivious to the covert exercise of power that can be used to maintain authority in the hands of those who already have dominant power over others. These blind spots, therefore, mark the point where critics of classical pluralists diverge from the classical pluralist theory.

3.1.4. Critique of pluralist power theory

The critics of classical pluralism, such as Domhoff (2010), Freedman (2010, 2008), Marsh (2008) and Heclo (1978), argue that in spite of the plurality of agents or actors interacting with the state, power can be concentrated through various means. These critics' explanation of power concentration indicates their recognition of all three dimensions of power. Their recognition of the second and third dimensions allows their theory to more accurately capture and explain the relationship between power decisions and actions taken within a capitalist democratic state, of which policy is a part.

The recognition of the second face of power is evident in the pluralist critics' identification of mechanisms used to secure compliance. Heclo (1978: 105 - 06) highlights the increasing influence of experts and networks of experts on government and policy due to America's fragmented and decentralised administration. The American government's increased reliance on experts and networks of experts to inform policy issues and the subsequent policy decision can result in suppression of certain ideas and interests. Evidence supplied by experts is used to legitimise government decisions and actions and, therefore, serves government's source of power. This

reliance on power is already structured within American governmental administration, including the policymaking process.

Heclo's identification of the influence of experts on government and policy (1978: 105 - 06) exhibits his recognition of Bachrach and Baratz's second face of power (1975, 1970), which in this case vindicates itself in the form of administrative rules. According to Heclo (ibid.), these rules can be mobilised to disadvantage policy actors with limited expert knowledge in the area of their concerns. As such, power becomes concentrated among a network of experts and those who manage these experts. Heclo's identification of the tendency toward power concentration differs from the elitist, Marxist and globalist thesis in that the source of power is not rooted in one specific class or institution.

In line with Heclo (1978), Domhoff (2010: 51 - 54) indicates that power is concentrated among major corporations due to their structural function in society. This function is evident in the corporate role of creating jobs and driving the economy, which promotes American government officials' credibility and stability in office. Therefore, the government and its agents are likely to prioritise corporate interests over others, providing corporations with the necessary ability to set the government's policy agenda and effectively preventing ideas and issues that may challenge their interests from reaching the policy arena. This function of corporations allows them to mobilise the government's bias in their favour.

However, counter to Elitist and Marxist theorists, Domhoff (2010: 51- 54) remarks that corporate power is not the only determining force in American society and that there is a limit to corporate power, especially in times of economic crisis. This limit is found in the volatility of corporate power due to competing sources of power from, for example, non-business agencies to which the government can turn in order to promote new economic arrangements (ibid.: 53). Corporate power is also limited by its dependence on government primacy to consider and introduce policy and regulations that promote its program and defend its assets (ibid.). This situation reflects an interdependent relationship between government and corporations which contradicts the elitist and Marxist thesis on power.

Similar to Domhoff (2010), Freedman (2010) and Marsh (2008) critiqued the classical pluralist account for its failure to recognise that structural factors, such as ideology, patterns of policy practices, political tradition and institutions can be devised to exclude alternative ideas and decisions

from the policy process. Marsh (2008: 263) identifies the British closed policy network and top-down concept of democracy as sources of power. These sources of power privilege certain policy actors when reinforcing their already dominant set of interests (economic, procedural and governmental) and excluding rival interests. Freedman (2008, 2010) also identifies framing and administrative process as a means to exclude competing ideas and policy options from entering the policy process. This process is 'structured-circumscribed by institutional, economic, technological and political dynamics and actor driven' (Freedman 2008: 4). According to Freedman (2010), framing begins when defining a policy problem, which is an early development in the policy process.

A policy problem is an exercise of power to shape the scope and objective of the policy process to exclude the values, interests, ideas and solutions that do not align with the mainstream ideology of a specific policy sector or the values and interests of the key influencers. The sources of power in this case are the institutionalised ideas, values, interests, practices, and administrative processes that endorse the framing. In recognising this second face of power, Freedman (2010, 2008) and Marsh (2008) disagree with the classical pluralist thesis by demonstrating that a structural context of policymaking can be devised to restrict rival policy actor influence on government and policy.

These critics of classical pluralism have also demonstrated that they recognise Lukes' third dimension of power (2005). This recognition is evident in the discussion of public opinion shaping and the role of media in the work of Freedman (2008) and Domhoff (2010). Both authors emphasise the role of media in distributing information in a particular way to advantage certain policy actor concerns and disadvantage others. This emphasis implies recognition of policy actors' potential to exercise the third face of power through media. According to Freedman (2008: 87), 'the media form a largely unaccountable force and…this policymaking influence is wielded without a democratic mandate and reserved for some of the wealthiest and most powerful corporations.' Freedman's account of this third face of power indicates the media's ability (power) to call government and policymaker attention to an issue to which it has devoted significant effort (2008: 87 - 89). In doing so, that particular issue stands a better chance of being considered. Thus, media coverage plays a part in framing policy agendas. Freedman (2008: 87 - 89) also points out that the media is, to varying degrees, controlled by corporations through various forms of funding models. Corporations are, therefore, able to use media as a tool to influence policy. In this respect, the

media can be treated as a source of power for corporations. Such exercise of power is practiced across the US and the UK.

The mobilisation or shaping of public opinion as an exercise of power to advocate particular policy preferences discussed in the work of Domhoff (2010: 119-46) also reflects a potential for exercising Lukes' third face of power. This practice is supported by the American constitutional protection of free speech and the right of assembly that allows citizens to organise into interest groups and to mobilise their policy preferences (Domhoff 2010b: 117). Given these rights, public opinion serves as another source of power that can be used to influence policymaker decisions as the constitution guarantees that public opinion (and public support) matters. For this reason, a complex opinion-shaping network is built into the American political system and policy process, involving not only the media, but also a multitude of commercial, academic, governmental and public organisations operating under the financial influence of the corporate community (ibid.: 120 - 21). These organisations include policy discussion groups, middle-class discussion groups, public relations organisations and the mass media. These associations develop and carry the designed messages to the public via various institutions, such as public schools, churches, the media and voluntary relationships with which corporations have established working connections.

Domhoff (2010) highlights the pervasive influence of corporations, but not to the extent that their exercise of power allows them to single-handedly determine a policy outcome. The work of Domhoff (2010) and Freedman (2008) shows that opinion shaping shares the same mechanism as that of the second face of power, in that opinion shaping mobilises a body of knowledge (a bias) to suppress certain ideas, values and interests from entering the policymaking domain. Nonetheless, neither author indicates that the media and corporations have exclusive domination over other actors. This position distinguishes their power theories from those that predicate power concentration upon a specific source, class or institution.

The critiques of classical pluralism reviewed here reconcile the two extreme positions on power (see 3.1.2 and 3.1.3) by acknowledging both the plurality of agents exercising their varying degrees of power (ability) to influence other actors and the power concentration resulting from resource inequality. The critics of classical pluralism can, therefore, be seen as having advanced from the other theories' restricted epistemology of power due to their exclusive emphasis on the domination aspect of the binary notion of power. By dedicating equal attention to the binary notion of power (ability and domination), critics of classical pluralism, such as Domhoff (2010), Freedman (2010,

2008), Marsh (2008) and Heclo (1978), have been able to develop their arguments based on a broader notion of power. This broader notion allows them to capture both the overt and covert exercise of power as well as resistance to power from active agents or policy actors. Therefore, these critics have been able to identify the plurality of sources of power, agency, the structured inequality in the political system and, thus, the policymaking process. This structured inequality serves as a vehicle for power concentration.

However, as these critics also recognise power as an ability, they reject the idea that any one source of power, agent, class or institution can dominate the policy domain, and thus agree with the classical pluralist account of plurality of agents competing to secure compliance from others. Given the notion of power on which the classical pluralist critics' thesis is built, the thesis offers a well-rounded explanation of power relations in the modern capitalist democratic state in which, as both an institution and an agent, it no longer has absolute power. The theory allows both the exercise of power and the ability to exercise it to be examined in relation to the resources and structured inequality in a political system and process. This research, therefore, contends that the concept of power projected by critics of classical pluralism serves as a better foundation for developing an analytical framework for policy process than other theories.

3.2. Approaches to the study of power in policymaking

John (2012: 13) observes that approaches to the study of power in policymaking coexist and are interrelated in that they are developed in responses to the failures of earlier approaches to account for policy change and variation. Based on John's observation (2012: 13) and the notion and theories of power reviewed in section 3.1, this research reviews the strengths and weaknesses of these approaches to build its framework for analysing the net neutrality policymaking process.

3.2.1. Stages approach

The stages approach is the simplest approach for studying policy. According to John (2012: 17), it is built on a straightforward concept that policy 'emerges from the inter-relationship between intentions and actions of political participants', which is assumed to have taken place in a linear manner. Based on this concept, analysts assess policy by distinguishing between policy goals and

outcomes that emerge sequentially at different stages of the policy process. One variation of the stages approach is the sequential model, which focuses on describing how policy moves from one stage to another. This model is based on an ideal political system featuring multiple processes to ensure a balanced result and maintain the legitimacy of the result (Easton 1965a, 1965b cited in Hill 2013: 154). According to Hill (2013: 154), the emphasis of this model is placed on the process instead of institutions or structures.

Built on Easton's approach (1965a, 1965b cited in Hill 2013: 154), Jenkins (178: 17 cited in Hill 2013: 154) proposed a sequential model to capture feedback loops in the policy process. His model (ibid.) includes 'initiation, information, consideration, decision, implementation and evaluation'. Hogwood and Gunn (1984: 4) take the sequential model to the next level by identifying more detailed processes, including 'deciding to decide, deciding how to decide, issue definition, forecasting, setting objectives and priorities, options analysis, policy implementation, monitoring and control, evaluation and review, policy maintenance, succession and termination'. The other model is the implementation model, which separates the policy process into two phases: policy formulation and implementation. An example of this model is Pressman and Wildavsky's research (1984). Their work emphasises difficulties in policy implementation. These difficulties subsequently introduce problems that are then fed back into the policy formulation that will emerge in response to these problems.

The slight difference between the two models is in emphasis. The former looks at the whole process from conception to decision. The latter focuses on the implementation phase, which then starts another cycle of policy and denotes a view that policies emerge in response to problems. Both models, according to Hill (2013: 155), are based on the representative democratic political system and policy process, featuring a hierarchical procedural flow involving politicians making decisions, senior civil servants translating the decisions into legislation and junior civil servants implementing them.

The advantage of the stages approach, according to John (2012: 28), is that it can be used as 'a heuristic device' to organise and focus the analytical attention devoted to key decisions and their consequences amid a multitude of interactions among actors within the structural context of the policy process. However, such approach is criticised, for example by Sabatier (1986) and Barrett and Fudge (1981), for its unrealistic projection of policy process based on the top-down perspective of policymakers. This critique indicates that the stages approach focuses exclusively on the

domination component of power and is prone to suffer what Lukes (2005: 70) calls 'exercise fallacy'.

The approach's narrow epistemology of power restricts its scope of analysis to only the overt power evident in decisions and actions taken by the state. The approach cannot account for non-state policy actor actions taken in response to those made by the state or policymakers. Neither can it account for limitations imposed upon policy actors by the ideas, ideology, public opinion shaping and the context in which they operate. Yet, these chains of actions complicate the whole policy process to make it complex and continuous. The inability to account for this complexity is likely to produce an incomplete analysis of the policy process and its outcome. This research recognises both the advantages and disadvantages of this approach and uses its broad concept as 'a heuristic device' to organise and present findings, but rejects the approach's top-down view of the policy process.

3.2.2. Institutional approach

According to Scharpf (2000: 763), the institutional approach is a study of the implications of institutions for policy actors and their actions and the origin as well as transformation of the institutions themselves. Based on this general concept, Scharpf (2000: 763 - 4) has identified the objectives of the institutional analysis: 1) to explain the existence of certain institutions in relation to their function and ability to address social and economic problems, 2) to identify and explain the impact of institutions on societal and economic problems, 3) to explain institutional changes as a result of strategic interactions between actors and institutions and 4) to identify and explain the impact of institutions on interactions between policy actors and policy.

The definition and categories of institution, according to Hall and Taylor (1996: 6 - 7), are 'the formal or informal procedures, routines, norms and conventions embedded in the organisational structure of the polity or political economy. They can range from the rules of the constitutional order to the conventions governing trade union behaviour or bank-firm relations'. Based on this definition, Kay (2005: 555) separates institutions into three levels: 1) the constitutional level or formal institutions, 2) the policy decisions and 3) the individual decisions. This definition indicates that institutions are structural factors that shape the way a society operates. Institutionalism is, therefore, an approach based on the notion that institutions prescribe the rules of the power game

by which government, policymakers, corporate executives, media, individuals and organised interest groups operate in the political system.

Institutions, according to Kay (2005: 555), are also path-dependent because they exhibit continuing traditions, practices and reliance on certain ideas, values and ideologies. Path-dependency is, therefore, used almost exclusively as a framework under the institutional approach to study policy (ibid.). In his work (ibid.: 554), path-dependency is defined as 'moves in one direction, further moves in that same direction' or 'the order in which things happen affect how they happen'.

The concept of institutions and the institutional analytical framework approach exhibit, almost exclusively, an interest in the exercise of the power of institutions over agents. There is only one branch of the institutional perspectives that recognises agents' ability to cause institutional changes through their strategic interaction with institutions. Nonetheless, by the epistemology of institutions, agents' ability or power to create institutional changes remains limited within the range permitted by the institutions. These actions and decisions taken at all levels will exhibit a degree of path-dependency. For this reason, Hill (2013), John (2012) and Kay (2005) contend that path-dependency, as an analytical framework, serves as a useful tool for explaining patterns of behaviour or practice that can both constrain and enhance the actors' engagement in the policy process and their influence on policy outcome.

The emphasis of this approach on the implications of institutions for policy actors, their actions and the transformation of the institutions themselves reveal Bachrach and Baratz's covert exercise of power through mobilisation of bias (1975, 1970). According to John (2012: 56), this approach is best used to compare policymaking and implementation between national states. Both John (2012) and Kay (2005) agree that the institutional approach is useful for explaining 'policy stability', but not 'policy change'. The approach's exclusive focus on institutions or structural factors and their power, however, makes it inadequate to capture agency exercise of power through, for example, public opinion shaping and lobbying to promote their goals, values and interests or suppressing competing ones.

The limitation of the institutional approach and its path-dependent framework is observed in Powell and Cooper's analysis of open Internet discourses and advocacy (2011). The authors use agenda setting and framing to consider how advocates, media and regulators shape the open Internet policy in the US and the UK. They find that the open Internet policy is 'a product of both local culture and

regulatory precedent' (Powell and Cooper 2011: 323). Both the 'local culture and regulatory precedents' indicate the influence of neoliberal ideology, which qualifies as an institutional form, according to Hall and Taylor's classification of institutions (1996: 938). This analysis demonstrates a degree of structural determinism and underplays the agency contribution to policies and the impact of structure and agency on policy.

The advantage of institutionalism and path-dependency as an analytical framework for explaining policy continuation is evident in the findings of Freedman (2010, 2008) and Marsh (2008). Marsh (2008, 2002) indicates that the British political system, based on a top-down democratic concept, shapes the sociology of political institutions and power relations in a political process in a way that discourages participation in the policymaking process and thus reinforces power inequality in the process. Thus, decision-making power is likely to be concentrated within the policymaking core that is not likely to be open to alternative views or policy options other than those participants are familiar with. From Marsh's observation (2008, 2002), elements of path-dependency that are applicable to this research include: a) the continued political practice and b) dependency on traditional institutional ideologies, policy options and measures that prevent alternative ideas from reaching the policy circle.

The institutional influence in Freedman's work (2010: 351) is discussed in the language of 'framing' or policy problem definition. He indicates that existing institutional or structural factors, including policy and regulatory precedents, the role policy actors play, values, interests and ideology the state and non-state institutions intend to promote, the political system and the policy process altogether define what is considered a problem for the emerging policy to solve (ibid.). Framing, therefore, filters in participants in the policy process. It also determines the scope of discussion and reinforces the rhetorical values and goals that will be included in the discussion. Framing thus acts as an entry barrier for ideas, interests, values and goals that fall outside that frame. This function of framing exhibits the covert exercise of power described by Bachrach and Baratz (1975, 1970) through mobilisation of bias in the form of institutionalised values, interests and objectives that privilege complementary values, interests and objectives and exclude others.

Given the advantages and disadvantages of the institutional approach reviewed in this section, this research builds institutional factors into its analytical framework for net neutrality policymaking to

explain how institutional factors shape policy and policy actors' behaviour. Institutional factors will also be used to explain the different net neutrality policy outcomes in the UK and the US.

3.2.3. Ideational approach

The ideational approach is an approach to study policy that is based on the concept that ideas influence or constitute action and thus can cause policy change. According to John (2012: 124), ideas are connected to policymaking because policymaking is 'about introducing an idea or keeping one in place' and doing so involves conflicts over idea adoption. The emphasis of this approach is, therefore, placed on ideology, a coherent structure of ideas and values, shape policy actors' behaviours and policy. Béland (2009) identifies three ways in which ideational processes shape policy change. One is through defining problems or issues that then enter into a policy agenda. Another is through formulating a framework or paradigm that either legitimises or challenges existing institutions or policies. The last is by serving as tools for challenging existing institutional arrangements.

Béland's ideational process (2009) refers to discourses or ways in which ideas are communicated and circulated. His argument is derived from studies on the impact of ideas on policy. Examples of these include the work of: 1) Kingdon (1995) who asserts that ideas play a part in constructing policy agenda, 2) Hall (1993) who indicates that ideas contribute to the development of a policy paradigm or framework which specifies policy goals and measures to achieve the goal and guides the policy learning process based on evaluation of existing policies and 3) Schmidt (2002) and Blyth (2001) who argue that ideas are tools for agents to create policy or institutional change through the ideational process or discourse.

These notions of the impact of ideas and ideational processes illustrate the relationships between ideas, agenda, interests, policy transfers, institutions and discourse. Ideas, according to John (2012: 126 - 27), can be mobilised to shape policy agendas. The mobilisation of ideas in this case resembles Béland's definition of the ideational process (2009). Weber's analogy of the switchman (2009: 63 - 64) indicates that ideas and ideologies represent a person's worldview and cause the individual to develop an interest and take action accordingly. Thus, from a sociological perspective, the communications and net neutrality studies discussed in Chapter 2 serve as examples of decisions and actions shaped by neoliberal ideology and are driven by interests born of ideology. From the political science perspective, Weber's analogy can be extended to support the mobilisation of ideas

or ideational process to explain how certain ideas and ideologies are introduced, promoted, adopted and implemented.

The political aspect of Weber's analogy (2009) is evident in the relationship between idea and policy transfer that emerges from Stone's analysis (2007) of the role of think tanks in policy advocacy through knowledge distribution. He wrote that think tanks conceptualised and developed a framework or paradigm for achieving an objective which was then adopted by policymakers (2007: 276). According to Béland (2009), ideas can, through the ideational process, contribute to institutional change within the limit of certain institutional constraints. The function of ideas and ideologies in policymaking, according to Béland (2009), Weber (2009) and Stone (2007) highlights the influence of ideas on social change. The function of knowledge distribution (Stone 2007) and the ideational process (Béland 2009) indicates that discourse serves as a means for idea circulation.

Like the concept of the ideational approach, Fairclough (1992: 63) examines social change through discourse analysis, regarding 'language use as a form of social practice', combining language and discourse in social theory. His take on language implies that discourse is a 'mode of action' and 'representation' and that 'there is a dialectical relationship between discourse and social structure' (Fairclough 1992: 63 - 64). Within social structure is ideology, a coherent structure of values and ideas, which Fairclough (1992: 87) regards as 'significations/constructions of reality (the physical world, social relations, social identities)'. Fairclough's definition of ideology implies his recognition that ideology directs interests, drives actions and contributes to social change. Linked to this perspective of language is the concept of intertextuality (Fairclough 2003, 1992) which emphasises an interrelationship between texts, indicating that in developing a text (written or spoken language), other texts are drawn upon. Thus, the text produced can be a reproduction of existing texts, of which ideas and ideology form a part, or the introduction of a new one. Fairclough's approach to discourse analysis places ideology at the centre of the power exercise and struggle to sustain, reproduce or transform the existing 'relations of domination' (1992: 87) connected to the ideology.

Reflecting the thinking of Fairclough (2003, 1992) on discourse, Fischer (2003) and Fischer and Gottweis (2012) introduced the argumentative turn concept, emphasising, however, the dynamics of the ideational process instead of language use. This concept treats discourses as data (Fischer 2003) or units of analysis (Fischer and Gottweis 2012: 2) of which ideology and ideas form a part.

The concept applies Fairclough's understanding of language and discourse directly to political activities in policymaking and focuses its analysis on how mutually agreeable decisions are reached and justified, and its relationship with discourses in the discursive process.

Regardless of the difference in emphasis, the relationship between language, discourse and social change underpinning the critical approach to discourse analysis Fairclough (2003, 1992) and the argumentative turn (Fischer and Gottweis 2012; Fischer 2003) make the combination of these approaches an effective tool for studying exercise of power in policymaking and its outcome. The argumentative turn explains how particular social and political practices and contexts, guided by ideology, privileges certain discourses and shapes mobilisation of ideas and ideology to sustain or transform the existing ideas, ideologies and social constructs. Fairclough's critical discourse analysis serves as a tool to operationalise the argumentative turn, allowing for examination of power exercise and struggle to continue, reproduce or transform the existing power relations constituted by ideologies through language use in a discursive process.

Powell and Cooper's net neutrality discourse analysis (2011) serves as an example of policy analysis based on the ideational approach and discourse analysis as a framework. Their results, however, highlight strong structural influences as they find that net neutrality policy 'is a product of both local culture and regulatory precedent' (Powell and Cooper 2011: 323). The institutional influence reflected in their work underlines the relationship between institutions and the definitional ambiguity of ideas. According to John (2012: 124), ideas can refer to anything from 'statements of value or worth', 'casual relationships', 'solutions to public problems' to 'ideologies'. Some of these definitions overlap with the Hall and Taylor's classification of institutions (1996: 938) in which ideologies or values, given their stability, can qualify as institutions. Powell and Coopers' work (2011) identifies ideas with social values, which, according to Hall and Taylor's classification (1996: 938), can be read as institutions. By treating ideas as institutionalised social values, Powell and Cooper (2011) explain the net neutrality policy as a result of structural factors and underplay the agency aspect of ideas that shape policy actors' competing interests and drive their actions.

The limitation of Powell and Cooper's work (2011) does not mean that the ideational approach's contribution to the power study in policy analysis is limited only to the overt exercise of power by institutions. The ideational approach recognises ideas as resources that shape policy actors' behaviour. It recognises the ideational process or discourse as a mechanism to mobilise ideas, which emphasises the agency exercise of power in relation to its resources. Thus, the ideational approach

can be useful for explaining how both institutions and agents shape policy and, under crisis or extreme conditions, create policy change. However, Jacobs (2009: 255) warns that this approach cannot measure the impact of ideas and the ideational process on policy actors or on policy. Neither can this approach alone determine policy outcome because ideas are not the only factor that shape policy and actors actions.

Acknowledging both the potential and limitations of this approach, this research employs the combination of the argumentative turn and critical discourse analysis to examine the net neutrality policymaking process. The combination of these approaches will be strengthened by the network approach, which provides a comprehensive and organised system to study the interaction and relationship between structural factors and actors that shape the net neutrality policy.

3.2.4. Rational choice approach

The rational choice approach is built on pluralist and economic or mathematical reasoning to study power. Several models have been developed using this approach. One is the pluralist political market model. This model is based on Down's idea to equate politics with a marketplace (1957). Based on this concept, authors such as Brittan (1977) and Tullock (1976) portray the state as the giver in response to individual or organised interest group demands. The authors see the state's growth in importance and power as a result of a number of pressures put on the government. This model, therefore, features the interaction and power exchange between policy actors and the state, in which self-interest is the dominant motive for both parties' actions. This self-interest, according to switchman analogy (Weber 2009: 63 - 64) is shaped by ideas and ideology (in this case, neoliberalism).

Similarly, the institution and collective action model, according to, is built on market mechanism, a neoliberal approach. This model equates policy choice to consumer choice and contends that policy and consumer decisions are made in a similar way, including consideration of individual demands and external factors that restrict their choices. Riker (1980: 432) implies that this model recognises institutions, which refer to a broad range of things from the political system to policy and regulatory precedents and market, as constraints or support for individual actions.

The economic theory of bureaucracy is also based on an assumption that self-interest is the dominant cause of public officials' behaviour. This model analyses the exercise of power by bureaucrats in the way that economists would analyse the behaviour of businesses with significant market power. Applying this model, Tullock (1976: 29) explains that bureaucrats are inclined to expand and perpetuate bureaucracy because the more complex the system becomes, the more their power and public respect for them increases. It is, therefore, in the bureaucrats' interests to expand their organisations and complicate their operations.

The difference between the political market place model and the economic theory of the bureaucracy model is in their different emphases. The former focuses on non-state agents while the latter focuses on the state as an agent. Slightly different from the aforementioned models, game theory is not built on an economic theory. Nonetheless, it assumes a similar rationale of self-interest backed by individual actions and decisions. The work of Scharpf (1997: 73) serves as an example of how game theory is used to study power exercise. His work is set in a missed-motive environment in which an obvious choice is absent. This theory features common conflict resolution within a given set of rules based on the desired outcome, which can be achieving a common interest or maximising an advantage. Like the institution and collective action model, game theory takes into consideration the 'rules' of the game or external factors that shape actor decisions and actions. Despite these variations, the common objective of the rational choice approach to study power is to explain why certain policy options are adopted and why policy actors behave in a particular way based on an economic concept or a similar rationale.

The potential of this approach lies in its notion of power. The approach inherits its recognition of the binary notion of power from the pluralist power theory. This allows the approach to study power both in terms of ability and domination, but focusing on state and non-state policy actors' power exercise in pursuit of self-interest. All the models place policy actors' choices, manifested in their decisions and actions, in a social, political and economic context that can undermine or enhance their choices and ability to exercise power. An analysis of individual choice or action using this approach, therefore, reflects the interplay between structure and agent, working within structural constraints to achieve their self-interested goals. According to Whistler and Ellickson (2010) and John (2012), the rational choice approach can explain reasons behind policy decisions and change in relation to both self-interest and context.

However, critics such as Hay (2002: 53) and Hampsher-Monk and Hindmoor (2010: 48 - 49) question the validity of the assumptions about actual human ability and economic rationality on which the approach is built. Hay (2002: 53) argues against the basis of the rational choice approach for having fallen for the determinism fallacy, assuming that individuals will react in the same 'rational' way to the same context. He contends that human behaviour is more complicated than that. Similarly, Hampsher-Monk and Hindmoor (2010: 48 - 49) question the efficiency of deductive methods based on the economic models featured in the rational choice approach to explain human behaviour. They argue that human decisions and actions are not only informed by economic calculation, but also cognition and that the rational choice explanation 'overplay[s] the [calculation] at the expense of [cognition]' (ibid.: 49).

Like the pluralist theory on which it is built, the rational choice approach equates actions and decisions with domination. In doing so, it risks falling for Lukes' 'exercise fallacy' (2005: 70), which is likely to limit the study of power only to observable events. The approach is not likely to detect the covert exercise of power through mobilisation of bias (Bachrach and Baratz 1975, 1970) and public opinion shaping (Lukes 2005). Nonetheless, this research recognises the potential of this approach to explain, to an extent, policy decisions based on an interaction between structure and agents. It, therefore, builds the interplay between agents and structure into its analytical framework.

3.2.5. Network approach

Similar to the rational choice approach, the network approach is built on the pluralist theory of power. It emphasises competition between policy actors engaging in the policy process within the limits of the political context in which they operate. This approach, according to Löblich and Pfaff-Rüdiger (2012), Bevir and Rhodes (2006), Marsh and Smith (2000), and Marsh and Rhodes (1992), offers a way to conceptualise relationships between social, economic and political structures, the state and other policy actors driven by their internal interests to engage in the policy process.

The network approach differs from the rational choice approach in that it does not portray the state or government as a neutral institution. Neither does it view the state as a passive facilitator of private interests the way Marxist theory does. It recognises the government's role (as both a self-

interested institution and an agent) in distributing power to policy actors. In doing so, the government privileges some and disadvantages others in their policy engagement through access to the policymaking core. Given the theory of power on which the network approach is built and its recognition of interplay between structure and agency, this approach has the potential to explain the dynamics of the policymaking process in relation to policy outcome.

An early form of the network approach emphasised a connection between policy actors and the structural context of the policy process based on resource dependency (Marsh and Rhodes 1992). It treats these links and the structural context that shapes them as static structures. The way in which Marsh and Rhodes (1992) portray the relationship between the network structure and the context subjects their version of the network approach to criticism. Such approach is taken to task for its inability to account for changes in network structure as a result of policy actor responses to existing structural factors (Hay 1998). This model of network approach does not fully recognise the agents' power or ability to resist the domination of structures. John (2012: 74) also criticises the network approach for its limited capacity to explain policy outcome. He argues that the network could be the result of other factors, for example, interests and institutions (ibid.). Therefore, this approach is inadequate to explain the cause of agents' action beyond structural constraints.

Having recognised the limitations of the earlier version of the network approach, Marsh and Smith (2000: 5) subsequently developed the dialectical network approach which, they argue, 'works as an explanatory variable involv[ing] three dialectical relationships between structure, agency, network and context and network and outcome'. This version addresses Hay's (1998) critique of the earlier version of the Marsh and Rhodes (1992) network approach. It does so by acknowledging that policy actors develop strategic knowledge and implement it in their policy engagement and that both the strategic knowledge and the context in which these actors operate shape actors' actions. All these elements can lead to changes in the network structure. Marsh and Smith (2000: 5 - 6) treat policy networks as both structures and agents. Networks are political structures that result from patterns of practice that a) define the roles policy actors play in a policy process, b) prescribe the rules of engagement in the process, c) frame issues discussed in the process and d) contain organisational imperatives (ibid.). As agents, networks depend on their resources (e.g., financial, personnel, contact, knowledge and skills) to develop and devise strategies to overcome structural constraints and resource limitations to advance their goals and interests (ibid.: 6).

Given these properties of the network, it is not merely a result of other factors as John (2012: 74) deems it to be. The dialectical network approach has been used to explain what Marsh (2002, 2008) calls 'structured inequality' in British politics which constrains some policy actors and network actions and privileges others. Yet the approach, given its recognition of network and policy actors as agents, can detect network and policy actors' attempts to bypass these constraints in order to achieve their desired policy outcome.

Marsh and Smith's dialectical network approach can, therefore, explain policy outcomes in relation to power connections between structures and agents as well as agents and agents in the policy process in a given context. Although the approach focuses on the exercise of power to achieve domination, the dialectical network approach recognises the binary notion of power in a way similar to that of Foucault (1987: 11, 19), i.e., strategic games determine the conduct of others and the state of domination evident in the structured inequality imposed upon policy actors by institutions and context and resistance against such constraints. The binary notion of power embedded in the dialectical network approaches allows it to escape what Lukes (2005: 70) calls 'exercise fallacy' and investigate many techniques, overt and covert, to secure and resist domination. The approach's emphasis on the interaction between structure and agency also facilitates mobilisation of bias in the form of ideologies and ideas that direct policy actors to particular interests and shape actions.

Löblich and Pfaff-Rüdiger (2012: 212) use the network approach based on the dual character of the network to study communications policy. Their rationale is that the dialectical approach allows researchers to provide causal explanations for policy outcome, political structures, policy actor relationships with one another and their influence on the network. However, their interpretive perspective puts policy actors at the centre of their explanation for the policy process and its outcome (Löblich and Pfaff-Rüdiger 2012: 199). Their interpretive perspective, unlike the critical realist perspective used by Marsh (2008 and 2002), Marsh et al. (2003) and Marsh and Smith (2000), risks producing a biased explanation of the policy process and outcome that downplays the structural aspect of the network and its constraints on agents. This pitfall resembles that of the rational choice approach.

All the variations of the network approach reviewed in this section are based on the pluralist concept of power, which recognises the binary of power. This foundation gives the network

approach the potential to explain policy outcomes as an interaction between structure and agency. The dialectical network approach (Marsh and Smith 2000), having addressed the limitations of the earlier version of the network approach (Marsh and Rhodes 1992), embodies the strengths of the institutional, ideational and rational choice approaches. This dialectical network approach builds the inequality structured in institutional arrangements into its analytical parameter. It acknowledges the influence of ideas and ideologies as they are circulated and manoeuvred by agents or policy actors in attempts to continue or challenge existing ideas and ideologies.

The strength of all the aforementioned approaches embodied in the dialectical network approach (Marsh and Smith 2000) allows it to overcome the limitations of any individual approaches. The strengths of the dialectical network and the binary notion of power, on which this approach builds, makes it a comprehensive and systematic framework for analysing all the interactions between structural factors and actors that shape net neutrality policies.

To complement this approach, the argumentative turn is employed to contextualise the power exercise in the discursive process of policymaking in relation to structure, agency and policy networks. Here, structure refers to Hall and Taylor's classification of institutions (1996: 938): 'the formal or informal procedures, routines, norms and conventions' which distinguish policy practice, discourses and outcome between the two cases. Agency refers to policy actors and their advancement of ideas and ideologies. Policy networks here emphasises policy actors' relationships with one another as shaped by the broader political structures and their interests.

3.3. Political systems, process and practices

Built on the role of institutions as defined by Hall and Taylor (1996: 938) in configuring power relations in the political process of policymaking, this section reviews literature on policy practices in the UK, EU and US to provide a broad political context for the comparative analysis in Chapters 5, 6 and 7. The emphasis of this review is placed on the relationship between the political systems, policy practices and power relations in these jurisdictions. This relationship directs how ideas and ideologies are mobilised, maintained and challenged to justify claims for action in the net neutrality policymaking process. Here, the EU is considered as a supranational institution and political system, which adds another layer to the decision-making hierarchy in the UK policymaking process and thus contributes to shaping the national policy outcome.

3.3.1. The UK context

According to Marsh (2002: 29), the British version of representative democracy is based on a 'limited liberal conception of representation and a conservative notion of responsibility.' In his work, the 'limited liberal conception' means limited democratic control and influence over those whom people vote into office to represent them. This limited degree of liberalism results in a political system that emphasises 'normative commitment to elite or leadership democracy' with strong executive dominance that discourages participation (Marsh 2002: 29). Such a system reflects the UK and European feudal history that fosters a paternalistic relationship between the state and its people as discussed in section 2.1.

This limited liberal representative democracy shapes not only political institutions and processes, but also power relations within the state. The limited notion of responsibility, reflecting the attitude of 'government knows best' (Marsh 2008: 263), means that access to the executive core is filtered by government interests. This political system also limits the number of access points to influence policy. Such limited access to the executive core, according to Marsh (2008, 2002) and Marsh et al. (2003), becomes a structural constraint for those with limited access, concentrates power among the decision-making executives and contributes to the 'structured inequality' in the policymaking process.

In line with Marsh et al. (2003), Freedman (2008:86 - 87) finds the number of policy actors participating in the policy process irrelevant to the outcome and how the policymakers arrive at the outcome. His interview data indicates that the policy process, both in terms of definition or identification of the conflict and the decision on policy instruments to remedy this problem, 'are drawn up, not by members of a dispersed policy 'network,' but by a small decision-making elite' (ibid.: 87).

Despite the aforementioned policy practice, the concept of democracy requires consent to be governed and a degree of participation through representation. These values form a significant feature of the British consultation tradition (Jordan and Richardson 2013: 84). Consultation contributes to maintenance of a democratic system because it imparts a sense of involvement and is, thus, believed to produce more acceptable policies (ibid.: 86). Related to consultation is a functional necessity for negotiation in order to achieve consensus among a multitude of participants representing competing interests as well as consent (from the ones governed). Jordan and Richardson (2013: 86) observe that the consultation turns into negotiation when political support is

needed. This reflects a form of resource dependence, which is one of the key features of pluralist politics identified by classical pluralists, such as Dahl (2005, 1961), Polsby (1980), and Truman (1971).

Nonetheless, the limited liberal tradition implies a tendency for the political norms featuring consultation and negotiation to be influenced by executive bias. This bias, according to Jordan and Richardson (2013: 90), vindicates itself in the executive view of 'who counts' and 'what [the issue is]'. Based on this notion, the tradition of consultation and negotiation may be rendered an empty formality to legitimise and compromise the country's top-down political approach with the democratic value of participation.

Evidence of such bias and its impact on the policy process and outcome is captured in Freedman's observation (2008: 91) that 'a commitment to transparency does not, in itself, make policymaking more accessible and indeed is more likely designed to legitimise the process in the eyes of the public'. Freedman also remarks that the 'public consultation does little to undermine government control of the policymaking process or of the decisions eventually taken' (ibid.). As such, the British political tradition and the subsequent policy practice emphasising consultation and negotiation serves as a formality that legitimises what Marsh (2008, 2002) refers to as 'structured inequality'. The British political process and policy practices are, therefore, likely to concentrate power among government executives and civil servants. This inequality and power concentration, according to Marsh and Smith's dialectical network approach (2000), acts as a structural constraint for certain policy actors while affording privilege to others in the policymaking process.

3.3.2. The EU context and its implications for the UK

In addition to national political tradition, Britain's policymaking process and outcomes are also shaped by the supranational politics of the European Union. Under the European Communities Act (1972), member states are obliged to transpose EU legislation into national law. As such, Britain is subject to EU legislation. Thus, to defend and promote national interests related to EU legislation, Britain actively participates in the EU legislative process through the Council of the European Union. The EU political system, process and practices form parts of the structural factors that shape the UK decision-making process and outcomes.

According to Pollack (2010: 30), EU political tradition is defined by Madisonian democracy, which emphasises separation of powers among executive, legislative and judicial branches and, arguably,

federalism. However, unlike the US, this separation of powers is not absolute. The EU separation of governing responsibilities requires a degree of 'co-mingling of powers' (Kreppel 2002: 5 cited in Pollack 2010: 30) in these three areas. For example, the Council of Ministers and the EP share legislative powers with the European Commission, which is responsible for agenda-setting; the Commission, member states and, in some cases, independent regulatory agencies together share executive power (Pollack 2010: 30). This indistinct separation of powers appears to have created a degree of executive dominance due to the interconnection between the legislative branch and executive. Such interconnection mirrors a similar feature of British parliamentary democracy.

Given this political arrangement, Young (2010: 53) observes that 'the EU combines pluralism with executive dominance'. The number of member states and the different organisations involved in the legislative and executive process complicate the policymaking process in the EU. Richardson (2006: 10) notes that the complexity and explosion of policy actors involved in the EU policymaking process is similar to that observed in American policymaking. The pluralistic feature of EU policymaking implies that the process is competitive as the policy process involves decision-making that can produce a scenario of winners and losers. Naturally, policy actors are likely to be competing to defend and promote their interests.

To cope with the explosion of actors, particularly member states that operate in various types of policy networks, Richardson (2006: 14) observes that the EU uses 'cooperation' as its strategy. Therefore, unlike the US, the EU policy style is, at once, competitive, cooperative and consensual (ibid.: 16). Richardson also argues that the EU policy process is not driven purely by interests (ibid.:6). In fact, the process focuses more on ideas, knowledge and expertise, as the Amsterdam Treaty that sets out quality requirements for EU legislation states that any decisions that will result in legislation are based on research findings and facts (ibid.: 4). This requirement of the Amsterdam Treaty, therefore, shapes the characteristics of the European Community as a knowledge-based community that values consultations, research and impact assessment (Richardson 2006: 17 - 18). The Treaty also defines policy engagement practices for policy actors operating within the EU.

As with the US, this requirement for knowledge-based decision making creates another access channel through which policy actors can influence policy, in addition to those opened by the separation of powers and the institutions sharing those powers. Nonetheless, there is a lower degree of reliance on facts and evidence in the EU decision-making process than in the US, where a

similar requirement results in a manoeuvre of knowledge creation as part of an opinion-shaping network strung together by major corporations. This difference in practice reflects a difference in policy style between the EU and the US. The former features a fusion of competition, cooperation and negotiation with an aim to achieve a consensus; the latter emphasises competition with an aim to win.

These EU policy practices form what Marsh and Smith (2000) refer to as a structural context in which the policy process is situated and, therefore, forms part of the structural factors that shape the UK's policymaking process and outcome. This is evident, for example, in Ofcom's framing of its net neutrality consultation, based on the duties of NRAs in ensuring user access to online content and services of their choice as prescribed in the 2009 revised regulatory framework for electronic communications. The relationship between the EU and the UK and the implications of EU legislation for UK law also drive British policy actors to participate in the EU policy process to defend and advocate for their goals and interests. As such, the EU policy process has opened up another channel for UK-based policy actors to forum-shift to influence national policy at the supranational level. However, this additional access point to policymaking can also pose as a constraint for actors with limited resources due to the resource-intensive nature of policy practices at both levels.

3.3.3. The US context

Contrary to British and EU traditions, American political processes and practices are heavily influenced by the concept of pluralism and liberalism. The significant differences between the European (Britain included) and the American notions of liberalism, as suggested by Hartz (1991: 5 - 14), contribute greatly to the differences in policy practices across the Atlantic. Given the absence of a feudal background, Americans interpret liberalism as the natural state of their being. Government intervention is welcome only when it is introduced to assist private operations. Based on this notion of liberalism, the relationship between the state and its people, including businesses, is one in which the state serves and answers to plural demands as mirrored in the American political system of representative democracy.

Pluralism in the American political system emphasises not only a plurality of participants, but also fragmented and diffused power competition (based on resource dependence) among policy actors to influence government decisions. This condition is recorded in the work of Dahl (2005, 1961),

Polsby (1980), and Truman (1971). The influence of liberalism on the American political tradition is seen in its assumption that government and governmental instruments serve as a means to respond to demands for social change. The fusion of pluralist and liberal influences results in an American representative democracy that emphasises participation and competition, which is a different model of democracy from that of the UK.

The pluralist influence on the American model of democracy results in a plethora of policy actors competing to influence the government and policy during the policymaking process. According to Freedman (2008: 81 - 82), the multitude of participants in the policy process in the US as well as in the UK not only results from the number of government departments responsible for media and communications policy, but also the growing number of stakeholders in relation to the expansion and convergence of the communications industries. In addition to government departments and the relevant industries, corporate lobbyists and trade associations are also very well established and involved, particularly in the US system. Freedman (2008: 82) refers to a key influencer, such as the Parents Television Council, in the process to develop the legislation to increase fines for broadcast indecency on American networks. Given the situation, the 'policymaking universe is becoming increasingly crowded' (ibid.: 83).

The multitude of policy actors involved makes consensus across all participants and the sustainability of such consensus required to institutionalise it highly improbable (Lowi 1969: 49). In line with this comment, Freedman (2008: 82) indicates that the US policy process is 'splintered'. This pluralist-induced competition and the fragmented policy process distinguish American policy practices from those of the EU and the UK. The influence of liberalism, which emphasises small government and limited governmental power to create and maintain social order, results in government's increasing reliance on expert knowledge to legitimise its intervention. This, Heclo (1978: 105 - 06) observes, leads to an increased expert influence on government and policy. Likewise, Freedman (2008: 98) detects the US policymakers' heavy reliance on facts and expert knowledge to demonstrate impartiality to the extent that abstract ideas, including critical and conceptually-minded academic inputs, are likely to be excluded (ibid.: 101).

Liberalism, as defined by Locke (1980: 75 - 76), also shapes the horizontal American separation of powers: executive, legislative and judicial. Such separation results in multiple access points to influence the government and hold it accountable, for example, by preventing dominance of

executive power in state activities. The clear separation of powers, based on Locke's liberal concept of civil government, makes the American model of democracy and its political system different from that of Britain and the EU. Locke's concept of liberal civil government has also influenced the American constitutional protections surrounding free speech and the right to assembly which, according to Domhoff (2010: 110), allows for public opinion to shape government decisions and actions. Locke's concept has, therefore, made public opinion another source of power in the US policymaking process. As a result, attempts are made to tap into this source of power to manoeuvre it through public opinion-shaping, involving mass media, public relations companies, policy discussion groups and expert knowledge (Domhoff 2010: 119 - 46).

Similarly, Freedman (2008: 102) echoes the frustration of policymakers and corporate lawyers as a result of interference from the 'public' or individuals who bring to the policy process and discourse 'opinion', not 'data or facts,' and thus further complicate an already complicated process. According to Freedman (2008), people's and government's opinions are shaped by the media, whose influence on the people and policymakers is 'wielded without a democratic mandate and reserved for some of the wealthiest and most powerful corporate figures, which have their own economic and ideological interests' (ibid.: 87). As such, the liberal emphasis on free speech, public opinion and support is one source of power and participation from a broad range of the public and is a norm in US policymaking and practices. The same level of public participation and importance of public opinion is not observed in the UK policymaking process and practices due to a different interpretation of liberalism and the related concept of civil government.

The US political system and practices based on the fusion of liberalism and pluralism presents a different form of power concentration from that of the UK. It can be argued that the level of competition in the US policymaking process makes policy engagement resource intensive, potentially more so than in the UK. The competitive nature of pluralism induces policy actors to exploit all available mechanisms to influence policy. In addition, the government's reliance on expert knowledge, as is required by the Administrative Procedures Act (APA), has also set as a norm a resource-intensive, knowledge-based policy engagement practice. This political tradition, according to Domhoff (2010), Freedman (2010, 2008), Marsh (2008) and Heclo (1978), results in power concentration in the hands of those who command the necessary resources required to successfully shape government's decisions. To achieve such success involves extensive schemes to shape public opinion, mobilise the public in support of policy actors' concerns and provide evidence in support of political demands across all the multiple access points in the policymaking process. Inevitably, the US policy engagement practices form structural constraints that disadvantage policy actors with limited resources in influencing government's policy decisions.

3.4. Research framework

The review of power theories in section 3.1 indicates that the critique of classical pluralism by Domhoff (2010), Freedman (2008, 2010), Heclo (1978) and Marsh (2002, 2008) is the power theory most sensitive to detect both the domination and ability aspects of power. This recognition lends this theory to the examination of the plurality of policy actors competing to inscribe their ideas, ideologies, values and interests on policies and the structural factors that constrain such ability. These structural constraints result in power inequality in the policymaking process. From the approaches to study power reviewed in section 3.2, the dialectical network approach (Marsh and Smith 2000) emerges as a comprehensive concept for observing both the domination and ability aspects of power in the interaction between structure and agencies in a political process. This research, therefore, builds its analytical framework based on the critique of classical pluralist power theory and the dialectical network approach to explain the net neutrality policy outcome in relation to the power dynamics of structure (institutions and policy network) and agency (policy actors).

The critique of classical pluralist theory of power informs the research on the nature of power in the modern capitalist democratic state. The dialectical network approach serves as a macro-structural framework for analysing the interaction between structure and agency in policymaking and the subsequent power relations among policy actors. This approach enables examination of the inter-relationships among three elements in the policy process. These include the pluralist nature of power, featuring policy actors competing to promote their values and interests, structural factors and the network of policy actors shaped by the broader political system and policy actors' interests. The approach also supports the examination of the second face of power (Bachrach and Baratz 1975, 1970) and the third face of power (Lukes 2005). The former is executed through mobilisation of ideas and ideologies to sustain or transform existing ideas and ideologies; the latter is exercised through opinion shaping to avert or prevent conception of competing demands and interests against dominant ones.

Exercise of both faces of power is shaped by existing institutions or structural factors, which include institutional structures (e.g., market, government, state agencies, organised interest groups and trade unions), organisational and political practices, policy precedents, ideologies, institutionalised values and interests and political practices. These institutions exhibit a degree of path-dependency which, according to Marsh (2008: 257), contributes to 'structured inequality.' This 'structured inequality' connotes interplay between institutions, including policy networks, and policy actors.

The interplay between these elements, according to Freedman (2010, 2008), Marsh (2008, 2002) and Marsh et al. (2003) shapes the interaction in the policymaking process and policy outcome. These structural factors are summarised in Figure 1.

Figure 1 Structural factors that shape policies
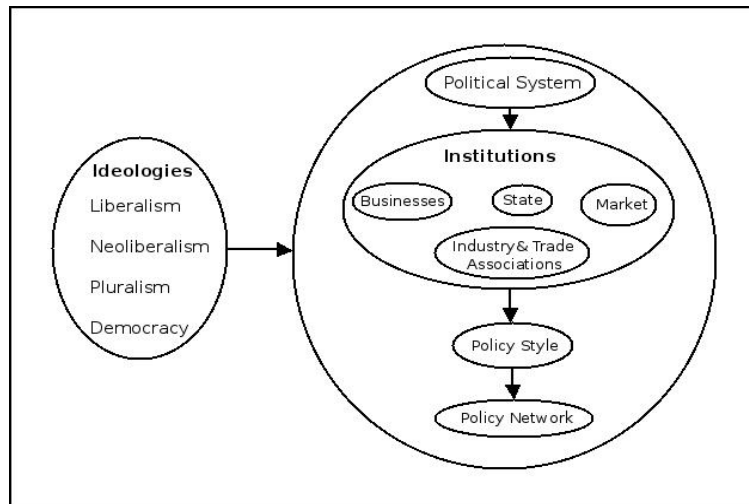
Complementary to the dialectical network approach, the argumentative turn (Fischer 2003; Fischer and Gottweis 2012) is used as a meso-analytical framework for analysing the relational power exercise in the discursive process of policymaking. This level of analysis emphasises mobilisation of ideas and ideologies as exercises of power in the discursive process of policymaking shaped by a complex web of relationships between structural factors, policy actors and the policy networks. The framework for analysing the net neutrality policymaking process based on the dialectical policy network and argumentative turn is displayed in Figure 2.

Figure 2 Research analytical framework based on the dialectical network and argumentative turn
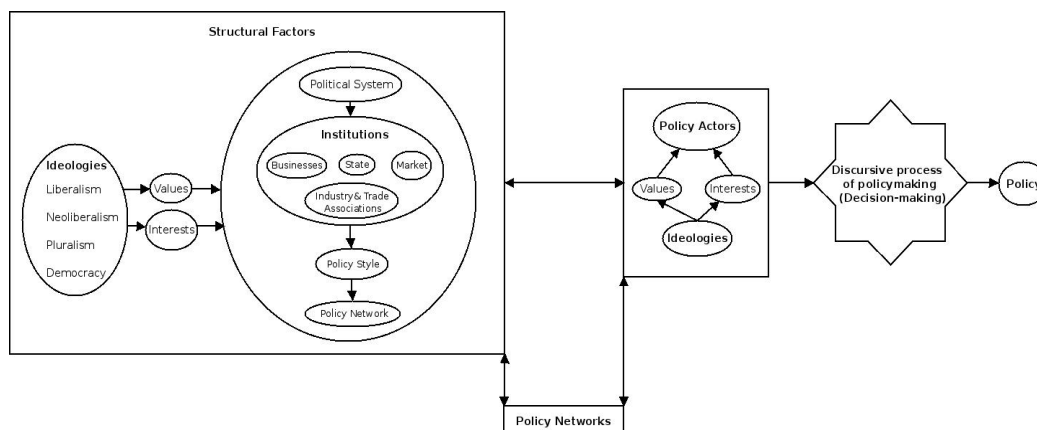
To operationalise the argumentative turn, critical discourse analysis (Fairclough 2003; Fairclough 1992: 86 - 91) serves as a tool to explain the texts produced in relation to the social and political factors that shape the text production process, in this case net neutrality policymaking process. Here, texts refer to policy documents, articulation of the current and future desirable circumstances policy actors produced during the policymaking process and the policy decisions. The concept provides a framework from explaining how texts and text production process contribute to social change or continuation, highlighting the significance of ideologies in shaping policy actors' interpretation of their circumstances, the future they intend to create and how this interpretation then shapes their discourses, actions and policy outcomes.

The research framework developed here supports three levels of analysis: a) the macro-level, which focuses on the relationship between structure and agency within a structured discursive process of policymaking, b) the meso-level, which concentrates on the relational power exercise in policymaking, including policy actors' behaviour shaped by a broader political system and process and c) the micro-level, which explains the interaction between structural factors, ideas, ideologies and policy actors that shape policy through critical discourse analysis.

A comparison between the US and the UK cases will contribute to the fields of critical communications policy research and political science by explaining the net neutrality policy outcome in relation to structural factors, ideas and ideologies that shape policy actors' behaviour. The analysis of policy actor engagement in this research contributes to the field of social sciences by which and how ideologies shape policy actors' behaviour as they interact in the policymaking process. The methods for delivering these answers are presented in the next chapter.

Chapter 4

Methodology

This chapter explains the application of the combined analytical framework discussed in section 3.4. To apply the analytical framework, a case study approach is used due to its ability to enable an 'inductive form of study' (David 2006: XXXVI) to facilitate the exploration of problems and resolutions featured in the cases studied and taking into consideration the context in which the cases are situated. Here, the cases of the US and the UK are compared in order to determine whether and how different structural conditions in these cases result in adoption of different policy objectives and measures. The comparison will explain how the interaction between structure and agency shape policy. The structural background of these cases is discussed in section 3.3.

The combination of argumentative turn and Critical Discourse Analysis (CDA) serves as a tool for policy analysis and answering the research questions set out in section 2.4.3. The combined framework enables an examination of the exercise of power and struggles to sustain or transform the existing order of power relations in the provision of broadband Internet access service and consumption of such service through a discursive process of policymaking, as discussed in sections 3.2.3 and 3.4. The framework emphasises the interaction between structural factors and policy actors' exercise of power through discourse or articulation of their present circumstances and the future they compete to recreate or sustain.

The analysis under this framework is based on the understanding of Fischer and Gottweis (2012), Fischer (2003), and Fairclough (2003, 1992) that discourse is constituted by both existing social and political practices shaped by ideologies and an exercise of power constituting social change or continuation. The duality of discourse is traceable in the articulation or representation of particular aspects of the world, which is constituted by policy actors' perceptions of their past and present circumstances shaped by existing structural factors. Based on such perceptions, policy actors recreate a new circumstance through articulation of this vision or maintain the existing order through the discursive process of policymaking. In this research, the aspect of the world discussed is the provision of broadband Internet access service.

Given the understanding of discourse shared by Fischer and Gottweis (2012), Fischer (2003), and Fairclough (2003, 1992), the representation of broadband Internet access service provision and oversight embodies traces of interaction between structure and agency which, according to the concept of dialectical policy network, shapes policy. The net neutrality discourses in policymaking therefore are exercises of power and form the data or unit of analysis for this research.

Elite interviews are employed to enrich the critical discourse analysis of policy documents or texts produced throughout the discursive process of policymaking. They are a means for gathering information on how policy actors engage in the policymaking process and advance their discourses under given structural limitations. The interviews are necessary for balancing the risk of structural deterministic analysis with agent engagement analysis. The list of interviewees, rationale for selection and the structure of the interview will be discussed in section 4.3. The analytical framework for interview data is presented in section 4.4.

4.1. Research Paradigm: Case studies

This research aims to explain how and by which factors the net neutrality policy in the US and the UK is shaped. This objective is based on the notion that this policy is an area within communications policy which, according to Freedman (2008: 38) and Iosifidis (2011a), is increasingly complicated to formulate due to the multitude of actors and structural factors involved. The policy therefore needs to be examined in relation to a particular context or environment. The complexity and the particularity of context in which the policy process is situated require a paradigm for research inquiry that can accommodate all these elements.

According to Stake (2006: 128), most case studies provide descriptive results that are 'complex, holistic and involving a myriad of not highly isolated variables'. Similarly, Foreman (2006: 160) indicates that case studies are useful in research where: 1) the immediate problem is to open a field for research, 2) the problem demands further conceptualisation of factors or functions affecting a given activity, 3) the problem demands emphasis on the pattern of interpretation given by subjects or functionaries and 4) the problem is to determine the particular pattern of factors significant in a given case. Given the complexity of this research, case study is used as a paradigm for inquiry to conceptualise the factors, actor behaviours and power relations affecting the net neutrality policymaking process.

To account for the relationship between structural factors, actors and policy outcome, a comparative approach to case studies is needed. According to Agranoff and Radin (2006: 110), 'by comparing cases one can build explanation and identify variables that emanate from multiple settings'. These variables, according to Yin (1984: 48 - 49 cited in Agranoff and Radin 2006: 109), 'either predict similar results or produce contrary results for predictable reasons'. The US and the UK are therefore selected as cases to provide the context and boundaries within which the net neutrality policymaking process is examined. These cases are selected on the grounds that, in both cases, net neutrality policy emerges in response to concerns over broadband access provision. The two cases, however, embody structural differences. These include political systems, policy practices and policy precedents, which have been shaped by ideologies and have resulted in different levels of market competition. From the comparison will emerge the explanation for the similarity or differences in policy outcomes constituted by variables emanating from the particularity of the US and UK cases. The paradigm also illustrates how these variables shape policy actors' behaviour, discourse and policy outcome in the policymaking process.

Despite the usefulness of comparative case studies, Foreman (2006: 153) remarks that case studies are 'weakest at the point of determination of adequacy in generalisations drawn from records' due to the particularity of the cases. However, Stake (2006: 126) argues that the value of case study lies in the depth of knowledge of 'the particular' cases. This knowledge, he asserts, is naturalistic generalisation, 'arrived at by recognising the similarities of objects and issues in and out of context and by sensing the natural conversations of happenings' (ibid.: 126-127). Stake's argument (2006: 126) indicates that the findings derived from the application of case studies may be valid in other cases or jurisdictions. A thorough knowledge of the particulars provides people with the understanding of 'how things are, why they are… and how these things are likely to be later or in other places' (ibid). Therefore, this research argues in line with Stake (2006) that an understanding of power dynamics in the policymaking process, the interaction between policy actors and structural factors and these factors' implications for policy outcomes produced by this paradigm of inquiry can be generalised. The understanding of the interrelationships between these factors and actors can be adapted to guide studies of the same policy in different contexts and different policies in the same contexts.

As a paradigm for research inquiry, case studies require other methods to collect and analyse data in order to build knowledge about the net neutrality policy process and outcome within the boundaries of the particular contexts of the US and the UK. This research therefore supports the

comparative case study paradigm with interviews and the combined framework of argumentative turn and CDA. CDA serves as a means to extract knowledge from the selected policy documents which form part of actor engagement in the policy process.

4.2. Critical discourse analysis: Framework and methodological application

As discussed in section 3.4, the analytical framework of this research combines the dialectical policy network, argumentative turn and CDA to study net neutrality policies. The former serves as a comprehensive framework for analysing the interaction of all the factors and actors that shape policies. The latter two complement the former by offering a way to explain this interaction in terms of power exercise in relation to the dialectical power relations of structure, agency and network.

As discussed in 3.2.3, argumentative turn and CDA emphasise different aspects of discourse. The former sees discourse as a communicative practice, an action, a way people represent their views, which are 'culturally shaped', 'socially motivated' and interpretive of their environment as well as other discourses (Fischer and Gottweis 2012: 6). These communicative practices constitute and mediate the process of argumentation in which discourses are exchanged as people communicate with an aim to 'reach and justify a mutually acceptable decision' (ibid: 9). Here, such decision is the net neutrality policy, an outcome of a communicative process or argumentation. The argumentation process, therefore, equates to the policymaking process. This perspective of discourse places discourse at the centre of such communicative process and emphasises its operation in the process. Given the function of the argumentation process, discourses are exercises of power to achieve consensus or dominance, to sustain or transform the existing power relations and social and political orders. The discourses produced throughout the net neutrality policymaking process are therefore treated as units of analysis because they embody traces of factors that privilege certain discourses over others and thus shape the discourses of the policy outcome.

CDA, using a socio-linguistic approach, explains discourses as exercises of power in relation to social practices, social structure and agency, in the sense that policy actors actively construct their discourses based on structural factors, their ideas and their interests. According to Fairclough (1992), discourses have three dialectical dimensions: social practices, discursive practices and texts. Social practices are related to ideologies, which give meanings to the physical world, social relations

and identity and contribute to the production, reproduction or transformation of power relations in society (Fairclough 1992: 87). Discursive practice 'involves a process of text production, distribution and consumption' (ibid.: 78) shaped by social practices and structures. The net neutrality policymaking process, which equates what Fischer and Gottweis (2012: 9) refer to as an argumentation process, involves all these elements of discursive practice. Texts are constituted by past discursive practices, other texts and policy actors' interpretations of these practices and other texts (ibid.: 75). In this research, texts are policy documents produced, distributed and consumed in the discursive process of policymaking.

Fairclough (2003) identifies three aspects of texts: genre, discourses and styles. In operationalising the argumentative turn, 'text' or elements of social events are constituted by other texts and discourses as well as constituting new texts and discourses (Fairclough 2003). Texts, therefore, are exercises of power. Genre is a way of communicating. In this case, the policymaking process or argumentation qualifies as a genre. Through the lens of the argumentative turn, this genre is a mix of argumentative and persuasive dialogue, one that opens with the question of what to do or whether to do something. Discourses, in this context, refer to 'ways of representing aspects of the world which can generally be identified with different positions or perspectives of different groups of social actors' (Fairclough and Fairclough 2012: 82). Styles 'are ways of being, social identities, in their semiotic aspect' (ibid.: 82-83).

To operationalise the argumentative turn, the framework for analysing practical reasoning, which is an application of CDA on discourses based on an argumentation theory (Fairclough and Fairclough 2012:86), is used. Both the CDA and argumentative turn share a common understanding of discourses. Under this framework, practical reasoning is a way in which a claim for action is represented as a discursive process of policymaking or argumentation. In this respect, practical reasoning is a discourse. The application of this framework in this research emphasises the relationship between the first two aspects of text: genre and discourses and not so much the style. The rationale for such emphasis is guided by the notions that discourses are both constituted and constitutive and a three dimensional property of discourse.

Genre is, therefore, analysed in this research in order to identify the institutional factors that shape discourses, texts and discursive practice, which is the way discourses are circulated in the net neutrality policy process. This level of analysis illustrates the interrelationship between structure and agency and the subsequent power relations among agents or policy actors engaging in the net

neutrality policy process. An analysis of the net neutrality discourses will explain what constitutes discourses and how these discourses constitute other discourses and policy outcomes. The comparison between discourses submitted by different policy actors at different turns or stages of the consultation, the formal aspect of policymaking, demonstrates how policy actors exercise their deliberative power in order to arrive at mutually acceptable discourses or policy decisions. Both levels of analysis help detect the power exercises through 'mobilisation of bias' (Bachrach and Baratz 1970: 44). Together, they explain how net neutrality policy is shaped with reference to the interrelationship between the structure, agents, and policy networks, which act as both structures and agents. The CDA concept and terminology discussed here are summarised in Table 6.

Table 6 CDA terminology

Terminology	Meaning	Reference in the research context
Texts	Elements of social events	Power exercise in policymaking
A discourse or discourses	'Ways of representing aspects of the world which can generally be identified with different positions or perspectives of different groups of social actors' (Fairclough and Fairclough 2012: 82)	Policy actors' perspectives and stance on net neutrality policy or arguments
Genre/ or practice	Ways of acting (e.g. interviews, consultation and lecture)	Formal (e.g. public consultation) and informal (e.g. private meetings and public opinion shaping) policymaking process

In operationalising the argumentative turn under the dialectical policy network framework, texts are power exercises through the issuance of policy documents by and dialogue between state and non-state policy actors throughout the net neutrality policymaking process. The social event, of which these texts form a part, is the net neutrality policymaking process. This process is shaped by social structures which, in policy network terms, include political systems and ideologies. The policy process is also shaped by social practices which, in policy network terms, translate into policy practices or the ways in which policy actors engage in the policymaking process. Each text or policy document contains many discourses. This nature of the text, according to Fairclough (2003: 22), shows that social agents or policy actors 'are not 'free' agents; they are socially constrained, but nor are their actions totally socially determined'.

In the context of policymaking, the dialectical policy network and argumentative turn approaches, this condition suggests that policy actors' power exercise through discourse construction and deliberation is shaped by other discourses, factors and actors. Policy actors enjoy a degree of freedom to choose what to build into their discourse and are able to insert their actual interests and objectives into their discourse. The discourses constructed then constitute a new perception of reality and can reshape the existing discourses. In practice, policy actors recognise, support, and reject the existing discourses when developing their own. The relationship between these discourses in a text, therefore, reflects the relationship policy actors have with one another.

The manner in which the actors produce and exchange discourses, which is a power exercise, in the net neutrality policymaking process, a way of communication, also indicates the influence on discourses of social structures, social practices and discursive practices. This influence results from the broader political system and the subsequent power relations between state and non-state policy actors that determine how these policy actors communicate in the specific context of net neutrality policymaking. The way of communication constitutes the way power is exercised in the net neutrality policymaking process according to the argumentative turn concept. According to CDA, the way of communication, or genre, also contributes to discourse construction as policy actors build both the communication protocol and the existing discourses into their discourse. Thus, genre also shapes both discourses and texts.

This relationship between social structures, social practices, text production and discourses corresponds with the notion of dialectical relationships between institutional factors or social structures and actors, networks and actors, as well as institutional factors and networks (Marsh and Smith 2000). The argumentative turn provides a framework for illustrating the interaction between these elements in the discursive process of policymaking as existing discourses shape the subsequent discourses constructed to reshape the existing ones. This relationship is displayed in Figure 3.

Figure 3 The dialectical relationships between institutional factors, network and policy actors embedded in texts based on the three dimentional concept of discourse (Fairclough 1992: 73) and CDA (Fairclough 2003)
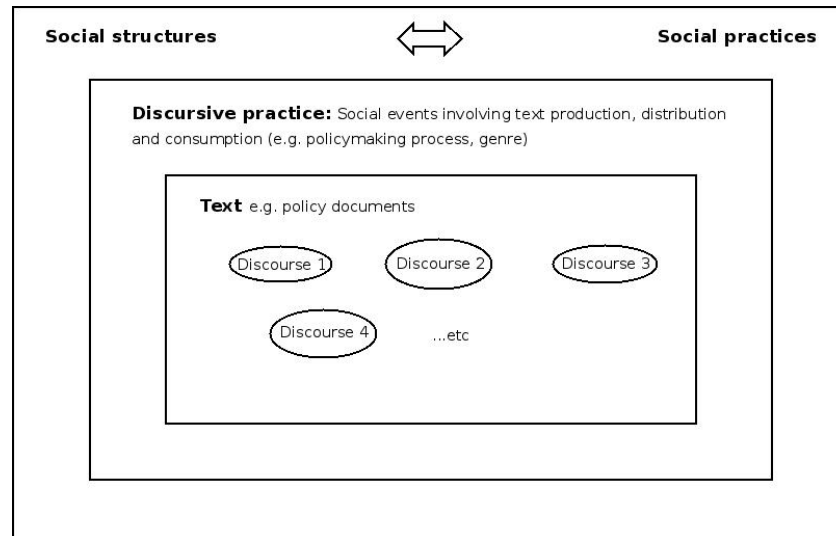
Based on the relationship among social structural factors, network and policy actors embedded in texts, CDA, in this research, is applied at two levels: genre and discourses. The genre analysis focuses on the structural factors that shape the way policy actors exchange and mobilise their explanatory discourse from a structural perspective. Here, genre spans both the formal and informal policymaking process. The objective of this level of analysis is to explain how the institutional factors shape the way policy actors communicate and the content of their communication, or discourse.

Discourse analysis demonstrates policy actors' representation of their policy stances and preferred regulatory options, reflecting their goals, values and interests embedded in the net neutrality discourse. The objective of this level of analysis is to identify the factors that constitute policy actors' claims for action and the power relations among policy actors in a given structural context. These factors include policy actors' goals, means-goals, values and interests connected to broadband Internet access service and shaped by ideology (see Table 7).

To identify these factors and answer research questions 1 and 4 (see section 2.4.3, page 51), Fairclough and Fairclough's framework for analysis and evaluation of practical reasoning is employed (2012: 35 - 61). Based on this framework, nine analytical categories are identified and defined in Table 7.

Table 7 Definition of research analytical categories based on the framework for analysing practical reasoning (Fairclough and Fairclough 2012)

Analytical Categories	Definition	CDA equivalence
Themes	Points of consideration	Discourses
(Conducive) Argumentation	Presentation and weighing of pros and cons for various points of consideration in relation to claims for actions (Fairclough and Fairclough 2012: 38)	Texts
Argument	Rationale for a policy actor's claim for action	Discourses
Claim for action	An action that an actor ought to take given a set of circumstances and a future state of affairs in line with the agent's concerns (Fairclough and Fairclough 2012: 42)	Discourses (This is a discourse in the most concrete sense, according to Fairclough and Fairclough 2012: 81), with an emphasis on representation or constitutive element of discourse.)
Goal	A future state of affairs in which values are realised (Fairclough and Fairclough 2012: 39-50)	Discourses
Values	A policy actor's judgement of what is important or what a policy actor concerns him/herself with (Fairclough and Fairclough 2012: 39-50)	An element constituting a discourse
Interests	Internal reasons for an involvement in an undertaking (Fairclough and Fairclough 2012: 42)	An element constituting a discourse
Circumstances	A policy actor's context of action (Fairclough and Fairclough 2012: 45)	An element constituting a discourse
Means-Goal	A means intended to take a policy actor from the current set of circumstances to a future situation that matches the actor's concerns. (Fairclough and Fairclough 2012: 39-50)	Discourses

Argumentation or texts in this research comprise three groups of net neutrality policy documents: the consultation documents, responses to consultations and policy decisions. These documents or corpuses are listed in Table 8. These texts are analysed to explain the exercise of power in the formal policymaking process. These texts or corpuses are policy actors' formal engagement with policy and with one another within a given structural context. The EU consultation documents, responses to consultation and policy decisions are included because the EU net neutrality policymaking process and its outcome form part of the structural factors that shape the discursive practices, discourses and policy outcome in the UK. As mentioned in section 3.3.2, the UK is bound by the European Communities Act (1972) to transpose EU legislation into national law and thus actively takes part in the legislative process at the EU level.

The selected responses to consultation represent the sampled policy actors from all communications sectors and the responsible state-policy actors involved in the process. The sampling is based on the actors' institutional functions (e.g., state and non-state institutions) and their industry affiliations. The aim of this sampling is to address all interests in net neutrality policy and broadband Internet service represented by different groups of policy actors. These interests are shaped by ideology, business ideas, social and political structure, practices and types and sizes of organisations. The selection criteria are also designed to represent both the stances of major corporations and those of small organisations in each category of policy actors. This is due to the different interests, markets and bargaining power tied to the size of the organisation. The interests and bargaining power connected to the size of the organisation are determined partly by its market share and is likely to determine the resources dedicated to and level of engagement in the policymaking process. Given the type and size of business, large corporations are likely to be more active in policy engagement due to the resources available and the size of their stake connected to the policy.

In the US context, Comcast, Time Warner, AT&T and Verizon are the four largest broadband providers based on the number of subscribers in the first quarter of 2015 (Leichtman Research Group 2015). Their market shares compared to other providers are displayed in Figure 4.

Figure 4 US Broadband market share by technology and by providers
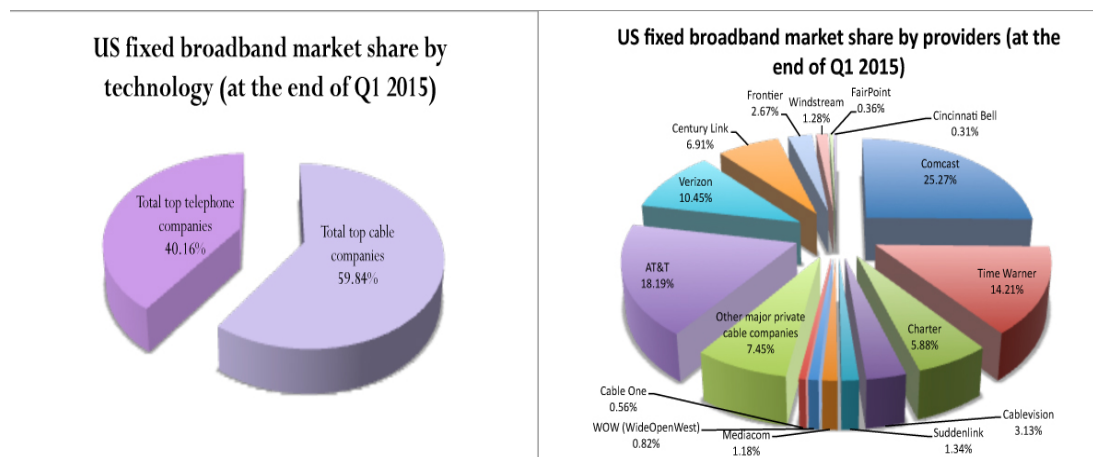
Source: Leichtman Research Group (2015)

Given the size of their market shares, the responses of Comcast, AT&T and Verizon, for example, are selected as corpus to represent major broadband and converged providers. Smaller broadband

providers are represented by their trade organisations. The responses of Yahoo and Google, for instance, are selected to represent the voices of major content providers, while Netflix and Skype are chosen to represent smaller content providers' policy positions, demands and interests.

In the UK Context, BT, holding 31% of the UK broadband market share (see Figure 5), is chosen as the representative of major broadband providers operating in the UK market and responder to Ofcom's and the European Commission's net neutrality consultation. Consultation responses by Virgin Media, Sky and Talk Talk, holding 20%, 20% and 15% of the UK fixed-line market respectively, are also included to represent the policy positions, demands and interests of smaller broadband and converged providers.

Figure 5 UK Fixed broadband market share
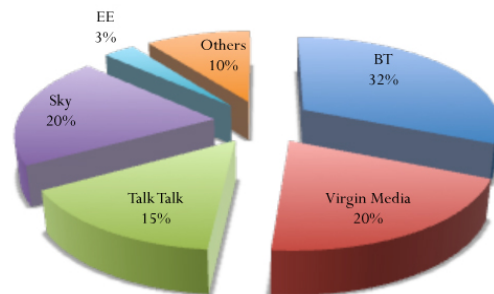
Source: CMR Fact &Figures 2014 (Ofcom 2014c)

Based on both the claimed used of selected online VoD services (Figure 6) and the channel shares in multichannel homes (Ofcom 2014b: 145), the consultation response by BBC, holding an 80% share of the VoD service used, is selected to represent the stance, demands and interests of major content providers in the UK case (Figure 6). The consultation responses of ITV and Skype, a Luxemburg-based company before having been taken over by Microsoft in 2011, are selected to represent smaller online broadcasters and application providers.

Figure 6 Claimed use of selected online VoD services

Claimed use of selected online VoD services in the past month (Q1 2014)
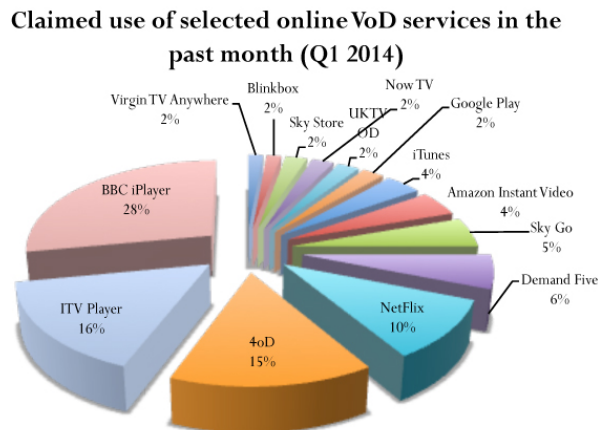
Source: Communications Market Report (Ofcom 2014b)

The documents representing policy decisions comprise the latest (up to 16th May 2015) net neutrality legislation or legislative proposals and codes of practice developed in these jurisdictions. These documents serve as hard evidence for commitment to certain ideology, goals, values and interests that align well with the policy positions of some actors and not so much with others. As detailed in section 2.4.3, net neutrality policy development in these jurisdictions varies. In the US, the first cycle of the policy process was completed with the FCC adopting open Internet rules and publishing them in the Federal Register in September 2011. However, these rules have been challenged by Verizon. This has led to an oral argument heard at the United States Court of Appeals for the District of Columbia Circuit on 9th September 2013. The Court, on 14th January 2014, struck down the no-blocking and no-unreasonable discrimination rules. Following this court decision, the FCC, under the current Chair, Tom Wheeler, launched a new net neutrality consultation and finally adopted and published even more stringent regulations (see section 2.4.3).

The corpuses selected for the US case covers net neutrality policy development up to the adoption of the 2015 open Internet rules in order to capture the similarity or changes in the new policy and regulatory proposals following the court decision. The latest development in the UK case is partly dependent on policy development at the EU level. Currently, the UK has opted for a self-regulatory option to preserve the openness of the Internet, guided by the voluntary open Internet code of practice. The research corpus covers this latest development by extending its analysis to include the code as the UK's latest policy decision. This result will change to reflect the EU's final net neutrality policy decision, which is being read at the Council of the European Union. The

corpuses cover net neutrality development at the EU level up to the latest decision made by the European Parliament on 3rd April 2014, approving the latest amendment to the Single Market proposal, which carries the net neutrality rules. The final decision made by the Council of the European Union is beyond the completion time frame of this research.

Table 8 List of corpuses by categories

Categories	Corpuses		
	US	UK	EU
Consultation documents	1. Notice of Proposed Rulemaking (NPRM) in the matter of preserving the Open Internet and broadband Industry practices (FCC 2009)	1. Traffic Management and 'net neutrality': A discussion document Ofcom (2010)	1. European Commission Information Society and Media Directorate-General's Questionnaire for the Public Consultation on the Open Internet and Net Neutrality in Europe (European Commission 2010)
Responses to consultation	Responses from: 1. Ad Hoc Telecommunications Users Committee 2. Alcatel Lucent 3. Alliance for Telecommunications Industry Solutions 4. American Cable Association 5. American Centre for Law and Justice 6. American Consumer Institute 7. Amezon 8. AT&T 9. Centre for Democracy and Technology (CDT) 10. Joint Comments of Computer and Communications Industry Association, Consumer Electronics Association, Electronic Frontier Foundation, Home Recording Rights Coalition, and Public Knowledge on the Matter of Copyright Infringement in the Open Internet Rules 11. EDUCAUSE 12. Electronic Frontier Foundation 13. Google 14. Independent Film and TV alliance 15. Information Technology Industry 16. Institute for policy innovation 17. Internet freedom coalition 18. Microsoft Corp. 19. Motion Picture of America 20. National Exchange Carrier Association 21. Netflix 22. New America Foundation 23. Open Internet Coalition 24. Property Rights Alliance 25. Public Interest Advocates 26. Public Knowledge et al. 27. Recording Industry Association 28. Skype 29. Southern Company Services 30. Telecommunications Industry 31. Telefonica 32. The Wireless Association 33. Time Warner 34. Verizon 35. Vonage Holdings Corps.	Responses from: 1. Alcatel Lucent 2. AT&T 3. British Broadcasting Corporation (BBC) 4. Broadband Stakeholders Group (BSG) 5. British Telecom (BT) 6. Cisco 7. Communications Consumer Panel 8. Consumer Focus (Now renamed as Consumer Futures) 9. Cable Wireless Worldwide (CWW) 10. Department for Business Innovation and Skills' Implementing the Revised EU Electronic Communications Framework 11. Ericsson Ltd 12. GSMA 13. Internet Innovation Alliance 14. Intellect 15. Internet Service Providers' Association (ISPA) 16. Internet Telephony Services Providers' Association (ITSPA) 17. ITV Plc. 18. Mobile Broadband Group (MBG) 19. Mobile Future 20. Open Spectrum Alliance 21. Open Rights Group (ORG) 22. Skpe 23. British Sky Broadcasting Group Plc (BSkyB) 24. Talk Talk Group 25. Verizon 26. Vodafone 27. Which? 28. Yahoo	Responses from: 1. Association of Commercial Television in Europe (ACT) 2. Amazon 3. Body of European Regulators for Electronic Communications (BEREC) 4. Cable Europe 5. Centre on Regulation in Europe (CERRE) 6. European Internet Service Providers Associations (EuroISPA) 7. UK Government 8. Virgin Media
Policy decisions	1. Federal Register Vol. 76, No. 185 of Friday, September 23, 2011: Rules and regulations for preserving the Open Internet 2. Federal Register Vol. 80, No. 70 of Monday, April 13, 2015: Protecting and promoting the open Internet	1. Open Internet Voluntary Code of Practice (BSG 2014)	1. European Single Market Proposal for Electronic Communications (COM(2013) 627 final) 2. Report on the proposal for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC, 2002/22/EC, and Regulations (EC) No 1211/2009 and (EU) No 531/2012 (COM(2013)0627 – C7-0267/2013 – 2013/0309(COD)). (A7-0190/2014). 3. European Parliament legislative resolution of 3 April 2014 on the proposal for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC, 2002/22/EC, and Regulations (EC) No 1211/2009 and (EU) No 531/2012 (COM(2013)0627 – C7-0267/2013 – 2013/0309(COD)) (Ordinary legislative procedure: first reading) P7_TA(2014)0281

The arguments made in the texts (argumentation), which comprise selected policy documents listed in Table 8, are the net neutrality discourses. These discourses can be grouped into themes. As a classification of discourses, themes embody goals, values and interests with which policy actors identify themselves. Both themes and arguments are representations of policy actors' perspectives and stances on net neutrality as a broadband access management principle. Like arguments, themes are points of consideration that support policy actors' arguments or rationales for the actors' claim for action.

A claim for action is an action that an actor ought to take given a set of circumstances and a future state of affairs in line with the agent's concerns (Fairclough and Fairclough 2012: 42). The main claims or calls for action recorded in the corpus are representations (discourses) of policy actors' choices of network management principles, policy stances and preferred regulatory measures. These claims will be analysed in Chapters 6 and 7.

A goal is a future state of affairs in which actors' values and interests are realised. A goal is what policy actors commit themselves to. It therefore guides actors' claims for action and shapes their discourses (Fairclough and Fairclough 2012: 39 - 50). Values are what policy actors judge to be of importance and thus concern themselves with. As such, values are among the key elements that shape actors' goals. Interests are actors' internal reasons for an involvement in an undertaking. According to Fairclough and Fairclough (2012: 35 - 61), interests are internal values that shape actors' goals. As such, interests also shape policy actors' discourses. Given Fairclough's definition of ideology (1992: 87), all the meanings of these elements are constituted by policy actors' ideology.

Based on Kay's (2005) and Hall and Taylor's (1996: 938) definition of institutions (see section 3.2.2, page 67 - 68), institutional or structural factors in this research include institutional or social structures (e.g., market, government, state agencies, organised interest groups and trade unions), policy and regulatory precedents, ideologies which institutionalise values and interests and social and political practices. These factors shape the communications landscape in which actors interact, the way people interact and their discourses.

Circumstances are situations that have been shaped by a convolution of social structures, practices and institutional factors. According to Fairclough and Fairclough (2012: 45), circumstances also shape actors' claims for action because present circumstances may restrict a certain range of actions that could have otherwise been taken to achieve actors' goals. Thus, actors may consider taking a

particular action that will take them from their present set of circumstances, which is restrictive to realising their goals, to a future state in which their goals can be realised. Therefore, circumstances, combined with goals, support actors' claims for action. Policy actors' interaction with their present circumstances, according to the dialectical policy network concept, can result in a change to policy actors' present circumstances and existing institutional structures. Means-goal refers to a means or an action intended for taking actors from the current set of circumstances to a future state in which their goals can be realised. The relationship of these elements is illustrated in Figure 7 below.

Figure 7 Dialectical relationship of discourse and structure
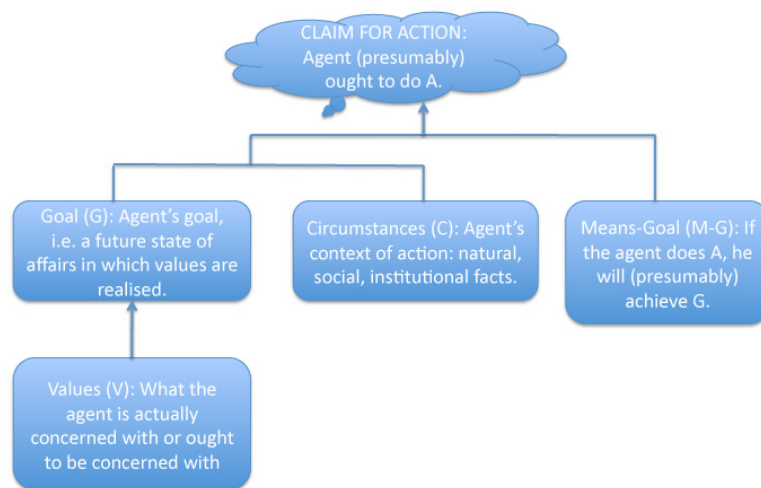
To analyse the discourses using Fairclough and Fairclough's framework (2012), coding is applied to group arguments or discourses into themes of discussion or points of consideration. A qualitative data analysis software known as NVivo is used to code texts. According to Saldaña (2009: 3), coding is a system for organising information. In applying coding (ibid.), codes or labels are assigned to arguments or discourses and other elements that Fairclough and Fairclough (2012) suggest constitute discourses based on the themes and their functions in the discourse structure. These functions include goals, values, interests, means-goals and circumstances. The codes emerge inductively from document analysis. They are listed and defined in Table 9.

Table 9 Codes, their definitions and functions in discourses

Themes	Definition
Competition	(Value, means-goal and circumstance) Entry into a market place with an intention to win consumers' purchasing power
Transparency	(Value and means-goal) Availability and accessibility of information on any traffic management practices and impact of such practices on Internet users' access to content and applications of their choice.
Access	(Value, circumstance and interest) ability to receive and impart information, content and application of one's choice online
Investment	(Value, interest and goal) Allocation of resources with intention to increase competitive advantage
Innovation	(Value, interest and goal) Development of new products and services
Choice	(Value and interest) Plurality of products and services
Consumers interests	(Value and interest) Things that consumers are concerned with, including transparency, access, innovation, and choice
Citizen interests	(Value and interest) Things that citizens are concerned with, including free speech and access to public services via the Internet
Congestion or network congestion	(Circumstances) Overfilling of network
Traffic management or network management	(Means-Goal) Measures employed by network providers to handle IP traffic in the network
Discrimination	(Means- Goal) An action taken to favour one party over the other

These codes are applied to all the selected texts or corpuses in both cases because all the discourses featured in these corpuses represent different perspectives on the same subject, net neutrality. The functions and relationships of these codes will be discussed in chapters 6 and 7. A comparison of the

US and the UK discourses will explain the similarities and differences in these discourses in relation to structural factors and policy actors' interpretations of such factors and interests.

The research separates the texts into three groups according to the phases of the formal policy process, the consultation: 1) consultation documents, 2) responses to consultation and 3) policy decisions. The first two sets of documents present the input phase of the policy process during which the problem is defined and mechanisms to address the problem are proposed. The legislation or legislative proposals and codes of practice are the outcome of the policymaking process. Discourses are first analysed in relation to the policy process phase to which they belong. The analysis at this level enables identification of actors' objectives during participation in the policymaking process and the underpinning values and interests embedded in their discourses. This analysis indicates the relationship policy actors have with one another and other structural factors.

The research then compares discourses between each phase of the policymaking process to establish how they are mobilised throughout the whole process and explain why certain discourses are privileged over others. This level of analysis will detect the prevailing discourses, which appear in the policy outcomes, and trace them back to the policy actors who construct and circulate the discourses and their underlying values and interests. Identification of the policy actors who construct the discourses is achieved through representation of policy actors' commitments (e.g., policy stance, goals, values, interests and means-goals) embedded in the texts produced at each stage of the policymaking process. This finding then explains policy outcomes in relation to power relations among policy actors and structural factors, including ideologies, other discourses and policy actors' objectives, values and interests. From such explanation of policy outcomes, implications for relevant policy actors will emerge.

The structural factors, such as ideology and institutionalised values and interests, built into the discourses as summarised in Figures 3, serve as sources of power or bias mobilised to justify policy actors' claims for action to promote their actual interests. In this way, the application of framework for analysing practical reasoning to operationalise the argumentative turn helps illustrate the sources of power. The dialectical relationship between these elements constituting the discourses explains how these sources of power are used in both the overt and covert exercise of power observable in the discourse and discourse practice of net neutrality policymaking.

Despite the benefits detailed above, the application of the combined analytical framework (argumentative turn and CDA) to net neutrality policy documents, the document analysis is limited when accounting for policy actors' engagement experience and the rationale for their actions based on their interpretations of their circumstances. Moreover, the policy documents analysed do not carry information about the informal process of policymaking taking place before and through the formal process of consultation for the decision-making phase. These informal engagements include, for example, lobbying, public opinion shaping, coalition-building, informal meetings with policymakers and policy negotiations. To span this gap in knowledge, elite interviews are employed as a means to obtain information on policy actors' informal engagement in the policy process and gain an insight into how policy actors interpret their circumstances and construct their discourses. The analysis of the interview data will explain how a policy is made and how policy inputs materialise in the policy outcome.

4.3. Elite interviews: The rationale and structure

As stated in the previous section, elite interviews are used as a method to gather information on policy actors' informal engagement in the policy process and their perception of their overall policy engagement. The rationale for using this method is in its benefits, as described by Ware and Sánchez-Jankowski (2006: 7) and Richards (1996: 200), and its ability to realise this research objective. These benefits include provisions of 'specific, technical and sensitive information' (Ware and Sánchez-Jankowski 2006: 7) and of 'information not recorded elsewhere, or not yet available … for public release' (Richards 1996: 200). This exclusive, specialised and technical information assists with interpreting documents authored by the elites interviewed.

The exclusivity of information, knowledge and experience held by individuals, who both 'know and can articulate how things are actually done' (Dexter 2006: 19) makes elites valuable interview targets. In other words, the superiority of elites over other interviewees lies in their importance and knowledge of the researched events. In this research, policy actors, who represent the government and organisations participating in the policymaking process, fit Dexter's description of elites. The decisions and actions that these actors are required to take on behalf of the organisations that they represent give them knowledge about net neutrality policy and policy engagement that no one in other positions can offer. This research, therefore, includes interviews with elites or individuals with the authority to act on behalf of the organisations that they represent in order to explain policy

actor behaviours in the policy process based on their perception of the policymaking context in which they operate.

In addition to the value of information held by elites, interview technique and structure also make elite interviews a method better-suited to inquiry compared to focus groups and surveys. According to Richards (1996: 200), elite interviews are aimed at obtaining a 'subjective account of events or issue' from the interviewees and thus provide researchers with 'an insight into the mind-set of the actors who have played a role in shaping the society in which we live'. To this effect, Dexter (2006) indicates that in elite interviews, the interviewer willingly allows interviewees to educate them on what the problems, the questions and the situations are.

According to Berry (2002: 679), the best structure for elite interviews is a conversation. This structure allows the interviewees to talk freely, but reserve some control over the conversation. The interviewer may emphasise particular issues by probing with follow-up questions or directing the interviewees back to the subject of the discussion. In line with Berry (2002), Myers and Newman (2007) suggest that to allow the interviewees the flexibility to talk about what they see as important, as opposed to what the researchers presuppose to be important, the elite interviews are semi- or unstructured. The questions asked under this interview structure, according to Myers and Newman (2007) and Berry (2002) are, therefore, open-ended.

Similar to elite interviews, focus groups use open-ended questions to obtain specific information from the targeted group of interview participants and an understanding of how this information is perceived by other participants. The advantage of this approach is in obtaining '"the collective wisdom" of the group because members would be 'inclined and stimulated to respond to the ideas being expressed by other members' (Ware & Sánchez-Jankowski 2006: 4). However, the established relationships among interviewees, interviewer and the environment in the focus group are significantly different from those in one-to-one interviews, including the elite interview.

The elite interview, according to Dexter (2006: 122), allows for a conversation based on 'a two-person relationship' to be built. This type of relationship, he asserts (ibid. 32-41), enables trust to be built between with the interviewee, making the interviewee feel special and thus willing to give the interviewer exclusive information which the interviewee would not otherwise offer under different circumstances. Given the sensitivity and exclusivity of the information the interviewee

holds, Dexter (2006) is also aware that the interviewee may not feel comfortable providing such information in an environment which involves a group of witnesses who might judge or interpret the interaction between the interviewer and interviewee in ways that might hurt the interviewee professionally, politically or personally.

Since the objective of this research in conducting interviews is to obtain information which is not available in the public domain, the elite interview serves as a better information gathering method than the focus group. The sensitivity and subjectivity of the information this research seeks requires the interview to be conducted in an environment which makes the interviewee feel special and comfortable with speaking freely. The subjectivity of the information results from policy actors' personal views and experience of their net neutrality policy engagement.

Another data collection method considered is the survey. According to De Vaus (2014: 6), this method serves as a means to collect '*systematic* data that allows for systematic comparison between cases on the same characteristics'. The strength of this method lies in the systematic and structured approach to data collection and macro analysis of research problems. The advantage surveys hold for this research could therefore be the understanding of the overall net neutrality policy issues and positions in the cases being studied and a systematic comparison of them. However, this study examines the net neutrality policymaking process, which is an area within the communications policy process and which Iosifidis (2011a) and Freedman (2008) suggest is complex and involves a multitude of actors and factors. As discussed in Chapter 3, actor behaviours and factors that shape policy are bound by broader political systems, social structures and practices in which the policymaking process takes place. These systems and contexts differ across the cases studied.

Given the relationship between context, actors and structural factors that shape policy, the differences in the political systems, social structure and practices are likely to result in different actor behaviours, policy practices and structural factors that shape policy. The complexity of the research framework (see section 3.4) is likely to exceed the capacity of surveys to capture and analyse. This complexity results from not only the multitude of factors and actors involved, but also actors' perceptions of the constraints these factors place on their engagement with policy, which determines their actions.

Moreover, as Fairclough (2003) suggests, policy actors' actions, decisions and discourses are shaped by both external structural factors and internal motifs. The data that this research requires to satisfy

its objective, therefore, contains elements that are subjective and unsystematic. This type of data, according to Dexter (2006) can be obtained from elite interviews, which are 'unstructured' in the sense that they do not assume that 'persons or categories of persons are equally important' or are based on the same characteristics in the way that surveys do. The data collected from the elite interviews complement the subjectivity detected in policy actors' formal discourses recorded in their policy documents.

Surveys also require structured interview questions to allow for data sets to be compared. Such questions, however, presuppose the matters or issues deemed important to the research based on the interviewer's perception as opposed to what the interviewees see as important. Myers and Newman (2007) and Berry (2002) believe that the unstructured or semi-structured interview protocol and open-ended questions used in elite interviews allow interviewees to talk freely. This allows the interviewer to learn about the interviewees' perspectives on net neutrality, the policymaking process and their engagement in the process, as well as their commitments to the policy, without interference from the interviewer's presuppositions. The structural differences between surveys and elite interviews, therefore, indicate that elite interviews are a more suitable method for data collection in compliance with this research framework.

Despite the benefits and suitability of elite interviews for this study, the researcher recognises critiques of this method pointed out by Myers and Newman (2007), Dexter (2006) and Berry (2002). These include issues concerning objectivity, validity and reliability of the interview data as well as the representativeness of the interview samples. Objectivity of data, as Myers and Newman (2007), Berry (2002) and Richards (1996) suggest, is not to be expected from the elite interviews. The subjectivity of the interview data is determined by the purpose of the method which, according to Richards (1996: 200), is to obtain interviewees' 'subjective account of an event or issue'. Therefore, the interview data cannot be taken as truth, but a perspective of the interviewee on the matter. Since this research uses interviews to collect information on policy actors' policy engagement, their perception of their participation in the policy process and the factors that shape their behaviour, subjective data is exactly what the research seeks. Discourse analysis of the interview data holds the key to decipher this subjectivity.

The issue of objectivity is connected to the issue of validity and reliability of data in that the bias in the collected data can render the data set invalid or unreliable. According to Beamer (2002: 68),

the validity and utility of data depends on 'the analyst's research design'. This means that as long as the research design can identify the possible ulterior motives of the interviewees and the reasons for self-censorship or distortion of information and either incorporates the motives and causes of self-censorship or distortion into its analysis, the data collected from elite interviewees is valid and usable.

Since it is the intention of this research to collect subjective data in order to identify the factors that shape actors' perceptions of their engagement in the policy process and interactions with other actors as well as other institutional factors using the argumentative turn combined with CDA, the data collected is valid. The framework for analysing practical reasoning will be used to explain the relationship among structural factors, policy actors' perceptions of such factors and their implications for actors' exercise of power through discourse.

In terms of reliability, Myers and Newman (2007: 5) suggest that elite bias can limit the researchers' understanding of the issues that they are investigating. This results from 'overweighing data from articulate, well-informed, usually high-status informants and, conversely, underrepresenting data from intractable, less articulate, lower-status ones'. Such bias can result in an underrepresentation of the policy actors whose discourses are inconspicuous or excluded from the policymaking process. In other words, the elite bias results from a lack of diversity of voices in the interview samples or what Richards (1996: 200) calls an underrepresentative sampling. Such limitation of elite bias is addressed in this research through the diversity of elites interviewed to represent various perspectives on net neutrality policy based on Beamer's definition of a valid interview sample, which emphasises representation of a range of elite views across the cases studied. The list of interviewees and their affiliations are presented in Table 10.

In addition to diversity, Beamer (2002: 88) also suggests that the sampled interviewees should be 'determined by the research questions'. Thus, research questions and objectives are also built into the interview selection criteria. Since the research questions centre on policy actors' commitments in relation to net neutrality policy and their policy engagement experience, the interviewees selected are the policy actors who have represented their organisation in the net neutrality policymaking process. These policy actors are identified from the policy documents that form the corpuses of this research and are the ones who by-lined the responses to consultation in both the US and UK cases.

The framework for interviewee selection highlights the connection between CDA (see section 4.2) and its benefit for interview sampling. CDA not only provides the list of interviewees, but also reveals a range of perspectives on net neutrality policy. The range of perspectives on net neutrality policy helps reduce the list of interviewees based on representation of policy actors' stances on such policy. The range of views on net neutrality policy is also used to group policy actors according to their policy stances and their internal motives based on their affiliation. Due to the multitude of responses to consultation, particularly in the US case, it is not feasible for this research to interview everyone who responded to the consultation. Interviewees are, therefore, shortlisted to represent all perspectives and types of policy actors. The classification of policy actors by type of organisation is displayed in Table 10.

Table 10 Policy actors by types of organisation

Main groups	Types of organisation	UK/ EU	USA
Regulatory and government agencies	Government/government advisory group, political body & regulators	• BSG (Government Advisory Group) • Ofcom (National Regulator) • DCMS (Develops a broader policy position) • House of Lords' Select Committee on Communications • European Commission	• FCC (National Regulator and Sole Agency Responsible)
Businesses	Content providers	• BBC • ITV • Chanel 4 • Skype (now part of Microsoft)	• Google • Netflix • Vonage
	Network/network equipment providers	• BT • Talk Talk Group • Vodafone • Virgin Media (Taken over by an American company in 2012)	• AT&T • Verizon • CISCO • Alcatel-Lucent
	Converged providers	• BSkyB	• Comcast
Advocacy groups	Industry/trade groups (content/applications)	• Association of Commercial Television in Europe (ACT)	• N/A
	Industry/trade groups (network)	• ISPA • Independent Network Cooperative Association (INCA)	• Broadband Forum
	Consumer/ citizen groups	• Consumer Focus (Rebranded Consumer Futures) • Open Rights Group • Which?	• Electronic Frontier Foundation • Media Access Project (representing Public Interest Advocates) • New America Foundation • Public Knowledge • Ad Hoc Telecommunications Users • Southern Company Services, Inc

As summarised in Table 10, the policy actors initiating consultations and responding to the consultations in the US, the UK and Europe are classified into three main groups according to their functions in the policy process. These groups include the national regulator, government agencies, businesses and advocacy groups. From the main categories, policy actors are further divided into

sub-categories by their role in the consultation, core businesses, policy perspectives and interests or interior motives. The regulator and government category is further divided into the government advisory group which is responsible for government departments and national regulators. Actors are further classified by their core businesses. These include content providers, network providers and converged providers. In this context, the term converged providers refers to service providers whose core business lies in providing content services, but who have branched out to provide Internet access service and vice versa. These businesses include BSkyB and Comcast. Advocacy groups are industry or trade associations or groups representing collective interests, values and goals of actors. This group of actors can be further classified by core business or interests of actors that the group represents, including content, network, consumers and citizens.

From this classification, the interviewees are shortlisted with an aim to include at least one representative from each sub-category to ensure diversity of perspectives on policy. To satisfy the research objective and research questions, the interviewees from the shortlisted organisations have to be high-level executives who are given the authority to represent the organisations in the policymaking process. This is identifiable from the policy documents analysed. Where the names of the executives from the shortlisted organisation have not been identified or the persons who by-lined the documents are no longer in the position to comment, background research and a snowballing technique are used to identify the appropriate interview candidate.

Examples of such cases include Ofcom, the Department of Culture, Media and Sport (DCMS), Federal Communications Commission (FCC), Electronic Frontier Foundation (EFF), New America Foundation and AT&T. In short listing interviewees, care has been taken to ensure representation of all perspectives regardless of the level of influence they have on the market and policy. This is achieved either directly through interviews with representatives from the smaller companies, such as Vonage and Skype (before it was taken over by Microsoft) or indirectly through interviews with industry representatives such as the ISPA. These industry groups or associations represent the interests of smaller companies as well as major corporations. Organisations such as ISPA can therefore contribute to this research the perspectives and experience of smaller companies whose resources are too limited to directly engage in the policymaking process. The list of interviewees, their representation and affiliation based on the selection criteria and process detailed above, is displayed in Table 11.

Table 11 List of interviewees and interview structure

Country/Case	Company/Organisation	Name	Title	Policy actor classification/ sector representation	Type of interview
USA	Electronic Frontier Foundation (EFF)	Rebecca Jeschke	Media Relations Director and Digital Rights Analyst	Consumer/public interest group	Semi-structured via Skype
	Netflix	Christopher Libertelli	Head of Global Government Relations	Business (Content provider)	Semi-structured via phone interview
	Vonage Holding Corp.	Brendan Kasper	Senior Regulatory Counsel	Business (VoIP application provider)	Semi-structured via Skype
	Google	Richard Whitt	Former Director/Managing Counsel for Telecom and Media Policy	Business (Content/application provider)	Semi-structured, face-to-face
	Southern Company Services, Inc	Jeffrey L. Sheldon	Attorney (submitting document on behalf of Southern Company Services, Inc)	Business (Major business user of telecom service and small whole sale network provider)	Semi-structured, face-to-face
	Ad Hoc Telecommunications Users Committee	Colleen Boothby	Counsel for Ad Hoc Telecommunications Users Committee	Business (Major business users of telecom services e.g. Fortune 500 companies in financial, automobile and insurance sectors)	Semi-structured, face-to-face
	Media Access Project (representing Public Interest Advocates)	Andrew Jay Schwartzman	Former Director of Media Access Project and Counsel for Public Interest Advocates	Consumer/public interest group	Semi-structured, face-to-face
	AT&T	Hank Hultquist	Vice President for Federal Regulation	Business (Telecom/broadband provider)	Semi-structured, face-to-face
	Verizon	Edward Shakin	Former Verizon Executive	Business (Telecom/broadband provider)	Semi-structured, face-to-face
	Informant (a lawyer specialising in telecommunications and satellite and former FCC officer)	James L. Casserly	Partner at Wilkie Farr & Gallagher LLP	N/A	Semi-structured, face-to-face
	FCC	Stephanie Weiner	Associate General Counsel	National regulator	Semi-structured via Skype
	FCC	Matt DelNero	Deputy Chief of the Wireline Competition Bureau	National regulator	Semi-structured via Skype
	Comcast	Kathryn A. Zachem	Senior Vice President for Regulatory and State Legislative Affairs	Business (Converge provider of telecom and content)	Semi-structured, face-to-face
	New America Foundation	James Losey	Former Fellow at New America Foundation (who participated in developing the response to the FCC's 2009 Open Internet and Broadband Industry Practices NPRM)	Consumer/public interest group	Semi-structured via Skype
	Public Knowledge	Michael Weinberg	Vice President	Consumer/public interest group	Semi-structured via Skype
	Broadband Forum	Robin Mersh	Chief Executive Officer	Industry group (Telecom)	Semi-structured via phone interview
UK/EU	Consumer Focus (renamed Consumer Futures)	Marzena Kisielowska-Lipman	Policy Manager	Consumer group	Semi-structured, face-to-face
	Ofcom	Jeremy Olivier	Head of Internet Policy	National regulator	Semi-structured, face-to-face
	Broadband Stakeholders Group (BSG)	Pamela Learmonth	Former Chief Executive Officer (who has been heavily involved in the development of the Open Internet Voluntary Code of Practice)	Independent advisory body to the UK government (BSG comprises members from various line of business across the broadband value chain)	Semi-structured, face-to-face
	BT	Alun Banner	Head of Regulatory Strategy (Retail)	Business (Telecom/broadband provider)	Semi-structured, face-to-face
	BSkyB	Grant Forsyth	Head of Regulatory Policy	Business (Converged provider of telecom and content)	Semi-structured, face-to-face
	ISPA	James Blessing	Council Member, Treasurer and Head of Broadband Group	Industry group (Telecom)	Semi-structured, face-to-face
	Independent Network Cooperative Association (INCA)	Malcolm Corbett	Chief Executive Officer	Industry group (for non-incumbent operators)	Semi-structured, face-to-face
	BBC	Daniel Wilson	Head of International Policy	Business (Content provider, public service)	Semi-structured, face-to-face
	Talk Talk Telecom Group Plc	Andrew Heaney	Executive Director for Strategy and Regulation	Business (Telecom)	Semi-structured, face-to-face
	House of Lords Select Committee	Lord Inglewood	Chairman	Political body	Semi-structured, face-to-face
	ITV Plc	Rhona Parry	Senior Manager for Policy and Regulatory Affairs	Business (Content provider, commercial)	Semi-structured, face-to-face
	Virgin Media	Andrew Wileman	Senior Regulatory Advisor	Business (Telecom)	Semi-structured, face-to-face
	Skype	Jean-Jacques Sahel	Former Director of Europe, the Middle East and Africa (EMEA) Policy and International Organisations (Microsoft) and Former Director of Government and Regulatory Affairs (Skype)	Business (VoIP application provider)	Semi-structured via Skype
	Chanel 4	Khalid Hadadi	European Affairs Manager	Business (Content provider, public service)	Semi-structured via Skype
	DCMS	Philip Milton	Former Senior Regulatory Policy Advisor	Government	Semi-structured via Skype
	Which?	Sumedha Pathak	Senior Policy Advisor	Consumer group	Semi-structured via Skype
	Open Rights Group	Jim Killock	Executive Director	Consumer/public interest group	Semi-structured via Skype
	European Commission	Peter Stuckmann	Executive Assistant to the Electronic Communications Networks and Services Directorate	Legislator (EU)	Semi-structured via Skype
	Association of Commercial Television in Europe (ACT)	Ross Biggam	Director	Industry group (Content provider)	Semi-structured, face-to-face
	European Competitive Telecommunications Association	Innocenzo Genna	Former Chairman	Industry group (Telecommunications)	Semi-structured via Skype

In addition to diversity of views, the elites interviewed include all the key influencers in the policy process in both the US and the UK. The indicators that qualify policy actors as key influencers include: a) policy actors' level of engagement, b) their market share, c) identification by other policy actors and d) the saliency of their discourse. The level of engagement in the US case is measured by the number of responses any one organisation, or policy actor, submits to the consultation. These responses include 'comments', 'reply comments' and 'ex-parte' letters, which record and make public any private meetings (or lobbying) policy actors undertake with the FCC during the consultation process. It is also measured by other informal policy engagement activities, such as research, lobbying and public opinion shaping that occur outside the consultation process. In the UK case, the level of engagement is determined by policy actors' formal (consultation responses) and informal engagement (e.g., private meetings with decision-makers and lobbying) in net neutrality policymaking at both the national and EU levels. Market share has been discussed in section 4.2. Identification by other policy actors will be discussed in section 7.1 as part of the interview analysis.

The saliency of policy actors is determined by the results of cross-comparison among the three sets of corpuses. In this case, the level of influence is attributed by the prominence of certain goals, values, interests and perspectives throughout the policy process from the input to the outcome phases. These goals, values, interests and perspectives can be used to identify policy actors who commit themselves to them. The selection of interviewees featured in Table 11 also addresses the interviewees whose goals, values and interests have been side-lined from the policy decisions to ensure a full range of views and thus validity and reliability of data.

As shown in Table 11, all the interviews conducted are semi-structured. This interview structure is informed by the characteristics and objectives of the elite interview which, according to Berry (2002) and Dexter (2006), require the interviewer to allow the interviewees the flexibility to talk about and emphasise the issues that they feel are important within the scope of the interviewers' research questions. The research questions and objectives, therefore, set the scope of the issues that the interviewees can talk about. The researcher, in the role of interviewer, engages in a conversation with the interviewee and asks open-ended questions to steer the conversation to the direction that satisfies the research questions and serves the research objectives. These open-ended interview questions are pre-designed, based on the research questions, objectives and results of the

discourse analysis of policy documents. These questions, therefore, probe the thinking of policy actors to discuss:

- their perceptions of power relations in the net neutrality policymaking process given the social structure, practices and discourse practice,

- their opinions on policy precedents and other structural factors that shape their discourse and net neutrality policy,

- their relationship with other policy actors in relation to the social structure, practices, discourse practices, their policy objectives and interests,

- their experience representing their organisation in the net neutrality policymaking process and their policy engagement strategy,

- their reaction to the latest policy developments (up to the point when the interviews took place) and

- their opinions of the causal explanations for the similarity and differences between the US and UK cases.

With probing questions, the researcher uses what Myers and Newman (2007: 17) call the 'mirroring' model in questions and answers. This practice refers to the use of the interviewee's words and phrases or ideas to construct the subsequent question or comment. The technique ensures that the researcher focuses on the interviewee's perspectives of their engagement in the net neutrality policymaking process and refrains from imposing the interviewers' perspectives of the subject on the interviewee.

4.4. Discourse analysis: Interviews

As discussed in section 4.3, the elite interview is used to obtain information that allows the researcher to gain understanding of policy actors' engagement in the net neutrality policy process, how they interpret their circumstances and construct their discourses. To appropriately clarify the interview data, the framework for analysing practical reasoning is applied to operationalise the argumentative turn. The justification for using this analytical concept lies in the subjective nature of the data and the policy actors' accounts of power exercise in net neutrality policymaking. This subjectivity lies in the way policy actors represent their policy stances, objectives and engagement with the net neutrality policymaking process.

Therefore, the interviews are treated as texts in a way similar to policy documents, according to the definition given by Fairclough (2003: 27). As such, the interviews embody the interviewees' discourses or the way they represent their engagement with the policy, objectives, values and interests. The interviews also carry other policy actors' discourses which also influence their discourses and engagement with the policy process.

The objective of the discourse analysis of the interviews is to explain how policy actors interpret their circumstances (e.g., policy precedents, hegemonic ideology, social structure and market practices) and design their discourse and policy engagement practices accordingly. The discourse analysis of the interview is designed to complement the policy document analysis to explain the implications of structural factors for policy actors' behaviour in the policymaking process, their discourse practices and subsequent power relations. The two sets of analysis combined will provide answers to all the research questions set out in section 2.4.3 (page 51).

To achieve this objective, the interview records are transcribed and entered into the NVivo software. Coding for qualitative analysis (Saldaña 2009: 3) is then applied as a means to group discourses in a similar way that is used to group or code the policy documents. However, due to the difference between the objective of the interview and the policy document analysis, the code structure for the interview analysis varies slightly from that of the document analysis. To cross-check the findings concerning policy actors' commitments in the net neutrality policymaking process, the same codes used in analysing discourses in the policy documents are applied to the interview data. These codes are displayed in Table 9. To account for policy engagement and discourse practice in relation to their engagement and policy outcome, two additional codes are added to those listed in Table 9. One such addition is *engagement,* which refers to actions taken by policy actors in order to gain dominance over the net neutrality policy. These actions are taken formally (e.g., formally responding to consultations) and informally (e.g., private meetings with policymakers and forming a coalition with other actors). The other is *evaluation*, which refers to policy actors' interpretations of their circumstances and relevant structural factors in relation to their policy objectives and interests.

By connecting these additional codes with the codes that represent policy actors' commitments in the net neutrality policy process, this research can then explain how and why certain discourses are privileged throughout the policymaking process. The combination of these two sets of analyses

(policy documents and interviews) allows the net neutrality policy outcomes to be explained in relation to the interaction between structure and agency and policy actors' exercise of power through discourse in the policymaking process. From this analysis, implications of the policy outcomes for policy actors involved will also emerge.

The findings from the application of these methods will be presented in Chapters 5, 6 and 7. Chapter 5 presents the findings from discourse analysis of policy documents and interview data, providing an overall picture of the net neutrality policymaking process and the basis of the application of CDA to policy documents in Chapter 6. Chapter 7 discusses findings from the discourse analysis of the interview data in relation to the findings in Chapter 6. Chapters 6 and 7 are presented in a virtual conversation with one another. The findings from the discourse analysis of policy documents emphasises the interaction between structural factors and policy actors' discourse construction. The interview analysis will complement through discourse the findings from the document analysis with agency perspectives on and reactions to the structural constraints.

To conclude, Chapter 8 draws on the analysis and findings in Chapters 5 - 7 to answer the main research question of how net neutrality policies in the US and UK are shaped. It identifies the challenges for convergence regulation development based on the cases of net neutrality policymaking and the implications of these challenges for communications policy evolution and industry development.

Chapter 5

Net neutrality policy precedents, politics and power structure

This chapter provides an overview of net neutrality policy development from policy precedents and politics, to which net neutrality policymaking responds, to the decision-making process. This overview is derived from an analysis of stakeholder interviews and consultation documents. It highlights inter-relationships between structure and agency in the net neutrality policymaking process according to the research framework (see Figure 2, page 86). Here, structure refers to policy precedents and the political systems that shape the way people communicate in the policymaking process. Agents are the policy actors involved. The analysis in this chapter contributes policy actors' perceptions of policy precedents which guide their approaches to net neutrality and the consultation functions in this specific policymaking process to the existing literature on net neutrality and policy practices. The net neutrality overview established here is the basis of the analysis of policy discourses in Chapter 6 and policy engagement practices in Chapter 7.

5.1. Policy precedents: Politics of net neutrality policy and discourses

Built on the net neutrality literature reviewed in section 2.4, this section examines how policy precedents drive the net neutrality policymaking process, shape net neutrality politics and frame policy discourses. The analysis in this section is based on an analysis of policy documents and interviews with policy actors. The emphasis is placed on interviews, which contribute an insight into policy actors' perceptions of the policy context, and how their perception constitutes the discourses analysed in Chapter 6.

These policy precedents are placed on a timeline (Figure 8) with other relevant events and actions leading up to and throughout the net neutrality policymaking process. From the interview analysis two key precedents emerge: the common carriage regulation and the First Amendment. These fuel and distinguish net neutrality politics and discourses in the US and the UK. The Communications Act (2003) and European legislation also shape UK net neutrality politics and discourses. The findings here provide an overview of the politics involved in the formulation of net neutrality policy

and highlight policy precedents as parts of the structural factors that shape policy discourses according to the research framework displayed in Figure 2 (see page 86). How these factors structure and function in the policy discourses as a way policy actors exercise power will be demonstrated in Chapter 6.

Figure 8 Net neutrality timeline in the US, the UK and the EU

The sequence of events in the timeline (Figure 8) indicates that the net neutrality policymaking process in both cases emerges in response to a series of industry developments and practices shaped by three core pieces of legislation: the Communications Act 1934 (US), the Telecommunications

Act 1996 (US) and Regulation No. 2887/2000 (EC) on unbundled access to the local loop, also known as the Local Loop Unbundling (LLU) regulation (UK). Interviews with policy actors also identify other policy precedents that play a part in shaping net neutrality policies.

The US case

Interviews with former Verizon, Google and Media Access Project executives and current AT&T, Comcast, Vonage and Ad Hoc Telecommunications User Committee executives, indicate that the Telecommunications Act (1996) and the FCC's reclassification of Internet service as falling under Title I of the Communications Act (1934) have had the deepest impact on the broadband market and net neutrality policy outcomes. These policy decisions contribute to the differences in the net neutrality debates and policy approaches among the US, the UK and the EU.

These interviews concur with Laxton's argument (2006: 15) that the Telecommunications Act (1996) was designed to promote a new market of advanced telecommunications service by freeing services classified as 'information service' from the common carriage obligation. The 1996 Act reclassified the types of services that would fall into the category of 'common carriers' under Title II of the Communications Act (1934). However, the 1996 Act did not conclusively determine whether cable and DSL services are 'telecommunication' or 'information' services.

Subsequently, in 2002 and 2005, the FCC decided to reclassify cable and DSL Internet services as 'information services', freeing service providers from common carrier regulations under the Communications Act (1934). This meant that cable and DSL Internet service providers could no longer be subject to the non-discrimination requirement under Section 202 of the 1934 Act. Counsel for Ad Hoc Telecommunications User Committee, Ms Boothby, explained in an interview that the abolition of the common carrier obligation leaves the values and interests of public interest groups and technology companies with non-discriminatory access and little protection.

From the net neutrality precedents illustrated in Figure 8, the Madison River Communications blocking of VoIP services in 2005 and the complaint filed against Comcast's treatment of BitTorrent traffic in 2007 exemplify industry behaviours fitting Ms Boothby's concern. The timing and different results of the two cases highlight the regulatory problem created by the FCC's own decisions to reclassify cable and DSL Internet services as 'information services'. In the *Madison River*

v Vonage case, Madison River conformed to the FCC's order and paid the fine. At that time, the services the company provided were still classified as 'telecommunications services' and subject to a common carrier regulation under Title II of the Communications Act (1934).

However, the FCC's adjudication in Comcast's treatment of BitTorrent played out differently. Comcast, having been freed from the common carrier regulation of 'telecommunications services' under Title II of the Communications Act 1934 on 5th August 2005, appealed the FCC's decision. On 6th April 2010, the D.C. Circuit Court of Appeals ruled in favour of Comcast, rejecting the FCC's use of Title I ancillary authority to punish Comcast for throttling BitTorrent traffic. The court, in its verdict, questioned the ancillary jurisdiction to regulate broadband Internet access under Title I of the 1934 Act that the FCC reserved in its order to reclassify DSL Internet services as 'information services' (*Comcast Corp. v FCC* (2010) 600 F.3d 642).

The common carriage abolition is referenced in the FCC's consultation document (2009: 11 - 12) as a build-up toward the launch of the net neutrality consultation, officially known as the *Notice of Proposed Rulemaking (NPRM) in the Matter of Preserving the Open Internet and Broadband Industry Practices*. The legal implications of the FCC's decision to reclassify cable and DSL Internet services restrict it to the ancillary jurisdiction to regulate broadband Internet access under Title I of the Communications Act (1934) and move it toward the broadband goals set out in section 706(a) of the Telecommunications Act (1996) (FCC 2009: 36).

The precariousness of the Title I ancillary jurisdiction attracted a number of controversies to the non-discrimination rule proposed in the consultation document. To the broadband providers interviewed, the proposed rule means re-introduction of the common carrier obligation. To Internet companies and Internet user representatives, the rule provides protection against broadband providers' discriminatory practices that began to emerge in 2005 following the FCC's reclassification of broadband service.

Interviews with Google's former Director/Managing Counsel for Telecom and Media Policy, Richard Whitt, the former Director of Media Access Project, the Counsel for Public Interest Advocates, Andrew Jay Schwartzman and former Verizon executive, Edward Shakin indicate that the ambiguity of Title I jurisdiction for regulating the Internet has haunted the regulator throughout the rulemaking process. Mr Whitt commented that FCC's reluctance to use Title I jurisdiction to

regulate net neutrality created an uncertainty among Internet companies, which pushed them to appeal to Congress to legislate net neutrality.

Mr. Schwartzman explained that both the public interest groups and tech companies (e.g., Google, Microsoft and Yahoo) had appealed to the then FCC Chairman to put Internet service back under Title II of the Communications Act (1934) because the Title I jurisdiction weakened the FCC's authority to regulate broadband service provision as proposed in the 2009 NPRM. However, he said '[the chairman] was unwilling to do so. He was concerned about the politics of it and offending Congress, and he was under pressure from Verizon and AT&T'.

The FCC's use of section 706(a) of the Telecommunications Act (1996) to justify its authority to regulate broadband service provision also indicates a path-dependent competition as a policy objective. This finding concurs with Aufderheide's observation (1999: 69 - 70) that the 1996 Act is designed to promote inter-modal competition, which differs from the competition model fostered in Europe. Similar to Wallsten and Hausladen's argument (2009), Public Knowledge's V.P., Michael Weinberg, commented that the competition model promoted by the 1996 Act resulted in market concentration on all facilities-based platforms. It also provided both ability and incentives for broadband providers to discriminate against certain traffic. Both the market concentration and ability of broadband providers to discriminate against certain traffic serve as the circumstances constituting the FCC's consultation discourse. How these policy consequences function in the FCC's consultation discourses will be demonstrated in section 6.1.

The FCC's decisions on common carriage abolition and its dependence on these policy precedents complicate the whole policymaking process due to two conflicts: 1) of interests between broadband providers in maintaining their freedom from common carriage rules and users (including tech companies, individuals and public interest groups) in reinstating the common carriage rules and 2) of the nature of the 2009 proposed rules and the past decisions not to treat broadband service as common carriage service. Verizon's former executive, Mr Shakin, observed that the conflict between the 2009 proposed rules and the past decisions was the one that gave the FCC unexpected trouble defending its rules in the September 2013 oral argument. According to the 2014 court verdict, this conflict turns out to be the court's justification for vacating the proposed no-blocking and non-discrimination rules underpinning the FCC's policy objectives.

The result of this complication led to another round of the formal policymaking process in which the FCC reversed its past decisions by reclassifying broadband services again as a common carriage service in order to prescribe rules banning blocking, throttling and paid-prioritisation. This time, the first conflict of interest between broadband providers and users triggered a legal challenge against the new rules. The continuing dispute over and challenges to the FCC's 2011 and 2015 rules indicate that the politics involving these policy precedents make consensus extremely difficult to achieve in the US policymaking process.

The First Amendment is another piece of legislation that plays an important role in shaping the net neutrality discourses in the US and distinguishes them from those of the UK. Mr Schwartzman explained that the First Amendment enshrines free speech or freedom of expression, rendering it an entitlement. He added that it is also 'built into the DNA of the US decision-making processes'. Given the circumstances, the FCC had to ensure that their proposed rules support free speech. The importance of free speech in US political culture is illustrated in the oral argument between Verizon and the FCC at the D.C. Circuit Court of Appeals on 9th September. In the oral argument, the First Amendment served as one of the benchmarks for the validity of the rules. An example of such discussion is excerpted below:

> 'MR. LEV: But the point -- I'm sorry. Verizon is not speaking, Verizon is a conduit for other's speech.
>
> JUDGE SILBERMAN: So, your answer is Verizon has no first amendment right to reject that message?
>
> MR. LEV: No.
>
> JUDGE SILBERMAN: Yes, that's your view because Verizon is not a speaker. Therefore it has no first amendment right to reject that message.'

In this argument, the then FCC General Counsel, Mr. Lev defended the open Internet rules arguing against Verizon's claim that the rules violated Verizon's First Amendment right. The argument demonstrates that free speech or the First Amendment right can serve as a political tool to challenge the regulations and values that conflict with the values and interests of policy actors. It can also be used as tool to support policy actors' claims for action (see Chapter 6).

In relation to the Internet and net neutrality, Mr. Whitt offered two interpretations of free speech in the US discourses. One treats the Internet as a platform for free speech. The other equates free

speech with free enterprise. By free enterprise he meant the diversity of types of companies thriving on the Internet. The first interpretation is the societal or civic aspect of free speech; the latter is the capitalist notion of free speech in the context of net neutrality. Corresponding to this observation, Vonage Holdings Corp' Senior Regulatory Counsel, Brendan Kasper, perceived that in advocating the civic aspect of free speech, public interest groups expanded the scope of net neutrality discourses further from the economic aspect of free speech in connection with the Internet of technology companies. These interviewee accounts of the meaning of free speech reflect the basis of political and economic ideologies: democracy and capitalism.

Irrespective of how free speech is interpreted and functions in the US policy discourses, the director of Broadband Forum, Mr Robin Mersh, expressed his personal view that although there appears to be a logical connection between free speech and the Internet as a platform that fosters the concept, the free speech argument digresses from the actual problem that sparked the net neutrality debate. He believes the actual problem that threatens the openness of the Internet is mechanical and that a number of broadband provider responses to such problem compete with the contractual interests of business and individual users.

Based on interviewees' understanding of the First Amendment, this piece of legislation serves as the policy precedent that gives free speech significant status in the American policymaking process in a way that no UK and EU policy precedents can match. Free speech and other actions and regulations that support free speech are, therefore, privileged in US policymaking. The constitutional significance of free speech in the US is the reason why it is a prominent theme in US discourses (but almost absent in UK and EU discourses) despite its debatable relevance to the actual problem of network capacity that has sparked the net neutrality debate.

The UK Case

In the UK, the net neutrality incidents recorded in the timeline (Figure 7) indicate two sources of policy and regulatory precedents that shape the net neutrality policy development: the EU and the UK policy precedents. All UK-based interviewees acknowledged both the legal binding of the EU legislation and government's decisions. This acknowledgement is either expressed in the interviews or inferred from interviewees' engagement experience in the EU legislative process. Based on the interview analysis, Ofcom's (2010) consultation document and the first EU consultation document,

policy precedents that shape the net neutrality discourses and policy outcome in the UK include: 1) the Regulation (EC) No 2887/2000 on unbundled access to the local loop, 2) the revised 2009 electronic communications framework and the connected continent legislative proposal and 3) the UK Communications Act 2003.

Ofcom, Virgin Media, BT, Talk Talk, ITV executives and the former BSG executive interviewed identify the Regulation (EC) 2887/2000 on unbundled access to the local loop as the key legislation that distinguishes the UK and EU net neutrality discourses from that of the US. The interviewees' comments are based on the intended effect of the Regulation (EC) 2887/2000 on Europe's broadband access services and the actual results. These comments support the early observations of Cave and Crocioni (2007) and Chirico et al. (2007) that net neutrality is an American problem because there is robust competition in the European broadband market. The same view is also echoed in the UK government's statement in the interim report of *Digital Britain* (DCMS and BERR 2009: 22).

Prior to issuing the statement, Microsoft's former director of Europe, the Middle East and Africa (EMEA) Policy and International Organisations and Skype's former director of government and regulatory affairs, Jean-Jacques Sahel, noted that there had been an internal communication between the responsible government department and Ofcom regarding the approach to net neutrality. Mr Sahel worked in the Department of Culture, Media and Sport (DCMS) around the time when the net neutrality question emerged in the US. The Ofcom response, he said, was that the UK Communications Act (2003) provided the regulator with sufficient power 'to address any abuse or anti-competitive behaviour' in broadband Internet access provision. Ofcom's response to the government inquiry indicated that the regulator treated net neutrality as a competition problem.

Consistent with Mr Sahel's account are Ofcom's position on net neutrality stated in its discussion paper (2010), policy statement (2011) and by Ofcom's Head of Internet policy, Jeremy Olivier, in his account of Ofcom's net neutrality position. Mr Olivier stressed in the interview that 'the [UK] market is competitive'. It can also be inferred from this interview that there is no equivalent level of competition that the UK broadband market enjoys in the US due to a fundamental difference between the characteristics of the US and UK fixed-line markets. This difference results from the failure of the US local loop unbundling.

AT&T's VP for Federal Regulation, Hank Hultquist observed that the local loop unbundling in the US turned out to be 'not as useful as it is in the UK' due to the population dispersion and 'technical reasons'. He explained that the loop length in the US from the central office down to subscribers' premises is longer on average than in the UK due to such population dispersion. The loop length affects the quality of service on DSL technology proportionate to the distance between subscribers' premises and the exchange hubs. This condition undermines the efficacy of the scheme in fostering competition in the retail broadband access market.

The perception of a competitive market, created by the LLU regulation, shapes Ofcom's approach to net neutrality and the scope of the consultation. In its consultation document, net neutrality is defined as a potential competition problem (Ofcom 2010: 2). This definition, therefore, limits the scope and emphasis of the consultation as well as the discourses operating within this frame to the economic aspects of broadband access service provision. A speech given by Mr Ed Vaizey, the DCMS minister, on 17th November 2010 at the Financial Times World Telecoms Summit echoed the same view and preference for self-regulation as a means to regulate net neutrality (Vaizey 2010). Many interviewees, advocating self-regulation and traffic management flexibility, shared the same view.

BT's Head of Regulatory Strategy, Alun Banner, observed that the higher level of broadband access competition Europe enjoys results in differences between the European and American approaches to net neutrality. This, he said, was the benefit of the stronger access requirement from the Local Loop Unbundling (LLU) legislation. The effect of the LLU regulation, according to Mr. Banner, allows, for example, a content provider whose content is blocked or throttled by BT to rent the LLU line and take the customer away from BT. He therefore contends that there is no need for the same level of government intervention as the one introduced by the FCC to ensure content providers' broadband access to their customers.

Likewise, BskyB's Head of Regulatory Policy, Grant Forsyth, commented that, generally, the EU regulation requiring incumbents to provide access to their local networks 'is very robust' and 'has therefore fostered and enabled very good competition against/with the incumbents'. He elaborated that BT commands approximately 28% of the retail broadband market in the UK while the proportion of retail broadband market share Verizon holds is unimaginably huge. However, he caveated that the level of competition seen in the UK market may not apply to other EU members,

which may cause these members to feel less comfortable with self-regulation. Corresponding to Mr Forsyth's comment and the timeline, ISPA Council Member and Treasurer, James Blessing, observes that there are many fewer broadband access restrictions in the UK than in the US and continental Europe.

Similarly, Talk Talk's Executive Director for Strategy and Regulation, Andrew Heaney, said that the legislation allows Talk Talk to gain access to BT's network, 'the monopoly bit of BT's network that [Talk Talk] can't replicate', and provide services in competition with BT. He added: 'there is no equivalent of local loop unbundling in the US so the only way to compete is to build your own network'. As a result, the US retail broadband market, Mr. Heaney commented, is dominated by a handful of BT-like companies offering services on different technology platforms.

ITV's Senior Manager for Policy and Regulatory Affairs, Rhona Parry, agrees that the LLU regulation makes a 'key difference' between the US and UK net neutrality approaches, having created 'on the face of it a very competitive market in the UK with four really big, strong players'. However, she argued that the subsequent market condition in the UK still does not actually create much competition because these four major providers 'all have roughly the same market share'. She also commented that the low level of switching arguably indicates that the UK market is 'not actually the most competitive market anymore'. The contributing factors to that, she explained, include provider switching barriers and greater service bundling, which is likely to make consumers reluctant to switch providers.

In line with Ms Parry, Mr Sahel remarked that despite the impression of a competitive market the LLU regulation creates, the actual market practice restricts user broadband access. He added that these restrictions came to policymakers' attention in 2008 during the review of the EU telecom rules and began to shape the net neutrality discourses from the renegotiation of the EU telecom regulations. Consequently, he added, the European Commission proposed a draft of the revised legislation that covered net neutrality, but 'it was just very preliminary language'. He further commented that the net neutrality provisions in the 2009 framework, built on this draft, places more emphasis on user access to the content of their choice.

The policy actors' accounts of the LLU regulation indicate that the perceived market competition of this regulation waters down the severity of user broadband access restrictions in the UK and the EU and thus weakens the arguments for the strict regulation adopted in the US. The competing

interests of broadband providers and users tied to broadband access service provision are, therefore, not as sharply at odds with each other as in the US case. This allows more room for compromises and consensus to be achieved.

In addition to the LLU regulation, the analysis of the interview data indicates that free speech, although enshrined in Article 10 of the Human Rights Act (1998), does not carry the same weight in the UK and EU net neutrality policy debate as it does in the US. According to the DCMS's former senior regulatory policy advisor, Philip Milton, the faint existence or absence of free speech in the UK policy debate is intentional. Mr Milton explained that the UK government's approach to net neutrality was to 'move the focus away from the freedom of speech argument' and emphasise the market-based competition issues 'because we felt those were more relevant for the UK'. He added that the DCMS never thought that the free speech argument was relevant in the UK because, unlike US market conditions, UK users have always enjoyed more than 1 or 2 choices of providers.

This approach is articulated in Mr. Vaizey's first speech on open Internet in which he highlighted the principle of traffic management transparency and competition as a means to address net neutrality concerns. Given this emphasis, free speech is equated to user choice, which emphasises primarily the economic aspect of the value. Free speech in the British context, therefore, does not carry as much weight as it does in America.

Framed as 'irrelevant for the UK', free speech does not receive much space for discussion in the subsequent public consultation as will be seen throughout Chapter 6. The Executive Director of Open Rights Group, Jim Killock, commented that free speech tends not to receive much attention in political discussions in the UK. Ms Parry also commented that 'free speech is a slam dunk argument in the US', but the argument does not carry the same weight in the UK. She contended that the different weight free speech carries in the UK and the US in this policy context results from the 'pragmatic approach' on net neutrality that the UK takes. This approach, Mr Milton indicated, aims at addressing what the government perceives to be the actual problem of net neutrality, which centres on the contractual relationship between broadband providers and the users of their services. Policy actors' views and the value they attached to free speech as discussed here indicate a stark difference in political culture between the US and the UK. While free speech, as a value enshrined in the First Amendment, is an integral part of American politics and the decision-making process, the same value, though with similar legal status, does not share the same weight in the UK context.

As such, the value serves little purpose as a source of power that can be mobilised in support for or against certain objectives, claims for action or decisions. Free speech, therefore, does not form a significant part of the UK policy discourses. Consequently, the Human Rights Act (1998), which guarantees the right of free speech, is not at all referenced in the UK policy debate, while the First Amendment is often referenced in that of the US.

At the EU policymaking level, however, free speech is recognised in the 2009 revised regulatory framework and the European Commission net neutrality consultation objective (2010) as a right. This recognition broadens the scope of the net neutrality debate at the EU level, which could provide an opportunity for UK policy actors to shift the forum to advocate free speech in connection with broadband access at the EU level. Even so, the political concept of free speech as the right of 'end-users', who also play the roles of consumers and citizens according to Article 8(4)(g) of the Framework Directive (European Parliament and the Council Directive 2009/140/EC), does not get as animated as it does in the US because the concept is only inscribed in the general principle of net neutrality in the 2009 regulatory framework. This principle refers to citizens' access to content, application and services of their choice via the Internet.

Free speech, when equated with the rights of 'end-users', is an entitlement as far as its connection to the civic or citizen part of the binary notion of users as consumers and citizens. This notion portrays users as citizen consumers paying for an Internet service in a contractual relationship with a service provider. This representation overwhelms the discussion and interpretation of free speech with the contractual and economic aspects of broadband access, leaving the social and political aspects of the issue under-discussed. This status of free speech in the EU discourse dims the UK policy actors' hope of advocating this value at the national level through policy engagement at the European level.

Another EU legislative act that shapes UK net neutrality policy development is the EU 2009 revised electronic communications framework. The legislation sets net neutrality as one of its objectives and defines the principle in Article 8(4)(g) of the Framework Directive (European Parliament and the Council Directive 2009/140/EC) as 'the ability of end-users to access and distribute information or run applications and services of their choice'. In delivering this objective, the legislation relies on the consumer-centric approach as a means to guard against detriments to user Internet access. According to the Executive Assistant to the Electronic Communications Networks and Services Directorate, Peter Stuckmann, this approach to net neutrality is shaped by the

European Commission's and Neelie Kroes' perception that, compared to the US, Europe has a higher degree of competition which, in principle, allows European users to switch providers. This perception of the Commission and Ms Kroes reiterates the perceived impact of the LLU regulation- a competitive market- on the Commission's original preference for a directive as a means to ensure net neutrality.

The 2009 revised framework influenced UK net neutrality policymaking at the departmental, regulatory and industrial levels. At the departmental level, civil servants drafted the minister's speech on open Internet and drew on the expertise of delegates sent to Brussels to represent the nation's interests and policy positions during renegotiation of the EU 2009 revised electronic communications framework. Following the minister's speech was the ministerial roundtable discussion chaired by the DCMS minister. From this forum emerged core principles that guided the development of the open Internet voluntary Code of Practice, brokered by the Broadband Stakeholder Group (BSG).

At the regulatory level, the framework shapes UK net neutrality scope and the objectives of Ofcom's consultation through the duties and regulatory powers it prescribes for Ofcom. Mr Olivier refers specifically to the objective of the Framework Directive (European Parliament and the Council Directive 2009/140/EC) requiring Ofcom, the UK national regulatory authority (NRA), to ensure end-user access to online services of their choice. He further identified two specific power obligations: the transparency obligation and the quality of service (QoS) obligation on broadband access providers. The transparency requirements are prescribed in Article 20(1), 21(1) and 22(1) of the Universal Service Directive (European Parliament and the Council Directive 2009/136/EC). The QoS obligation is prescribed in Article 22(3) of the same Directive. Bound by the European Community Act (1972) to transpose EU legislation into national law, these provisions, Mr Olivier said, 'underpin' Ofcom net neutrality consultation on how the regulator should exercise these powers. According to its consultation document and statement, the regulator prefers self-regulation and exercise of these powers *ex-post facto*.

At the industrial level, the former Broadband Stakeholder Group's (BSG) Chief Executive Officer (CEO), Pamela Learmouth, said that broadband providers approached the BSG and asked if the organisation could act as 'a neutral broker' between ISPs in their development of the transparency code and to help them promote the code to other stakeholders following a signal from Ofcom and

the revised EU 2009 framework. She noted that broadband providers had already been providing information about the traffic management they deploy and saw the legal requirement from the 2009 framework as an opportunity for them to collaboratively develop a common approach on delivering transparency. This collaboration, she said, marked 'the first foray' of BSG into the net neutrality policy process in the UK.

Following the transparency code, Ms Learmouth added, the DCMS Minister asked BSG to facilitate the development of an open Internet agreement. She explained that the open Internet code was intended to reflect the commitments already made on transparency and address two more principles: 'a commitment to provision of open Internet product' and discrimination against content providers on commercial rivalry. The additional principles emerged from the roundtable discussion.

Apart from the EU regulatory precedents, section 3(1) of the UK Communications Act (2003) also shapes the scope and emphasis of Ofcom's net neutrality consultation through prescription of the regulator's statutory duties 'to further' the interests of citizens and consumers. According to the interview with Mr Olivier, both are connected to users' freedom to access online content, applications and services. This means the consultation attempts to accommodate both, but places heavier emphasis on competition as a means to fulfil the regulator's statutory duty to oversee broadband internet access service provision.

In addition to EU legislation, the EU policymaking process also contributed to the UK net neutrality policymaking, discourse and outcome because the EU legislative outcome will override UK law. Some of the key elements of this process include the net neutrality consultations and the Body of European Regulators for Electronic Communications' (BEREC) report on traffic management practices in Europe and the Connected Continent legislative process (See Figure 8). The European Commission's consultation document (2010: 2) indicates that the consultation started was in compliance with the declaration in Annex I of the adoption of the EU 2009 revised framework. According to Mr Stuckmann, the consultation was also shaped by the Commission's own policy objectives, recorded in the Digital Agenda presented by the European Commission (COM (2010) 0245 final) as part of broader policy objectives of Europe 2020 (Com (2010) 2020 final), the political agenda of certain European commissioners as evident in Neelie Kroes' statements (2013, 2014), political pressure from the European Parliament (EP) and the findings from BEREC, all of which shaped the EU continuous net neutrality policymaking process.

In the Digital Agenda, broadband is represented as an enabling infrastructure for innovation and economic growth. In the review of the Digital Priorities, creating 'a new and stable broadband regulatory environment' tops the list (European Commission 2012a: 1). The political pressure from the European Parliament is recorded in its resolution on the open Internet and net neutrality in Europe (European Parliament 2011), published on 7th November 2011. In this resolution, the parliament 'calls further on the Commission to ensure that internet service providers do not block, discriminate against, impair or degrade the ability of any person to use a service to access, use, send, post, receive or offer any content, application or service of their choice, irrespective of source or target' (European Parliament 2011: 4). Then on 26th October and 15th December 2012 (see Figure 8), the European Parliament demanded net neutrality legislation again.

According to Mr Stuckmann, BEREC's reports serve as a track record of net neutrality violations or practices that limit net freedom, which the 2009 revised regulatory framework intended to ensure. It can be inferred from the interview that these reports led the Commission to take further action to address limitations on users' Internet access, including conducting the consultation on the subject. These developments contributed to the incorporation of net neutrality into the Commission's connected continent regulatory proposal.

Given the policy precedents at both the national and supranational levels (EU) discussed here, the UK net neutrality policymaking process and discourse indicate stronger guidance from state policy actors than from the public. Non-state participation in the framing of the net neutrality policy debate here was a response to the government's net neutrality speech, setting out the government's approach to net neutrality, and Ofcom's *ex post facto* approach to implementing the net neutrality provision prescribed in the EU 2009 revised framework. Both approaches reflect the influence of EU legislation and legislative procedures on UK net neutrality policymaking and discourses.

The response from non-state policy actors to the minister's speech urged the government to involve the public on a broader scale in the form of a round-table discussion chaired by the DCMS minister. An example of such pressure is the joint open letter to the minister regarding the open Internet (Lynn et al. 2010). The input phase of the UK net neutrality policymaking process, according to the research framework (see Figure 2, page 86), therefore, differs from the US in that the UK government took the initiative to frame the debate, which unexpectedly attracted a large number of responses from the public. Public resistance subsequently pushed the government to

involve the public more in further development of the policy. The multitude of non-state policy actors with competing interests involved further complicated the policymaking process. This situation concurs with Freedman's (2008) observation that policymaking is political and complicated due to the number of policy actors participating.

Discussion

The policy precedents in the cases studied indicate the strong influence of a neoliberal emphasis on free market competition. However, the policy precedents that frame the UK net neutrality consultation and discourses have not resulted in the deregulatory dilemma seen in the US. In this respect, the UK's approach to and principles of net neutrality have not been developed in response to regulatory and market failures. They have emerged in response to the technological advancements and increasingly complex commercial relationships between service providers and users and, consequently, conflicting interests. Given a different precedent (the LLU regulation), the UK/EU-based policy actors interviewed do not perceive Internet access restrictions, particularly on fixed-line, as serious a problem as policy actors in the US and some European countries. In addition to the LLU regulation, the EU 2009 revised regulatory framework for electronic communications requirements and the regulator's statutory duties prescribed by the Communications Act (2003) contributed to the framing of UK net neutrality policymaking.

From the series of events taking place following the LLU regulation and interview accounts, EU net neutrality policymaking has developed in response to executive and political agendas rather than to a deregulatory dilemma as with US policymaking. In this context, the inadequacy of existing legal infrastructure to keep pace with technological advancements and increasingly complex commercial relationships between service providers and users are the actual drivers.

However, the interview analysis in this section indicates that existing UK and EU legislation presents a dilemma in regulating the convergence of telecommunication and media. This dilemma, according to Garnham (1996: 284), results from different regulatory goals and criteria for the previously distinct communication sectors: telecom and media. The interviewees' perspectives of net neutrality policy precedents indicate that such regulatory dilemma is a ripple effect on many levels of the preceding policy and regulations contributing to the convergence of telecom and media. The interviewees' perceptions of the policy precedents discussed in this section indicate a cyclical relationship between policy and industry development. These opinions concur with the

literature discussed in sections 2.2.2, 2.3.2 and 2.4.2. Supported by existing policies, the artificial barrier between telecom and content is fading as technology advances and the commercial relationships between providers of telecommunications services and content become increasingly complex. These changes in the market require policy and regulations to adapt and evolve as in the case of net neutrality.

Contributing to Powell and Cooper's analysis (2011) of the net neutrality advocacy discourses, the analysis of the interview data policy documents in this section indicates that free speech is more prominent in the US discourses than in those of the UK because the political cultures in these countries attach different values to free speech. As free speech carries more weight in the US decision-making process, it is built into policy actors' discourses to empower their claims for action. In the UK, policy actors interviewed suggest that free speech does not carry as much weight in the decision-making process. Consequently, including it in their discourses is not likely to help them achieve their aims.

Moreover, interview data indicate that, specific to this policy development, free speech has been ruled by the government as being irrelevant to this policy issue. It is, therefore, almost absent from the UK discourse. Where free speech is present in the UK debate, it is represented in terms of choice, which primarily emphasises its economic aspects. In the US, on the contrary, free speech is discussed in all economic, social and political aspects due to its social and political significance in the American political system.

5.2. Net neutrality policymaking process: Mixed genres of communication

This section examines another set of structural factors, the policy practices in the net neutrality policymaking process, within the broader political systems of the cases studied. These factors form part of the input into the policymaking process (see Figure 2, page 86). The analysis of the consultation documents and interview data here explains: 1) how the turns of argumentation throughout the policymaking process are shaped by the broader political system and policy practices in the US and the UK and 2) how such terns of argumentation constitute power relations in this policymaking process. This explanation, according to the concepts of argumentative turn and CDA, shapes the discourses operating in this policymaking process, which is a genre of communication.

The analysis of the way policy actors communicate in this process indicates, in support of the literature on policy practices (see 3.3), that such process involves two genres of communication: formal and informal. It also highlights the power inequality structured in the genres of communication that privilege certain discourses over others and thus shape subsequent discourses. This relationship between genre and discourses reflects a constant interaction between structure and agency throughout the policymaking process. Here, the structure examined is the genre of communication; agency refers to policy actors. This interaction is the basis of the discourse analysis of the policy documents in Chapter 6.

Interviews with policy actors indicate that the informal process in both cases involves private meetings with the regulators, decision-makers, relevant ministers and civil servants. The practice of this genre of communication is a dialogue between non-state and state policy actors in which the non-state policy actors try to convince the state policy actors to adopt a certain course of action. The turn of communication enables the non-state policy actors to input their demands for state policy actors' consideration. The state-policy actors, however, retain their ability to resist such demands.

As discussed in sections 2.4 and 5.1, the net neutrality consultations in both cases emerged in response to a debate on the management of access control of the Internet network infrastructure, which first started in the US, and policy precedents. The consultations, therefore, serve as a means to reconcile approaches to broadband access provision and oversight. The normative understanding of consultation embodies the democratic values of participation and representation. Nonetheless, the specific function of consultation varies slightly across the US, the UK and the EU, according to political practices in these jurisdictions.

In the US case, the interview analysis indicates that the consultation serves as a means of ensuring public participation in a proposal and the establishment of regulations by the federal government of the United States and its agencies, as required by the Administrative Procedure Act 1946 (APA). The FCC's Associate General Counsel, Stephanie Weiner, said that the FCC's consultation is governed by the APA and the FCC's own regulations. Guided by the these regulations, the FCC launched a consultation, the open Internet and broadband industry practices NPRM (2009), in response to the net neutrality debate and the difficulties in regulating broadband access service due to the precedent regulatory and market failures. In the consultation, the FCC uses its statutory duty to propose oversight measures for the management of broadband access and services. The FCC

justified its action by describing the circumstances and defining the problems to which the regulator is responding. Given the function of the consultation as prescribed by the APA, the regulator has to consider comments on the proposed rules and decide, based on evidence submitted in support of respondents' comments, whether and how to adapt the proposed rules.

The FCC's authority, guided by the APA, privileges the regulator to set the scope of the consultation and frame the discourses operating under the formal genre of consultation. This power enables the FCC to filter in certain values, interests and solutions through its description of the circumstances, problem definition and corresponding solutions. How the FCC exercises this power will be demonstrated through discourse analysis in Chapter 6. Unlike informal communication, the formal policymaking process privileges the FCC to build selective non-state policy actors' inputs in response to policy precedents into its problem definition and proposed solutions. In the formal policymaking process, the non-state policy actors are, therefore, limited to responding to the proposed solutions based on state policy actors' problem definition.

In the UK, the analysis of the interview data indicates that in practice the consultation functions differently from that which Jordan and Richardson (2013: 84) observe to be the case. According to these authors (ibid.), the consultation serves 1) as a means to uphold the democratic value of participation through representation by involving the public in the government's policymaking (ibid.) and 2) as a platform for negotiation and means to achieve consensus among competing interests and ultimately the consent to be governed (ibid.: 86). According to Ofcom's Head of Internet policy, Jeremy Olivier, Ofcom's net neutrality consultation is not a standard consultation because it aims at setting out the regulator's understanding of competing arguments concerning the regulatory oversight of broadband access management with a view to consider whether a specific intervention rather than a policy objective might be appropriate.

In the specific case of net neutrality, Ofcom uses consultation to test the water to see how much resistance to its approach to traffic management there is and what political actions may be involved. This use of consultation indicates that Ofcom's decision on the matter has already been made. Similar to the US case, the way Ofcom uses consultation in net neutrality policymaking privileges the regulator to selectively build non-state policy actors' input from the preceding informal policy process (see 5.1) into its consultation document, which sets out its approach to net neutrality.

This use of consultation allows Ofcom to exclude or downplay the values, interests and regulatory options that compete with its preferences through its problem definition and proposed solutions in the consultation document. The formal power that the non-state policy actors have to resist the regulator's initial decision is likely to be minimal unless the consultation responses indicate strong resistance to that decision. In this formal genre of communication, non-state policy actors' ability to shape the subsequent discourses is limited to the scope and emphasis of the consultation Ofcom sets out.

Similar to the function of Ofcom's consultation, the interview analysis is in line with Richardson (2006: 17 - 18), i.e., policy actors' recognition that consultation is one of the requirements prescribed by the Amsterdam Treaty for any decisions that will result in EU legislation. This legal requirement implies that the EU consultation also serves as a means to legitimise the legislature's regulatory proposal. The analysis also supports Richardson's (2006: 14) observation that consultation here also serves as a means to achieve 'cooperation' among the EU members. It contributes to the literature the practical function of the net neutrality consultation carried out by the European Commission, i.e., a means to test the water and understand the politics involved.

According to Mr Stuckmann, the European Commission has the right of initiative in the European legislative process. Given this right and the statutory requirement prescribed by the Amsterdam Treaty, the European Commission (EC) conducted the consultation, partly to inform the legislative proposal for traffic management oversight being developed. By notifying member countries of the legislative proposal, the EC received comments from member countries and other policy actors, which indicated the level of support for and resistance to the proposal.

Similar to the cases of the FCC and Ofcom consultations, the function of the consultation gives the Commission the prior authority or ability to selectively incorporate certain public and BEREC inputs into its consultation document. This ability, supported by the formal policymaking process, allows the Commission to prioritise certain values, interests and approaches to net neutrality over others through its problem definition which frames the scope and emphasis of the consultation from the outset. The consultation function in EU net neutrality policymaking, therefore, restricts the scope and emphasis of the policy discussion and discourses to only the issues that fit the consultation objectives (European Commission 2010).

The functions of both informal and formal policymaking process in the US, the UK and the EU discussed in this section indicate that the broader political system and practices shape the ways policy actors communicate in policymaking. The analysis of the overall policymaking process demonstrates that the process involves mixed genres of informal and formal communication. Genres dictate the roles policy actors play in different phases of policymaking. The roles policy actors play, in line with Freedman (2010: 355) and (Braman 2004: 154), structure power relations among them and privilege some actors over others in agenda setting, defining policy problems, promoting hegemonic interests and foundational values and framing the subsequent debate.

These power relations indicate that the genre of communication contributes to structured inequality in policymaking. The analysis, therefore, reinforces Marsh and Smith's argument (2000) that political structures, resulting from patterns of practice, define the role policy actors play in the policymaking process. The limitations of non-state policy actors highlighted in the formal genre of consultation and the limitation of state-policy actors in the informal genre of communication are examples of what Marsh (2008, 2002) calls structured inequality that is rooted in institutional factors such as political systems and practices.

Both the informal and formal genres of policymaking fit the argumentation process described by Fischer and Gottweis (2012: 9) which features people seeking 'to reach conclusions through reason'. This process is treated, based on the argumentative turn approach, as one in which policy actors 'communicate in civil debate and engage in persuasive [and argumentative] dialogue and negotiation…in order to reach and justify mutually acceptable decisions' (ibid.).

The analysis supports the observation made by Fischer and Gottweis (2012) that policy actors engage in the argumentation process of policymaking with an aim to change or keep in place the existing structure or policies and regulations. The power relations among policy actors and between the actors and the structural factors such as policy precedents are dialectical. The objective and practices of both genres of communication make the style of communication persuasive and argumentative.

Given the mixed genres and styles of communication in policymaking, the exercise of the second face of power (Bachrach and Baratz 1975, 1970) is most observable. This power exercise includes mobilisation of bias (of the policy makers) to exclude or suppress rival goals, ideas, values and interests. In this case, the informal genre serves as a means for non-state policymakers to justify

their policy inputs using policy precedents and prompting the state policy actors to take the actions deemed necessary. Some of these inputs constitute the state policy actors' problem definition and proposed solutions. The formal genre of consultation, on the other hand, serves as a means for state policy actors to use policy precedents to justify their problem definition and proposed solutions in the consultation documents. Problem definition, according to Braman (2004: 154) is political. It shapes the subsequent discourses operating within this mixed genre of communication.

The analysis of interview data and consultation documents in this chapter reveals an ongoing interaction between structure and agency. Here, structure includes political systems that differentiate policymaking practices in the two cases and the state as an institution. Agency refers to policy actors, including the state as an agent with its own objectives and interests. The mixed genres of communication in policymaking results in power disparity between state and non-state policy actors in the informal and formal genres. Due to this power disparity and mixed genres, power is concentrated in the hands of state policy actors, a group comprised of the FCC, Ofcom, the DCMS minister and relevant civil servants and the European Commission. However, the informal genre of communication, preceding and throughout the formal process, provides opportunities for non-state policy actors to input their demands into state policy actors' framing of the net neutrality policy and discourses.

The power relations observed here reinforce the critical pluralists' thesis on power (see section 3.1.3) that no one policy actor or group of policy actors has absolute dominance across the whole policy domain. Non-state policy actors have varying degrees of influence over the consultation documents developed by the state-policy actors (formal genre), the subsequent discourses and policy outcome. Policy actors' ability to exercise the power of persuasion and consequently their influence on policy framing and discourse construction is observable through discourse analysis in Chapter 6 and their policy engagement practices discussed in Chapter 7.

Chapter 6

Net neutrality policy discourses and power exercise

Using the CDA-based framework for analysing practical reasoning to operationalise the argumentative turn, this chapter explains how the structural factors discussed in Chapter 5 shape the net neutrality discourses in the formal policymaking process. Here, the discourses are produced in three stages: 1) consultation document, 2) responses to consultation, 3) consultation outcome. These will be deconstructed (according to Table 7) in order to identify the factors that shape specific discourses.

The application of the CDA-based analytical framework to policy documents explains, in contribution to the existing net neutrality literature, how the interaction between structure and agency in the input and decision-making phases of policymaking (see Figure 2, page 86) shapes policy discourses and outcome, constituting policy differences in the cases studied. This interaction involves an exercise of power through discourse within the limits of the genre of consultation and policy precedents. The analysis emphasises the exchange of discourses within and between different stages of the formal policymaking process to explain the domination of certain discourses over others.

6.1. Discourses of Consultation Documents: The exercises of power

This section examines the discourses operating within the formal policymaking process to explain how and why the US and UK regulators and the European legislators are in fact consulting about different problems and solutions concerning the same subjects: a) the appropriate management principles for access to the Internet infrastructure and b) regulatory oversight to ensure adherence to a mutually accepted principle.

Following the power relations among policy actors and their roles in the consultation genre, the first set of discourses to be analysed is the consultation documents. The discourses of responses to the consultation documents and policy outcome will be analysed in section 6.2 and 6.3,

respectively. As discussed in 5.2 (the argumentative turn in the formal policymaking process), consultation begins with the state policy actors framing the scope and emphasis of the subjects that these actors seek public comments on, having selectively built in the preceding policies and public inputs. The consultation scope and emphasis are set out in the objective of the consultation documents or claims for action. Here, the claims for action will be dissected in order to identify the factors constituting these calls. Such identification will reveal the objectives and underpinning ideologies, values and interests that serve as a structure that advantages the aligning discourses and disadvantages the competing ones. These claims for action are summarised in Table 12 below. They represent state policy actors' initial positions.

Table 12 Summary of claims for action

Claims for Actions & Policy Positions	FCC	Ofcom	European Commission
Access to applications, services and content of choice	✓	✓ (*Citizen interest: Article 8(4)(g) of the 2009 Framework Directive)	✓ (*Citizen interest: Article 8(4)(g) of the 2009 Framework Directive)
Blocking	✗	Potential problem	Potential problem for 'net freedom of citizens' (European Commission 2010: 2)
Traffic discrimination	✗	Potential problem	Potential problem for 'net freedom of citizens' (European Commission 2010: 2)
Reasonable traffic management, including specialised services	✓ (*Unclear definition of 'reasonable traffic management)	✓	✓
Traffic management transparency	✓	✓	✓
Policy measures	High level prophylactic rules	Self-regulation supported by traffic management transparency and power to impose the minimum quality of service	High level principle directive or a recommendation

Overall, the claims for action in the US, UK and EU feature the consideration of the management principles for access to the Internet infrastructure and the means or regulatory oversight to ensure adherence to the mutually accepted principle. In general, the objective of the consultation fits what

Iosifidis (2011a), Michalis (2007), Van Cuilenburg and McQuail (2003), Napoli (2001) and Aufderheide (1999) describe as the distribution infrastructure aspect of communications policies. Providers of such communications services are in the telecommunication sector and thus subject to telecommunication regulatory criteria that emphasise the economic values of universal, non-discriminatory, fair and equitable access to the infrastructure at a reasonable and affordable price.

The common values underpinning the US, UK and EU consultation objectives that emerge from the analysis of the consultation documents include access, competition, and varying degrees of non-discrimination. These shared principles indicate a degree of dependence on existing policy. The continued application of these regulatory criteria to determine how access to distribution infrastructure is managed, as recorded in the work of Iosifidis (2011a), Michalis (2007) and Aufderheide (1999) and in the consultation documents, indicates that these values have been institutionalised. As such, they serve as institutional factors that shape the state policy actors' discourses. This finding coincides with existing net neutrality literature that policy precedents contribute to different net neutrality policy approaches across the Atlantic. However, the critical discourse analysis of these documents further indicates that circumstances and problem definitions play equally important parts in shaping the discourses operating within the formal genre of consultation.

The structures of these discourses are visualised according to Fairclough and Fairclough's framework for analysing argumentation (2012) in Figures 9 – 11.

Figure 9 Discourse structure of the US consultation document

FCC claim (call for action)
To presere the open Internet by codifying ex-ante rules, banning blocking, discrimination and mandating transparency

Goal:
- Preserve the open Internet
- Promote competition

Circumstances
- Limited options to broadband and access services.
- Conflict of interests between those providing broadband access services
- Network congestion/ network capacity problem

Means-goal
- Regulation, banning blocking and 'unreasonable' discrimination and mandating transparency in traffic management deployment.
- Competition/market mechanism

Discourses of goal
'Promoting competition for Internet access and Internet content, applications and services is another key goal (FCC 2009: 22)

Values and interests
- Access
- Competition
- Resonable network management
- Choice
- Consumer interest
- Public interest
- Openness/non-discriminaion
- Encourage broadband deployment
- Transparency

Goal and means-goal discourse
'These proposals aim to maximise the Internet's potentital to further users' interests and the public interest ... by safeguarding the essential openness that has been a hallmark of the Internet since its inception, and by assuring transparency in the Internet's operation' (FCC 2009: 5).

Access and traffic management discourses
'Reasonable network management consists of: a) reasonable practices employed...to (i) reduce or mitigate the effects of congestion on its network or address quality-of-service concerns; (ii) address traffic that is unwanted by users or harmful; (iii) prevent the unlawful transfer of content; and (b) other reasonable network management practices (FCC 2009: 50).

Transparency & market mechanism discourse
'...to protect and empower consumers and to maximise efficient operation of relevant markets by ensuring that all interested parties have access to necessary information about the traffic management practices of networks' (FCC 2009: 45)

Non-discrimination and reasonable traffic management discourses
'The non-discrimination principle would prohibit broadband Internet access service providers from faouring or disfavouring lawful content, applications, or services accessed by their subscribers, but would allow broadband providers to engage in reasonable network management' (FCC 2009: 4)

Choice & competition discourses
'...consumers have limited options for high-speed broadband Internet access service ... broadband providers generally sell other services... that face competition from content and applications offered by others over the Internet. As a result, broadband providers' interests in maximising profit may not always align with the interests of end users and the public' (FCC 2009: 4)

Overall values and interests discourses
'... Consumers are entitled to access the lawful Internet content of their choice (Federal Communications Commission 2009: 3.
- ... Consumers are entitled to run aplications and use services of their choice, subject to the needs of law enforcement' (FCC 2009: 3)
- '... Consumers are entitled to competiion among network providers, application and service providers (FCC 2009: 3).
- The principle of non-discovery 'that would require a broadband Internet access service provider to treat lawful content, applications, and services in a non-discriminatory manner' (FCC 2009: 5)
- '...that would require broadband Internet access service providers to disclose such information concerning network management and other practices as is reasonably required for users and content applications, and service providers to enjoy the protection specified in this rulemaking' (FCC 2009: 5).

Transparency, citizen interest, innovation and investment discourses
- 'We propose a transparency principle to protect and empower consumers and to maximise the efficient operation of relevant markets...' (FCC 2009: 45)
- '...we seek to preserve, open, safe, and secure Internet and to promote and protect the legitimate business needs of broadband access service providers and broader public interests such as innovation, investment, research... speech and democratic engagement (FCC 2009: 21)

Traffic management discourses
'...Tools that enable network operators to prioritise or degrade trasmissions of particular content, applications... are increasingly available and widely deployed,- and the use of these tools raises important policy questions...broadband providers may have both the incentive and the means to discriminate in favour of or against certain Internet traffic... in ways that negatively affect consumers, as well as innovators...' (FCC 2009: 4)

As illustrated in Figure 9, the FCC, the US national regulator, proposes to preserve the open Internet by codifying and implementing three rules, banning blocking and discrimination and requiring broadband Internet access service providers to disclose traffic management information applied to users' Internet access *ex-ante* (FCC 2009: 38). The proposed *ex-ante* regulation would require broadband providers to treat all traffic equally except in the case of congestion management. The actual intention of the rules is clarified in the official transcript of the oral argument between the FCC and Verizon at the D.C. District Court that took place on 9th September 2013:

> 'JUDGE TATEL: But the whole purpose of this regulation, the whole
> purpose of it is to prevent Internet, broadband Internet providers from
> imposing charges on the edge providers. In other words, the Commission
> itself acknowledges the capability and the incentive to do it.
> MR. LEV: Absolutely, Your Honor'…

And:

> 'JUDGE SILBERMAN: -- the broadband provider can't charge the edge
> provider, that's the only limitation here.
> MR. LEV: No, that is the only limitation, but yes, that's correct.'

The responses of Mr. Sean Lev, the then FCC general counsel, to Judge Tatel's and Judge Silberman's questions imply that the FCC intends to ban both negative and positive discrimination. Here the positive discrimination includes the imposition of charges by broadband providers on the edge providers or content providers for priority. In line with the FCC's stance in the oral argument, an interview with the FCC Deputy Chief of the Wireline Competition Bureau, Matt Del Nero and Associate General Counsel, Stephanie Weiner, about the objective of the proposed open Internet rules suggests that the rules were designed to prevent traffic management practices that result in discrimination that harm competition and the virtuous circle of supply and demand. This objective reveals that the FCC views traffic management and discrimination as problems. To the FCC, the harm to consumer, competition and the virtuous circle of supply and demand that traffic management and discrimination can create are real. The interview also shows that the FCC finds that broadband providers have strong incentive and ability to discriminate against unaffiliated traffic. The FCC's finding connotes the pejorative view toward traffic management and discrimination that the regulator holds. This view differs from the initial views of the UK regulator and EU legislature.

Figure 10 Discourse structure of Ofcom consultation document

Ofcom claim (call for action)
Use market competition to address traffic managemget and discrimination concerns

Goal:
Address traffic management and discrimination concerns

Circumstances:
- Traffic management and discrimination concern

Means-goal:
- Market competition
- Transparency

Citzen interest discourse
'Access to broadband is therefore becoming an important way to access public services and traffic management could potentially have an impact on how citizens might access these services in the future' (Ofcom 2010: 8)

Values and interests:
- Citizen interests
- Consumer interests
- Access
- Trafficmanagement
- Reasonable discrimination
- Competition
- Transparency

Circumstance discourse
'Generally speaking, our initial position is that discriminatory behaviour is only a potential issue where firms have substantial 'market power' and coud discriminate in favour of their own services... We believe that there is insufficient evidence at present to justify the setting of blanket restrictions on all forms of traffic managemen' (Ofcom 2010: 2).

Means-goal discourse
...it is likely that our initial view would be to explore existing competition tools and consumer transparency options before considering a minimum Quality of service' (Ofcom 2010: 2)

Traffic management discourses
'Our intial analysis indicates that there is currently no strong case for an outright ex ante prohibition on all such discriminaion. Regulatory intervention which focused exclusively on traffic management (prohibiting certain forms of traffic management) could have the unintended consequences of encouraging the development of closed networks and devices, which evade any such ban (Ofcom 2010: 33)

Transparency & competition discourses
- '... consumers should be fully informed of any traffic prioritisation, degradation or blocking policies being applied by their ISP and therefore should be able to factor this in when making purchasing decisions... so that competition is effective at the retail level' (Ofcom 2010: 17)

Innovation & investment discourses
- 'In particular, content and service providers have claimed that if network operators and ISPs started charging them this may have serious effects on their incentives to invest and innovate with wide ranging consequences for the Internet at large' (Ofcom 2010: 31).
- 'It is worth also considering the impact of policies in this area on the investment incentives of network operators and ISPs ...' (Ofcom 2010: 32).

Figure 11 Discourse structure of the European Commission consultation document

The discourse structures in Figures 10 and 11 demonstrate that the UK regulator, Ofcom, and the European Commission's claims for action favour market competition as measures to address the negative effect of traffic management over *ex-ante* rules. The regulator deems that *ex-ante* rules are not necessary because there has not been sufficient evidence of anti-competitive effects of traffic management found in the UK. This regulatory approach aligns with that of the European Commission (Figure 11). However, the Commission's consultation has cast an even wider net for ideas on how the traffic management concerns should be addressed in Europe.

In its consultation document (Ofcom 2010: 2), Ofcom represents traffic management and discrimination as 'only a potential issue where firms have substantial 'market power' and could discriminate in favour of their own services'. Such representation of traffic management and discrimination implies that these practices would become a problem when they have an anti-competitive effect. According to Mr Olivier, Ofcom is aware of the negative effect of traffic management and discrimination, which could be a concern, but he does not currently see such practices as a problem. He feels that they would become a problem that prompts Ofcom to intervene when there is significant proof that they undermine the quality of consumer Internet access service. Such representation of traffic management and discrimination implies that Ofcom is more receptive to discrimination beyond congestion management, such as paid-for-prioritisation and guaranteed quality of service, than is the FCC.

More affirmative to traffic management and discrimination, the European Commission, under the amended telecoms framework, accepts that traffic management can be 'a legitimate tool for the provision of differentiated services… provided that the requirements of the framework are adhered to and customers are kept informed, in particular with regard to the minimum service quality they can expect' (European Commission 2010: 5). Like that of Ofcom, the European Commission's definition of non-discrimination is more flexible than that of the FCC. According to an interview with the Mr Stuckmann, the Commission places heavy emphasis on the consumer rights to broadband access and innovations enabled and stimulated by broadband access. These factors are used as indicators for determining whether certain kinds of traffic management are permissible. This indicates that the Commission's definition of reasonable or unreasonable traffic management is principle-oriented. The commission's definition allows more flexibility for traffic management than the FCC's technical-based definition. As such, the Commission's consultation document shows no sign of foreclosing traffic management and discrimination *ex ante*.

Given the interconnection between functions of the discourses in Fairclough and Fairclough's framework (2012) for analysing practical reasoning, the definition of the non-discrimination value contributes to the differences in the consultation objectives across these jurisdictions (Figures 9-11). Due to such differences in definition of non-discrimination, the FCC's goal of preserving the open Internet leaves very little to no flexibility for positive discrimination through charging for prioritisation and guaranteed delivery service. The FCC's definition of the non-discrimination value also muddies the definition of reasonable discrimination and deprives broadband providers of legal certainty in their service provision. This lack of clarity is reflected in the oral argument that took place at the D.C. District Court on 9th September 2013, excerpted below:

> 'MR. LEV: The Commission did not say, and this is in paragraph 76, the
> Commission explained for many reasons why it may be concerned about
> pay for priority, different pay rates, but it did not actually find here that
> those would always be illegal, it says they would raise significant cause
> for concern is the first sentence of paragraph –
> JUDGE SILBERMAN: But any discrimination, of course, prevents
> something beyond blocking, which is less adequate service.
> MR. LEV: Absolutely.
> JUDGE SILBERMAN: Yes. So, that's why they're two together.
> MR. LEV: But it's only unreasonable discrimination, and there may be
> reasons to have less good–'

While the proposed open Internet rules 'would require a broadband Internet access service provider to treat lawful content, applications, and services in a non-discriminatory manner' (FCC 2009: 5), the FCC's General Counsel, Mr Lev, argued in defence of the rules during the oral argument that not all types of pay for priority would always be illegal. Yet, the effect of such positive discrimination, as Judge Silberman pointed out, results in 'less adequate service'. This highlights the lack of a clear and consistent benchmark for regulatory intervention.

The Ofcom and European Commission consultation objectives, however, are clearer than those of the FCC. They target the effect of traffic management and discrimination on access to Internet infrastructure. Given Ofcom's and the Commission's definition of the value of non-discrimination, the objective of their consultation is not to ban traffic discrimination. Their representation of the value of non-discrimination implies that their concept of open Internet accepts discrimination to an extent that such practices do not foreclose access to non-discriminatory Internet or harm

competition and that consumers are informed of such practices. The distinction between the UK, EU and US consultation objectives highlights the relationship between the representation of the institutionalised value of non-discrimination and problem definition, constituting the structural factors shaping these actors' discourses.

As suggested in Figures 9-11, the consultation objective is related to value and problem definition. The US consultation document frames traffic management for and beyond congestion management as 'raising important policy questions' (FCC 2009: 4) as it undermines what the FCC understands to be the value of non-discrimination, underpinning the FCC's consultation objective. Such representation of traffic management and discrimination indicates that these practices are treated as problems in the US as opposed to merely potential concerns as they are represented in the UK and Europe.

The FCC's, Ofcom's and the European Commission's representation of circumstances underpinning their claims for action is an exercise of what Bachrach and Baratz (1975, 1970) call the second face of power. Their representation of circumstances and subsequent problem definition serves as a mechanism of bias mobilisation to suppress or exclude competing values and interests from entering the formal consultation process. In the US case, the representation of traffic management and discrimination as problems contributes to the FCC's adoption of *ex-ante* regulation as a means-goal. It also creates a bias against traffic management and discrimination, which results in a pejorative definition of the non-discrimination value. By defining traffic management and discrimination as problems and thus proposing to ban such practices, the FCC excludes the value and interests in traffic management and discrimination.

In the UK case, Ofcom represents traffic management and discrimination as a potential problem. This representation contributes to a non-interventionist choice of means-goal market competition and transparency. Ofcom's framing of traffic management and discrimination as hypothetical problems serves as a bias against the views that such practices harm or undermine access to the Internet and weakens the argument for *ex ante* regulation.

Similar to Ofcom, the European Commission did not represent traffic management and discrimination as problems. Such representation aligns well with the existing regulation, the 2009 revised Electronic Communications Framework, which acknowledges that 'traffic management can be a legitimate tool for the provision of differentiated services in the interests of the efficient functioning of network…' (European Commission 2010: 5). This framing creates a bias against the ideas that traffic management and discrimination are harmful to Internet access. Without

substantive harm to the goal of access, there is no warrant for *ex-ante* regulatory intervention that the FCC proposed. By representing traffic management and discrimination as hypothetical problems, Ofcom and the European Commission can silence competing interests of other non-state policy actors that may actually be harmed by such practices, fitting the Bachrach and Baratz (1975, 1970) of the second face of power.

The discourse analysis of the consultation documents shows that value and problem definition serve as the sources of power or biases and the ways the state-policy actors mobilise bias to frame the scope and objective of consultation to prevent competing objectives, values and solutions from emerging in the subsequent policy debate. This ability granted to state-policy actors by the consultation genre to frame the subsequent debate indicates a degree of power concentration among state policy actors that privilege them to shape the subsequent policy discourses and debate. However, as discussed in 5.1 and 5.2, preceding policies and informal public input leading up to the formal policymaking process also play a part in shaping the state policy actors' representation of circumstances and problem definition. The power that state policy makers have in shaping the subsequent discourses is, therefore, not absolute.

The analysis also reveals a path-breaking regulatory solution in the US case. The *ex-ante* regulation as a means-goal, such as the proposed open Internet rules, breaks away from market competition, which Aufderheide (1999) observes to be a common and favoured policy measure for the infrastructure side of the communications policy throughout the US history of telecommunications. Given Aufderheide's account of the US telecommunications regulatory tradition (1999) and Hartz's description of American natural liberalism (1991: 5 - 14), which shapes the relationship between the state and its people, government regulatory intervention is only welcomed as a tool to correct market failure. The FCC representation of circumstances and problem definition to justify its innovative proposal to apply *ex ante* regulation fits the traditional justification for regulatory intervention: a correction of market failure. As such, although the US proposed policy measure is path-breaking, its justification for such proposal is path-dependent.

However, discourse analysis of the consultation documents indicates that the Ofcom and the European Commission proposed policy measure of competition is path- dependent because it continues what Michalis (2007: 143 - 44) observes to be a favoured telecommunications regulatory objective and tool since the mid-1970s. This choice of means-goal also reflects the continued influence of neoliberalism since the mid-1970s.

The similarity between the Ofcom and the Commission discourses of their consultation objectives and means-goal also indicates policy and regulatory coordination. Such policy coordination results partly from institutional factors: existing policy and regulation and the political system. The policy precedents that influence Ofcom's consultation objective are the 2009 revised Electronic Communications Package and Communications Act (2003). The political system here refers to the relationship between the UK, as a member country, and the EU, which obliges the UK to transpose EU legislation into national law.

Ofcom started the net neutrality consultation in the UK (when the 2009 revised Electronic Communications Package was due to be transposed into national law) to sound out how its net neutrality duty, prescribed in the EU legislation (Ofcom 2010), should be fulfilled. This duty involves promoting user ability to receive, distribute and run content and services of their choice and translates into one of the core values, access, underpinning the objective of Ofcom's consultation. However, Ofcom takes a narrower view of the objective by focusing on its duty as a regulator to address the practices that are seen as potential harms to Internet access, leaving out 'the questions of fundamental rights, industrial and public service policies' (2010: 7 - 9). Ofcom's narrower focus is shaped by two institutional factors: the duty of National Regulatory Authorities (NRA) prescribed in the 2009 revised Electronic Communications Package and the organisation's statutory duty prescribed by the Communications Act (2003).

As suggested in Figure 10, Ofcom's consultation objective focuses on the implications of traffic management and discrimination for citizen and consumer interests in Internet access and 'the best way to deliver consumer transparency' (2010: 1- 2). Consistent with the consultation document, Mr Olivier indicates that, in the context of the net neutrality consultation, Ofcom considers its primary function to be the pursuit of citizen and consumer interests which are connected to the Internet: a platform for free speech, innovation and competition. Ofcom's interpretation of its duties implies that the citizen and consumer interests in Internet access overlap one another. Ofcom's role is to choose the appropriate regulatory oversight for traffic management and discrimination to ensure that the Internet continues to serve those interests.

The way Ofcom represents its consultation objective indicates an emphasis on the contractual relationship between ISPs and the users of the Internet access service in the roles of citizens and consumers. Both the social and economic welfare aspects of the public interest, as defined by Van Cuilenburg and McQuail (2003), are acknowledged in Ofcom's consultation objective. However,

the scope of social welfare in Ofcom's consultation (2010: 8) excludes its connection to content policies. The economic welfare values are emphasised in the contractual relationship between broadband providers and users of the Internet access service.

Despite the similarity between Ofcom's and the Commission's claims for action discussed in the previous paragraph, the Commission took a broader consultation objective than Ofcom. This is evident in the Commission's representation of its goal, which is to ensure users' 'ability to access and distribute information or run applications and services of their choice' (European Commission 2010: 2). This representation indicates the Commission's explicit attempts to accommodate what Van Cuilenburg and McQuail (2003) call the economic, political and social welfare aspects of public interest. These aspects, according to Iosifidis (2011a) and Van Cuilenburg and McQuail (2003), are the core objectives of communications regulation. Here, the economic welfare aspect underlies the Commission's emphasis on the flexibility of broadband providers' ability to manage their network asset and the quality of service consumers receive. The political and social welfare aspects are included in the main objective of ensuring user access to the open Internet or 'net freedom' (European Commission 2010: 2). These aspects are reflected in Question 15 (ibid.: 9), which aims at addressing concerns over the impact of the way the Internet functions on other industry and public service policy principles, such as freedom of expression, media pluralism and cultural diversity on the Internet that Ofcom excludes from its consultation.

Underpinning these consultation objectives are the values connected to the economic, political and social welfare values that support traditional communications regulatory objectives of public interest. The representation of these values, according to Fischer and Gottweis (2012), serves to justify the claims for action. Overall, the values of access, competition, non-discrimination, traffic management, transparency, consumer interests, citizen interests, investment, innovation, free speech (US terminology) or net freedom (the European Commission terminology) and choice shape the scope of the consultations across the US, UK and EU (See Figures 9–11). However, the emphasis placed on these values, their functions and representation, at times, varies across jurisdictions. Additionally, they share a similar discursive relationship structure across all the cases studied.

According to Figures 9-11, competition serves four functions in the practical reasoning of the net neutrality consultation documents across the US, UK and EU. First, competition is a value because the FCC, Ofcom and the European Commission deem that the condition in which service providers

enter into a market place with an intention to win the consumers' purchasing power is desirable. Competition is also a value because it is in the interests of both citizens and consumers to have a choice of broadband services and providers available as well as choices of online content and applications. These interests are what the regulators and legislators need to consider and respond to.

Second, as summarised in Figures 9-11, competition serves as a goal in the FCC, Ofcom and the European Commission consultation documents. In the FCC's consultation document, competition is an entitlement of consumers (FCC 2009: 5). In those of the European Commission (2010: 3) and Ofcom (2010: 17), competition is a regulatory objective for retail Internet access.

Third, competition is represented in the FCC, Ofcom and the European Commission consultation objectives as a means-goal to ensure Internet access for users (Figures 9-11). These users comprise Internet dependent businesses, such as content, software and application providers, and individuals, in the roles of both citizens and consumers. Competition as a means-goal emphasises plurality of broadband providers entering into a marketplace with an intention to win user purchasing power. Assuming that users continue to value freedom that the open Internet offers, broadband providers will be motivated to offer broadband access service accordingly.

Fourth, competition functions as a present circumstance, constituting either a problem requiring a regulatory solution or satisfaction. This function is based on the communications infrastructure regulation adopted in the 1960s, as observed by Michalis (2007) and Aufderheide (1999). The principle has become an institutionalised value, requiring the regulators and legislators to consider both the supply and demand sides of the market. Thus, competition is inevitably connected to the values of citizen and consumer interests on the demand side as citizens and consumers (individuals and businesses) use the broadband access service. As a regulatory objective, according to Michalis (2007), Doyle and Vick (2005) and Aufderheide (1999), competition dates back to the Telecommunications Act (1996), the Communications Act (2003) and the 2002 EU legal framework for electronic communications and emphasises a plurality of suppliers of communications services. As a means-goal, competition is a mechanism for balancing supply and demand.

As discussed in section 2.3.2, Iosifidis (2011a) and Michalis (2007) note that competition, as a regulatory tool, has become a preference over state intervention since the 1970s as a result of a shift in ideology to neo-liberalism. This concept, according to Crouch (2011: 17), portrays competition

as a mechanism to balance supply and demand with limited or no state intervention. According to Hesmondhalgh (2007: 109 - 10) and McChesney (2000: 6), the shift toward competition as a regulatory tool is a political impact of neo-liberalism, aimed at minimising interference from non-market institutions in commercial activities. From this political shift, power to intervene is bestowed upon market institutions: suppliers and consumers. The role of non-market institutions is reduced to market facilitator. This function of competition in the FCC, Ofcom and EC claims for action indicates the strong influence of neoliberal ideology. The continued dominance of competition as a regulatory principle, objective, and tool highlights a dependence on this institutionalised principle, neo-liberal ideology and regulatory precedents.

By including this value to justify claims for action, the FCC, Ofcom and the European Commission effectively exercised the second face of power (Bachrach and Baratz 1970, 1975) through mobilisation of institutionalised principles against competing principles, such as the public good value of certain types of content and social and cultural benefits. Through competition promotion, the FCC, Ofcom and EC suppress the alternative value, regulatory objectives and tools for addressing the non-economic aspects of Internet access.

Connected to access and competition is the value of traffic management (Figures 9-11). Here, traffic management refers to a variety of measures broadband providers use to handle IP traffic in the network to ensure user access to the Internet to receive, impart and run content and applications of their choice (Table 9, section 4.2). This definition of traffic management is based on state policy actors' understanding and subsequent representation of the practice. Traffic management is not explicitly prescribed in the traditional telecommunication or infrastructure regulatory criteria identified by Iosifidis (2011a), Michalis (2007), Van Cuilenburg and McQuail (2003), Napoli (2001) and Aufderheide (1999). However, it contributes to delivery of access.

Counter to this argument, content providers, consumer and public interest groups argue that traffic management is *de facto* discrimination. Such representation highlights the conflict between traffic management and the traditional telecommunication regulatory criteria. The representation of traffic management in the consultation documents suggests that the FCC, Ofcom, and the European Commission attempted to balance its positive and negative aspects, which are intertwined with the interests of broadband providers to deploy traffic management and the interests of users (businesses and individuals) to distribute, receive and run content and applications without being subject to control. This attempt suggests a number of institutional influences at play. One is the statutory obligations of the regulators and the legislature to consider the interests of broadband providers and

end users to ensure broadband access, deployment and investment. The others are the institutionalised values of access and non-discrimination.

Despite the common attempt to balance positive and negative aspects of traffic management, the FCC, Ofcom, and the European Commission represent traffic management, discrimination and their implications differently. Aside from different definitions of the non-discrimination value, with which traffic management has a direct relationship as discussed earlier, circumstances in which the state policy actors find themselves contribute to representational differences. As suggested in Figures 9-11, market competition is the circumstance that determines how the regulators and the legislature perceive and represent traffic management. In this respect, traffic management and discrimination are connected to competition. Both are viewed and represented as threats when market competition is perceived to be poor or failing, leaving broadband providers with the incentives and ability to discriminate against unaffiliated traffic.

In the US case, broadband providers' ability to manage traffic is restricted due to the prescriptive nature of the proposed open Internet rules, based on the representation of traffic management as a problem. The technical restrictions of the rules (FCC 2009: 50) leave broadband providers with legal uncertainty concerning their Internet access service provision. Despite the murky definition of traffic management restrictions in the proposed 2009 rules, Mr Del Nero commented that such rules were based on the finding that broadband providers have both the means and incentives to discriminate against unaffiliated traffic irrespective of market power. Both incentives and abilities to discriminate can contribute to failure or negative competition. The rationale for prescribing such restrictions indicates that competition is a circumstance and a goal that is used as a benchmark for prescriptive regulation.

Ofcom and the European Commission, on the contrary, are more flexible with traffic management (Figures 10-11). In his interview, Mr Olivier suggests the regulator takes an *ex-post facto* approach to traffic management because it perceives that competition in the fixed-line broadband access service is effective as evident in the variety of service and providers available. Similar to the UK, the Commission puts forward competition as a regulatory benchmark for traffic management. The interview with Mr Stuckmann indicates that harms to consumer broadband experience and interest in choice, which implies market competition, are determiners for whether and what type of traffic management is deemed reasonable and permissible. The use of competition as a regulatory benchmark across these cases highlights the continued hegemonic influence of neo-liberalism on

communications policies since the 1980s (see 2.3.2). The ideology emphasises the role of market in delivering communications products and services as opposed to state institutions or national monopolies.

The discourses of traffic management in connection with access discussed previously reveal a tension between the societal and economic aspects of access. The former is enshrined in user rights to impart, receive and run content and applications of their choice or non-discriminatory access to the Internet. The latter includes the economic viability of both broadband and content providers and the contractual relationship between suppliers of broadband services and users. This tension results primarily from policy and regulatory precedents (see 5.1). These precedents shape the scope of the consultation. They determine issues, values, interests and circumstances that the regulators and the legislature have to consider and the relationship between state and non-state policy actors.

Another contributing factor to this tension surfacing from the discourses of traffic management is the convergence of telecommunication and content services. As discussed in 2.2.2, convergence involves policy evolution as it contributes to the removal of technical barriers between telecom and content service provision and complicates the relationship between service providers and users. In response to this change (section 2.3.3), Michalis (2007: 191 -215) and Aufderheide (1999: 61 -79) observe that policies in the US, UK, and Europe shifted toward competition to allow for cross-sector service provision. This shift toward competition has resulted in what Garnham (1996: 284) calls a regulatory dilemma. The dilemma features the competing traditional regulatory goals and criteria underpinning the previously distinct sectors of telecom and content or media.

The analysis of the discourses of traffic management shows that the FCC has decided that competition is not a sufficient tool to maintain both societal and economic values attached to broadband access. Ofcom and the European Commission, however, remain optimistic, yet cautious, that competition can deliver and prevent potential harm from traffic management to the political, social and economic benefits of broadband access.

The different representations of traffic management by the FCC, Ofcom and the European Commission illustrates an exercise of the second face of power (Bachrach and Baratz 1975, 1970). This face of power is exercised through value definition and the use of institutionalised regulatory criteria, such as competition, non-discriminatory access and other consumer values, to frame and represent traffic management in a different light. By framing traffic management as a threat to institutionalised regulatory criteria, for example, the FCC can justify *ex ante* control over traffic

management to promote the institutionalised values of competition, access and consumer benefits. This exercise of power constrains the American broadband providers' interest in deploying traffic management. Similarly, by using the institutionalised regulatory principles (e.g., competition) to frame traffic management as a tool that can be used to deliver these principles, Ofcom and the European Commission justify more flexibility for traffic management. The Ofcom and the Commission exercise of power in this way suppresses the competing interests in traffic management restriction.

Transparency is connected to access, competition and traffic management. Based on how the FCC, Ofcom and the European Commission represent transparency (Figures 9-11), the term refers to the availability and accessibility of information on any traffic management practices and impacts of such practices on Internet users' access to content and applications of their choice. In the consultation documents, transparency is represented as a value and a tool for delivering access, competition and other consumer benefits, as illustrated in Figures 9-11 (European Commission 2010: 3; Ofcom 2010: 17; FCC 2009: 45). It is a value because it is in the interest of consumers (users of broadband services) to know what traffic management is applied to their broadband service and how that affects their Internet experience. It is represented as a tool for delivering access and competition in the consultation across the three jurisdictions based on the same logic that information on traffic management information empowers consumers to make informed purchasing and service provider switching decisions. These decisions are what the market should compete for. Such representation of transparency indicates the strong influence of neoliberalism on net neutrality policy.

Despite the similarity in representation, the FCC, Ofcom and EC put different emphasis on transparency as a regulatory tool. This difference results from problem definition. The discourse structure in Figure 9 shows that the FCC represents traffic management as a threat to consumer benefits and competition. This representation is based on the limited broadband access service and provider options available and the conflict of interest between broadband and content providers (FCC 2009: 4). As a result, the FCC prioritises prescriptive rules (banning blocking and (unreasonable) discrimination over the transparency rule) as a tool to deliver competition and broadband access. This preference is a path-breaking regulatory option for the US. European Commission (2010: 3) and Ofcom (2010: 2), on the other hand, prioritise the use of transparency to ensure that competition delivers open broadband Internet access and relevant consumer benefits over *ex ante* regulation (Figures 10-11). The Ofcom and the Commission choice of policy measure is a path-dependent decision influenced by neo-liberalism, which prioritises market mechanism over state intervention.

The FCC, Ofcom and the European Commission representation of transparency (Figures 9-11) is an exercise of power. By representing transparency as a means to empower consumers and thus ensure that competition delivers consumer benefits, these policy actors manoeuvre the institutionalised values of competition, access and consumer benefits to justify transparency as their policy measure (European Commission 2010: 3; Ofcom 2010: 17; FCC 2009: 45). They frame transparency as consumer interest, which supports its use as a tool. This form of power exercise downplays the values of and interests in interventions beyond competition regulation. Given the relationship between transparency and competition and the exercise of power to include transparency in the consultation document and justify it as a means-goal, these state policy actors are continuing the hegemonic value of competition and neo-liberal ideology. However, the degree of support for such value varies, depending on the circumstances in which these policy actors perceive themselves to be and the severity of problems they are trying to solve.

Also connected to the values discussed above are the overlapping values of citizen and consumer interests that refer to the same group of people: users of Internet access service. Citizen interest is associated with political and societal aspects of access, while consumer interest is associated with the economic or contractual aspect of broadband access. These interests are represented differently across the cases studied.

The FCC does not differentiate between the two roles users play. This is evident in the use of the term 'users' and 'consumers' in the consultation document in referring to the political, social and economic aspects of user interests in broadband access. According to the consultation documents (FCC 2009: 21), citizen and consumer interests include freedom of expression, choice of content and broadband services, innovation, broadband access and investment. Of these benefits, choice and investment fit what Van Cuilenburg and McQuail (2003: 184) refer to as the economic welfare value of public interest. Only freedom of expression fits the authors' description of a political welfare value. The content choice, here, fits the authors' definition of both social and economic welfare values.

The FCC's definition of citizen and consumer interests suggests a strong emphasis on economic welfare values. This definition, according to the interview with Ms Weiner, is based on the concept of the virtuous circle. This notion places the user in the role of consumer in the driver's seat, generating demand for broadband services and content. These demands then encourage innovation and attract investment to support that innovation. Based on this idea, the principle of net neutrality

or open Internet is represented as one that fosters innovation, particularly content, applications and online services. Therefore, the open Internet is in the interest of users. Innovation and investment constitute what Iosifidis (2011a: 27) and Van Cuilenburg and McQuail (2003: 184) refer to as 'public interest'. Here, the term is used in a broad sense, according to McQuail (1992: 3), to include benefits beyond individual interests, such as plurality, diversity, choice and the public good value of certain types of content. However, the FCC's examples of what constitutes 'public interest' include 'innovation, investment, research and development, competition, consumer protection, free speech, and democratic engagement' (FCC 2009: 21). These examples emphasise economic welfare values rather than the political and social values of broadband access.

The language of Ofcom's consultation document (Ofcom 2010: 6-7) distinguishes between citizen and consumer interests according to the regulator's duties prescribed in the Communications Act (2003). In the consultation document (Ofcom 2010: 7), citizen interest is narrowly defined as public services and information made available on the Internet, such as the BBC iPlayer. The ability to access online content of users' choice, including public services and information, also implies adherence of the value of freedom of expression. This value, according to Van Cuilenburg and McQuail (2003: 184), carries the political welfare value, which constitutes public interest. The regulator acknowledges the concerns that traffic management 'could potentially have an impact on how citizens might access these services in the future' (Ofcom 2010: 7). The interests of consumers are associated with the commercial and contractual relationship between broadband service providers and consumers of such services (Ofcom 2010: 8). In practice, however, Mr Olivier states that citizen and consumer interests in net neutrality are difficult to distinguish, particularly in the case of freedom to access and impart content of their choice because such freedom is in the immediate interest of individual consumers and society at large.

Based on the consultation document (Ofcom 2010: 8, 31), innovation and investment are connected to broadband access and the contractual relationship between providers and consumers of such access. However, there exist the conflicting interests of broadband access service providers and users in relation to innovation and investment. Broadband providers, argue that to continue investment and innovation in network infrastructure, they need traffic management flexibility for profit. Comprising content providers and individuals consuming broadband and content services, users, as represented by consumer and public interest groups, argue that traffic management discourages content innovation and investment.

Ofcom's representation of these arguments in the consultation documents shows that the regulator attempts to balance both interests and is aware that policy decisions on the matter will have implications for innovation and investment in both the infrastructure and content branches of communications. This representation implies that the regulator intends that both co-exist. The representation of citizen and consumer interests, in connection with its framing of traffic management and competition (Figure 9), indicates strong emphasis on consumer interests because traffic management concerns primarily the commercial relationship between providers and users. This type of representation is economically oriented and fits Van Cuilenburg and McQuail's description (2003: 184) description of economic welfare value.

Similar to Ofcom, the EC distinguishes between citizen and consumer interests. Citizen interest is associated with the ability 'to access and distribute information or run applications and services of their choice', as prescribed in Article 8(4)(g) of the 2009 Framework Directive (European Parliament and the Council Directive 2009/140/EC). This ability embodies the value of freedom of expression, which according to Van Cuilenburg and McQuail (2003: 184) is the political welfare value underpinning public interest. The term consumer interest, in the consultation document (European Commission 2010: 4, 5, 8), represents the expected benefits of choice (of broadband services and content), transparency (of contract terms), competition, content and innovation as a result of the open principle of Internet access. Consumer interest is also connected to the value of investment in that broadband providers' traffic management flexibility encourages a wider variety of Internet access services. These consumer benefits are examples of Van Cuilenburg and McQuail's definition (2003: 184) of economic welfare values, constituting public interest.

The discourses of citizen and consumer interests analysed here (Figure 11) indicate that the citizen interest in access is a high-level value that the Commission intends to promote. However, the Commission's consultation objective (European Commission 2010: 2) suggests that the actual emphasis of the consultation is on traffic management, which concerns primarily the relationship between broadband providers and consumers of such services. The consultation objective makes citizen interest and its political and social welfare values constituting public interest an ancillary objective in this consultation. The citizen interest and its associated values only become a policy problem when sufficient evidence can be found that the traffic management deployed harms the net neutrality principle and the benefits it offers. This specific focus of the consultation objective brings to the fore the economic welfare value of public interest in Internet access, ahead of the social and political welfare aspects.

The way the FCC, Ofcom, and EC represent citizen and consumer interests confirms the continuing priority of the economic welfare value of public interest in the communication infrastructure policy, as observed by Iosifidis (2011a), Michalis (2007), Van Cuilenburg and McQuail (2003), and Garnham (1996). The shared emphasis on the economic welfare value of public interest in the consultation objective discourses across all the cases studied underlines a dependency on the previous policy decisions and institutionalised values. The priority of competition and transparency as means-goals for safeguarding the political and social welfare values attached to the online content also indicates a shift in the emphasis of public interest from social equity to market efficiency, affirming Iosifidis' observation (2011a: 70 - 72). In the case of net neutrality policy, this shift is most obvious in the Ofcom and European Commission consultations, where the market, by means of competition and transparency, is a preferred measure to deliver both citizen and consumer interests in broadband access. The FCC represents such measures as important tools to deliver the benefits of non-discriminatory broadband access. However, the US regulator, according to the interview with Mr Del Nero and Ms Weiner, is convinced that additional behavioural measures are needed to ensure that the market delivers the benefits of non-discriminatory broadband connection.

Despite the common regulatory goal of public interest, the FCC, Ofcom and EC interpret the public interest slightly differently. Concurrent with the description of the American interpretation of public interest as 'the popular interest' (Iosifidis 2011a: 25), the FCC does not distinguish between citizen and consumer interests. The discourses of such interests in the FCC consultation document suggest that the public interest in the net neutrality consultation involves mainly the interests of individuals concerning broadband access, such as choice. On the other hand, the fact that Ofcom and the European Commission differentiate between citizen and consumer interests implies that they align their interpretation of public interest with a set of values and collective interests-informational, cultural, political, social and economic-that extends beyond the immediate interests of individuals. This interpretation fits the Iosifidis (2011a) and Van Cuilenburg and McQuail (2003) definition of public interest discussed in section 2.3.1.

The representation of citizen and consumer interests in the consultation objective and other values discussed in this section reflects an exercise of the second face of power (Bachrach and Baratz 1975, 1970). This power exercise is achieved through the mobilisation of public interest, which is one of the traditional telecommunication regulatory criteria (see 2.3.1) to justify support for citizen and consumer interests. Such exercise of power yields a similar effect to that of framing which, according to Freedman (2010), serves as a means to continue institutionalised values, ideas, policy

options and interests. In this case, the regulators and legislature, privileged by the consultation genre, highlight the economic welfare value of public interest and broadband access, while moving the social and political aspects of public interest to the background in the subsequent discourses.

The discourses of the net neutrality consultation objectives examined here show the strong influence of institutional factors and the three layers of power exercises. These institutional factors include political systems and policy precedents. The political systems (see 5.2) shape the way policy actors communicate (genre) and the power relations among policy actors in the policymaking process. In the formal policymaking process (the consultation), state-policy actors are privileged to selectively include the preceding input from non-state policy actors in framing the scope and emphasis of the consultations. These subsequently shape the discourses of consultation responses (see 6.2).

The influence of policy precedents is vindicated in dependence on the traditional telecommunication regulatory criteria which, according to Iosifidis (2011a), Michalis (2007), Van Cuilenburg and McQuail (2003), Napoli (2001) and Aufderheide (1999), are economically oriented. These criteria include access, non-discrimination, competition and consumer and citizen interests. The discourse analysis of the consultation documents here shows that these regulatory criteria serve as values, interests, circumstances and means-goals underpinning state policy actors' claims for action.

State-policy actors' representation of these values, interests, circumstances and means-goals are exercises of power observable in problem definition and mobilisation of bias to promote and sideline certain values and solutions. Here, problem definition is based on state policy actors' representation of the circumstances of broadband access provision, including the types and levels of traffic management involved, choice of service and competition. The representation of these circumstances results in different consultation objectives and proposed policy solutions across the cases studied. For example, by representing traffic management as a problem and broadband service choices and competition being limited in the US case, the FCC proposed a prescriptive regulatory measure banning certain forms of traffic management. By describing traffic management as a potential problem and competition as healthy, Ofcom and the Commission propose competition and transparency as tools for delivering broadband Internet access.

At this stage of consultation, mobilisation of biases involves continued reliance on traditional regulatory criteria and neoliberal ideology for delivering Internet access. This exercise of power privileges the policy measures favourable to state policy actors over other alternatives. The other

exercise of power is achieved by manoeuvring the institutionalised regulatory emphasis on economic welfare values to continue the emphasis on the economic welfare aspect of Internet access against other equally important values. By representing competition and transparency as circumstances and the preferred means to deliver consumer benefits as well as the political and social welfare values of non-discriminatory access and free speech, the focus of the consultation naturally gravitates to the economic welfare values. The political and social welfare values of broadband Internet access are therefore downplayed, thus minimising the resistance against the state policy actors' preferred regulatory priority and facilitating policy consensus. All these exercises of power are crucial to pre-selecting the winning arguments, values and interests in the policymaking process. Their implications for the shape of the subsequent discourses and policy outcomes will be examined in sections 6.2 and 6.3, respectively.

6.2. Discourses of net neutrality consultation responses: A power struggle

Built on the analysis in 6.1, this section examines the implications of the consultation genre and the discourses of the consultation documents for the subsequent discourses of consultation responses. It compares the discourses of consultation responses with the discourses of the consultation documents and argues in contribution to existing net neutrality literature that the formal genre of policymaking and policy precedents is not the only factor that shapes net neutrality policy discourses and solutions. The discourse analysis of the consultation responses shows that non-state policy actors work within their structural limits (e.g., genre and policy precedents) in attempts to reshape the regulators' and legislature's discourses in pursuit of their actual goals and interests. This analysis addresses the interaction between structure and agency highlighted in the dialectical network concept in the input and decision-making phases of the policymaking process (Marsh and Smith 2000).

Overall, the comparison between the discourses of the consultation documents and the consultation responses indicates that the discursive scope and emphasis of the responses to consultation resemble that of the consultation documents. These include: 1) the management of broadband Internet access and 2) the regulatory oversight for broadband access management. The competing views vary in degrees of resistance to state policy actors' claims for action. These counter-calls or counter-claims for action are a way in which non-state policy actors communicate and exercise power within the limits of the consultation genre to challenge and reshape the proposed net neutrality policies. The

stances policy actors take on these two accounts are summarised and classified by jurisdictions and types of organisations in Table 13.

Table 13 Summary of net neutrality policy positions

Policy positions	Classification of policy actors													
	Government/ Regulator/ Advisory body		Content providers		Broadband providers		Converged providers		Industry/trade groups (representing consumers & citizens)		Industry/Trade groups (representing content providers)		Industry/trade groups (representing broadband providers)	
	US	UK/EU	US	UK/EU	US	UK/EU	US	UK/EU	US	UK/EU	US	UK/EU	US	UK/EU
Traffic management	✘ With limited flexibility for reasonable network management (Federal of Communications Commission 2009: 3, 5, 38, 41 and 45)	✔ Provided that such practices do not harm consumer broadband access or carried out in a discriminatory manner against specific sources (Ofcom 2010: 3; BSG 2010: 2; European Commission 2010: 2; BEREC 2010: 14) yet with some concerns about the implications of the 'two tiered Internet' (Communications Consumer Panel 2010: 7)	✘ With varying degrees of traffic management accepted flexibility (Google 2010: 9; Netflix Inc 2010: 3; Skype Communications S.A.R.L. 2010: 8; Vonage 2010: i-ii)	✘ With only technical and legal exceptions (BBC 2010: 11; ITV 2010: 6; Skype 2010: 1)	✔ Beyond congestion management (AT&T 2010:2-9; Verizon 2010: 6-10)	✔ Beyond congestion management (BT 2010; Talk Talk Group 2010; GSMA 2010)	✔ Beyond congestion management (Comcast 2010: ii-iv)	✔ Beyond congestion management (BskyB 2010: 5, 9 and 10)	✘ With an exception of promoting technical functionality of ISPs' network (Electronic Frontier Foundation 2010: 3; Public Interest Advocate: 6, 9; Media Access Project 2010: 31-32; AD-HOG Telecommunications User Committee 2010: 7)	✘ With varying degrees of traffic management accepted flexibility (Consumer Focus 2010: 3; Which? 2010: 2; Open Rights Group 2010: 2).	✘ With varying degrees of traffic management accepted flexibility (Independent Film and TV Alliance 2010: 2; Open Internet Coalition 2010: 28; Motion Picture of America (2010: 15)	✘ With exceptions for congestion management and some prioritisation (ATC 2010: 4)	✔ Beyond congestion management (Telecommunication Association 2010: 2)	✔ Beyond congestion management (ISPA 2010)
Traffic management regulatory oversight	*Prescriptive regulations* (Federal of Communications Commission 2009: 3, 5, 38, 41 and 45)	*Divergent claims:* Some prefer self-regulation, supported by competition and transparency principles while others think such an approach is insufficient (Communications Consumer Panel 2010: 7; Office of Communications 2011: 10; European Commission 2010: 3; BEREC 2010: 14).	*Ex-ante regulation* with an emphasis on non-discrimination rule (Amazon 2010: 3; Google 2010: 58; Netflix 2010: 3; Skype Communications 2010: 12)	*Wary of the self-regulation,* supported by the transparency principle (BBC 2010: 21; ITV 2010: 7; Skype 2010: 1).	*Ex post facto competition law* with different claims on non-discrimination rule (Alcatel-Lucent 2010a: 4; AT&T Inc 2010: 127; Telefonica S.A. 2010: 3; Verizon and Verizon Wireless 2010: 12)	*Ex post facto competition law* with different claims on national regulatory agencies' (NRAs) power to impose minimum quality of service requirement on public Internet access services (Alcatel-Lucent 2010b: 4; AT&T Global Network Services 2010: 3; British Telecom 2010: 3; Cisco Systems Inc 2010: 9; GSM Association 2010: 8)	*Ex post facto competition law* (Comcast 2010: i-ii)	*Ex post facto competition law* (British Sky Broadcasting Group Plc 2010: 1)	*Divergent claims:* self-regulation, ex-ante regulation or high-level regulation (American Consumer Institute 2010: 11; Electronic Frontier Foundation 2010: 30-3; Public Interest Advocate: 2; Media Access Project 2010: 1; AD-HOG Telecommunications User Committee 2010: 1; CDT 2010: 5)	*Divergent claims:* self-regulation and ex-ante regulation (Consumer Focus 2010: 15; Which? 2010: 2; Open Right Group 2010: 1)	*Ex-ante regulation* with flexibility to innovate specialised services (Independent Film & Television Alliance 2010: 6; Motion Picture Association of America 2010: 15-16; The Association of Research Libraries 2010: 3).	*Divergent claims:* self-regulation and ex-ante regulation (Internet Innovation Alliance 2010: 4; Internet Telephony Services Providers Association 2010: 6).	*Self-regulation* (Information Technology Council 2010: 14; National Exchange Carrier Association Inc 2010: 2; Telecommunication Association 2010: 2)	*Self-regulation* (ISPA 2010: 1)

According to Table 13, policy actors participating in the consultations in the US, UK and Europe hold divergent views on discrimination. Overall, all policy actors accept traffic management for network functionality and legal purposes. Beyond these objectives, policy actors' support for traffic management varies depending on the type and purpose of such practice. The key difference between the net neutrality policy discourses in the US and the UK and Europe is that those of the US are sharply polarised, with a strong emphasis against discrimination. The discourses in the UK and EU are more flexible on the range of traffic management practices deemed acceptable. The UK and EU discourses emphasise consumer rights to non-discriminatory broadband access and traffic management transparency. These differences result partly from circumstances, problem and value definitions, goals, and interests underpinning the consultation objectives (see 6.1). Such factors shape the scope and emphasis of the discourses operating within these consultations.

The objective and prescriptive nature of the FCC consultation, particularly the non-discrimination rule, attracts strong reactions from non-state policy actors due to their competing interests. These include 1) the interests of broadband providers to manage their networks as they see fit and demand requires and 2) the interests of users in non-discriminatory access to audience, content and applications. The former set of interests is commercially-oriented, while the latter group embodies political, social and commercial or economic values. The discourses of responses to the FCC consultation, therefore, revolve around non-discriminatory access with an emphasis on the economic values of such access principle.

Although emerging from the same set of competing interests, the UK and EU consultation objectives have not attracted as much controversy as those of the US. As summarised in Table 13, Ofcom, the UK government and the EC have no intention to ban any specific types of traffic management. In fact, discourse analysis of the consultation objectives (European Commission 2010: 2; Ofcom 2010: 3) indicates that both Ofcom and the EC accept traffic management beyond congestion management so long as such practices do not harm user ability to access, distribute and run content and applications of their choice. The consultation documents issued by Ofcom (2010: 2) and the European Commission (2010: 3) propose measures to ensure that traffic management does not harm users' broadband access and that users are informed of the traffic management applied to their Internet access, rather than blanket restrictions on traffic management.

By refraining from proposing prescriptive rules that directly privilege or disadvantage any particular interests, the tension between the two key competing interests is diffused. Although the Ofcom and

European Commission stance can be interpreted as conflicting with that of users, it does not entirely exclude user core interest in non-discretionary access. The benchmark set for acceptable traffic management is intended as a compromise for the two extreme ends of net neutrality, while protecting user rights to non-discriminatory broadband access and traffic management transparency (European Commission 2010: 3; Ofcom 2010: 2). Thus, resistance to the proposed Ofcom and Commission net neutrality measures is not as strong as the resistance to the FCC proposal.

The state-policy actors' stances on traffic management summarised in Table 13 indicate that the FCC holds a pejorative view on traffic management, while Ofcom and the EC do not. The basis of this difference is explained in 6.1. The alignment of the Ofcom, the British government and BSG positions (Table 13) on traffic management implies the influence of a political system that shapes the relationship among the government, the regulator and the government advisory bodies and discourses. This relationship is the basis of what Marsh and Smith (2000) call a policy network which acts as both structure and agency. As a structure, a policy network is a collective force that privileges certain objectives, values and interests over others. As an agency, a network actively pursues its interests. The shape and function of the net neutrality policy network will be discussed in 7.1.2.

According to Table 13, content providers responding to the FCC and Ofcom consultation hold divergent views on traffic management. The responses of Google, Netflix, Vonage and Skype Communications to the FCC consultation indicate concerns about broadband providers' ability and incentives to discriminate against unaffiliated content. They claim that such discrimination undermines their access to viewers. They are wary of the impact of broadband providers' ability to act as a gatekeeper and engage in exclusive deals with content providers (Google Inc. 2010: 59; Netflix Inc. 2010: 3; Skype Communications S.A.R.L. 2010a: 8; Vonage Holding Corp. 2010: i - ii). Amazon (2010: 3), on the contrary, maintains that broadband providers should have the flexibility to deploy traffic management beyond the purpose of congestion management. This position competes to an extent with the regulator's consultation objective, but aligns with that of the broadband providers, converged providers and the supporting industry groups.

Similarly, industry/trade groups representing content providers who responded to the FCC consultation hold divergent positions on traffic management. The Independent Film & Television Alliance (2010: 2) and the Open Internet Coalition (2010: 28) are against traffic management deployment beyond congestion management, particularly prioritisation. Motion Picture

Association of America, Inc (2010: 15) supports network management practices beyond congestion management so long as such practices are not applied in an anti-competitive manner. Despite the differences, all accept that traffic management is necessary for ensuring the smooth functioning of the broadband network, especially when faced with network congestion. The position on traffic management taken by content providers and content industry groups, regardless of the size of their businesses, aligns in varying degrees with the FCC stance in the consultation. This position indicates an interest in non-discriminatory access to viewers for content providers.

Unlike the US-based content providers, those of the UK/EU are more focused on what is considered permissible traffic management. There is a general consensus among content providers-the BBC (2010: 11), ITV (2010: 6) and Skype Communications S.A.R.L. (2010b: 1)-that traffic management for technical and legal purposes is reasonable and acceptable. This emphasis creates an impression that their position on traffic management aligns (in general) with that of the UK state policy actors. The alignment of these emphases confirms the argument made in 6.1 that the discourse of the consultation objectives plays an important part in shaping the discourses put forward in response to the consultation.

Nonetheless, there exist differences in ranges of traffic management that these content providers deem reasonable. The BBC (2010: 11) views that traffic management and discrimination by origin, e.g., cases where either Google Talk or Skype are favoured one over the other, are unacceptable, but discrimination by application type (e.g., email vs VoIP) may be acceptable provided that such practice is for technical reasons.

To Skype Communications S.A.R.L. (2010b: 1), 'Traffic management practices can be deemed 'acceptable' or 'reasonable' if they can be explained as being relevant, proportionate, necessary, and non-discriminating.' The policy actor also disapproves of 'extraction of payment for traffic delivery on the best efforts in global public Internet' (ibid.). The industry/trade groups representing content providers, including the Internet Telephony Services Providers Association (2010: 7) and the Association for Commercial Television in Europe (ACT) (2010:4), are inclined to reserve room for specialised services. These services include, for example, prioritisation and other forms of guaranteed content delivery.

These responses imply that the UK and EU content providers and their supporting industry groups are interested in non-discriminatory access to their viewers via the Internet and support more traffic

management restrictions. The similarity between the traffic management discourses submitted to the Ofcom and the Commission consultations indicates an exchange of ideas and interests between national and supranational policymakers due to the influence of EU institutions and legislation on national law and policies, which constitute structural factors according to the research framework.

Broadband providers, converged providers and their supporting industry/trade groups in both the US and the UK make the same claim. They support network management deployment beyond congestion management. Despite similar positions on traffic management deployment, these discourses differ in focus. In the US, the discourses on traffic management focus on the FCC's proposed non-discrimination rule. Major US broadband provider discourses show that they are against a strict non-discrimination rule (AT&T INC. 2010: 104 - 05; Verizon and Verizon Wireless 2010: 66; Comcast Corporation 2010: 39). Their discourses reveal that they perceive the non-discrimination rule as a limitation on broadband providers' ability to legally experiment and develop new network access services for both business and individual customers. Discourse analysis of policy documents and interviews with AT&T and Comcast executives and a former Verizon executive indicate that the major US broadband providers interpret this limitation as a reintroduction of common carrier rules, which have been abolished. For this reason, the proposed non-discrimination rule has attracted considerable controversy, particularly from broadband providers.

On the other hand, traffic management discourses submitted in response to Ofcom's consultation by the UK-based broadband providers, converged providers and the industry/trade groups centre on broadband providers' ability to deploy network management according to user demands and optimisation of existing network infrastructure. This position aligns with the Ofcom and government approach to net neutrality, which supports the co-existence of the open Internet and traffic management.

As for industry/trade groups representing consumer and public interests in the US, the key members of this group comprise the Electronic Frontier Foundation (EFF), the Media Access Project, and the Public Interest Commentators. They accept only network management practices for 'promot[ing] the proper technical functioning of an ISP's network' (EFF 2010: 3; Media Access Project 2010: 7; Public Interest Commentors 2010: 31 - 32). In the UK, consumer and public interest groups accept varying degrees, types and purposes of traffic management. For example, Consumer Focus (2010: 6) accepts network management practices that 'tackle legitimate

congestion issues, quality of services chosen by a consumer…' The latter purpose of network management deployment can be interpreted to encompass exclusive deals struck between content and network providers to provide and ensure that the agreed quality of services provided to consumers is maintained. However, the Open Rights Group (2010: 8) opposes traffic management beyond congestion management on the grounds that 'network discrimination could easily be a means to disadvantage peer production if, for instance, peer-to-peer distribution suffers'.

Similar to other policy actors' discourses, those of the consumer and public interest groups' traffic management emphasise the consultation documents. Overall, the discourses of consumer and public interest groups align with those of the content providers and the supporting industry/trade groups. In the US case, discourses of consumer and public interest groups' traffic management under the FCC consultation support the proposed rules. Thus, the FCC's discourses of consultation objectives are advantageous to these policy actors, but conflict with the interest of broadband providers and their supporting industry/trade groups. In the UK case, however, discourses of consumer and public interest groups conflict in varying degrees with Ofcom's claim for action, depending on the range of traffic management and practices deemed reasonable.

With regard to regulatory options or means-goals, Table 12 highlights two competing discourses operating under the consultation genre in the US, UK and at the European level. One is the *ex-ante* or prescriptive approach; the other is the self-regulation or *ex-post facto* competition law approach. Compared to the scope and emphasis of the consultation and the means-goal set out in the consultation documents analysed in section 6.1, the regulatory options debated in the consultation responses are limited to the means-goals proposed in the consultation documents or one from the opposite end. The means-goal discourses in the FCC consultation focus more on the non-discrimination rule, while across the Atlantic the emphasis is placed on the principle of transparency.

The traffic management oversight discourses summarised in Table 13 highlight a sharp distinction between the means-goal proposed by the FCC and that proposed by Ofcom, the British Government, the European Commission and BEREC. For the FCC, it is the prescriptive approach. Ofcom, the British government, the government advisory bodies, the European Commission and BEREC indicated in the consultation objectives and policy statements that they prefer the *ex post facto* competition law approach.

The state-policy actors in the US, UK and EU also emphasise different regulatory principles. The FCC (2009) proposed to codify two additional regulatory principles: non-discrimination and transparency. The order of these principles in the 2009 NPRM implies that the non-discrimination regulation was prioritised over transparency. Unlike the FCC, Ofcom, the British government and BSG, the European Commission and BEREC focused instead on transparency as a principle and means to ensure user access to the open Internet. In their discourses, transparency is represented as a legal requirement under Articles 21 and 22 of the revised Universal Service Directive (European Parliament and the Council Directive 2009/136/EC).

As for content providers, it is worth noting that some key actors in this group comprise both national and transnational corporations, operating in the US, UK and EU markets. Of these providers, Skype (before the Microsoft take-over in 2011) responded to all the net neutrality consultations in the US, UK and EU. Amazon is an active respondent to the US and EU consultations. These policy actors' and their supporting industry/trade groups' regulatory oversight discourses are similar and consistent across all jurisdictions studied. They all question the efficacy of the market, or self-regulation, in preventing discrimination against legal content by type or origin. However, the US-based content provider and their industry/trade group discourses show strong preference for *ex ante* regulation, with Amazon preferring flexibility for prioritisation and managed services on conditions that such services do not interfere with other content. This preference aligns well with the FCC's favoured means-goal (see 6.1).

Most of the UK/EU-based content providers and industry/trade groups' regulatory oversight discourses, on the contrary, do not explicitly emphasise preference for regulation. Skype is an exception in their explicit preference for regulation in all its submissions across the US, UK and EU consultations. This implicit preference for regulation conflicts with the position on regulatory oversight of the British regulator, government and the EU legislature. The preference is represented as scepticism toward the efficacy of state-policy actors' desire for self-regulation. This representation creates an impression of compliance with the state-policy actors' regulatory wishes, which blur the differences between state-policy actors' and content providers' preferred measures. This representation allows content providers to convince the state-policy actors to consider alternative regulatory approaches without being completely excluded for its actual preference for regulation.

Broadband providers, converged providers, and the broadband industry/trade groups across the Atlantic share the same position on regulatory options across all cases studied, i.e., traffic management should be self-regulated and governed by competition law (Alcatel-Lucent 2010: 4; AT&T Global Network Services (UK) 2010: 3; BT 2010: 3; Cisco Ststems, Inc. 2010: 9; GSMA 2010: 8; The Information Technology Industry Council 2010: 14; ISPA 2010: 1; MBG 2010: 7; National Exchange Carrier Association, Inc 2010: 2). In response to the FCC consultation, these policy actors argue that the proposed non-discrimination rules are too restrictive and interfere with their First Amendment right to manage the traffic flowing across their network as demand requires. This position competes with the FCC approach to net neutrality. Even so, these policy actors are very open about their differences with the FCC. Nonetheless, these actors' representation of their regulatory preference shows conformity to the scope and emphasis of the FCC consultation discourses. Given the formal genre of policymaking and consequently the power relations between state and non-state policy actors, the FCC pejorative view of traffic management and preference for prescriptive regulation disadvantages broadband providers' discourses.

The UK-based broadband providers and industry/trade groups are also against regulation and regard the imposition of minimum quality of service (QoS) as unnecessary. The minimum QoS requirement is a power granted to national regulatory authorities (NRAs) by Article 22(2) and (3) of the revised Universal Service Directive (European Parliamanet and the Council Directive 2009/136/EC). Unlike their American counterparts, these policy actors' discourses align with state-policy actors. The implications of such alignment will be further examined in 6.3.

The consumer and citizen groups responding to the consultations put forward divergent discourses concerning traffic management oversight. The American Consumer Institute (2010: 11) and the Electronic Frontier Foundation (EFF) (2010: 30 -31), for example, favour self-regulation governed by competition law or narrowly tailored government regulation. The Media Access Project (2010:2), Public Interest Commentors (2010: 1) and the Ad Hoc Telecommunications Users Committee (2010: 1) support *ex ante* regulation because, they feel, the four Internet principles recorded in the Internet Policy Statement (FCC 2005: 3) are inadequate.

The Centre for Democracy and Technology (CDT) (2010: 5) also supports regulation, but only at a 'high-level' as opposed to prescriptive behavioural rules. The positions represented by the American Consumer Institute and the EFF conflict with the FCC position on traffic management, while the Public Interest Commentators, the Media Access Project, the Ad Hoc

Telecommunications User Committee and the CDT align with the regulator. The policy actors who support *ex ante* regulation also share the same position as content providers and their supporting industry/trade groups, while those supporting self-regulation, in the US context, share the same position as broadband providers.

Similarly, consumer and citizen groups engaging in the Ofcom and EC consultations represent divergent views on traffic management regulation. Nonetheless, all these views are based on the rationale that self-regulation supported by competition and transparency principles is not sufficient to ensure open Internet. Consumer Focus (2010: 15) and Which? (2010: 2), for instance, claim for a co-regulation guided by an open Internet guideline. On the other hand, the Open Right Group (2010: 1) supports *ex ante* regulation as a means to deliver open Internet. The position shared by Consumer Focus and Which? is a compromise between Ofcom's preferred self-regulation and content providers' scepticism about the efficacy of self-regulation and transparency rule. The Open Right Group's position, on the other hand, aligns well with content providers, but is at odds with that of Ofcom and broadband providers and the supporting industry/trade groups position.

In addition to the exercise of the second face of power, both traffic management and regulatory oversight discourses submitted in response to the consultations in the cases studied highlight the institutional influence of the consultation genre. This influence vindicates itself in the similarity between the scope and emphasis of the discourses submitted in response to consultations and the discourses of the consultation objectives. This similarity also suggests domination of the state-policy actors' discourses and thus implies a degree of power concentration among the state-policy actors, which privileges the interests of policy actors that align with the state policy actors' policy positions and objectives. However, the resistance observed in the discourses that compete with those of the state policy actors' forms the basis of this research's argument, in line with the critical pluralist perspective of power, that a complete dominance cannot be achieved. How powerful such resistance is will be investigated in 6.3. Other contributing factors to the success and failure of such resistance will be examined in Chapter 7.

The operation of these power exercises in the formal genre of policymaking is best explained through discourse analysis of the consultation responses in conjunction with the discourses of the consultation objectives. The discourse analysis and comparison between the consultation document and consultation response discourses illustrate how the non-state policy actors challenge and reshape the state-policy actors' network management principles and the proposed policy solutions

through representation of their actual interests and objectives. The non-state policy actors mobilise the values, interests and goals underpinning the discourses of the consultation objectives to justify their policy preferences and principles. The structure of this representation is seen in Figures 12-14.

Figure 12 US-based pro-traffic management and pro-self regulation discourse structure
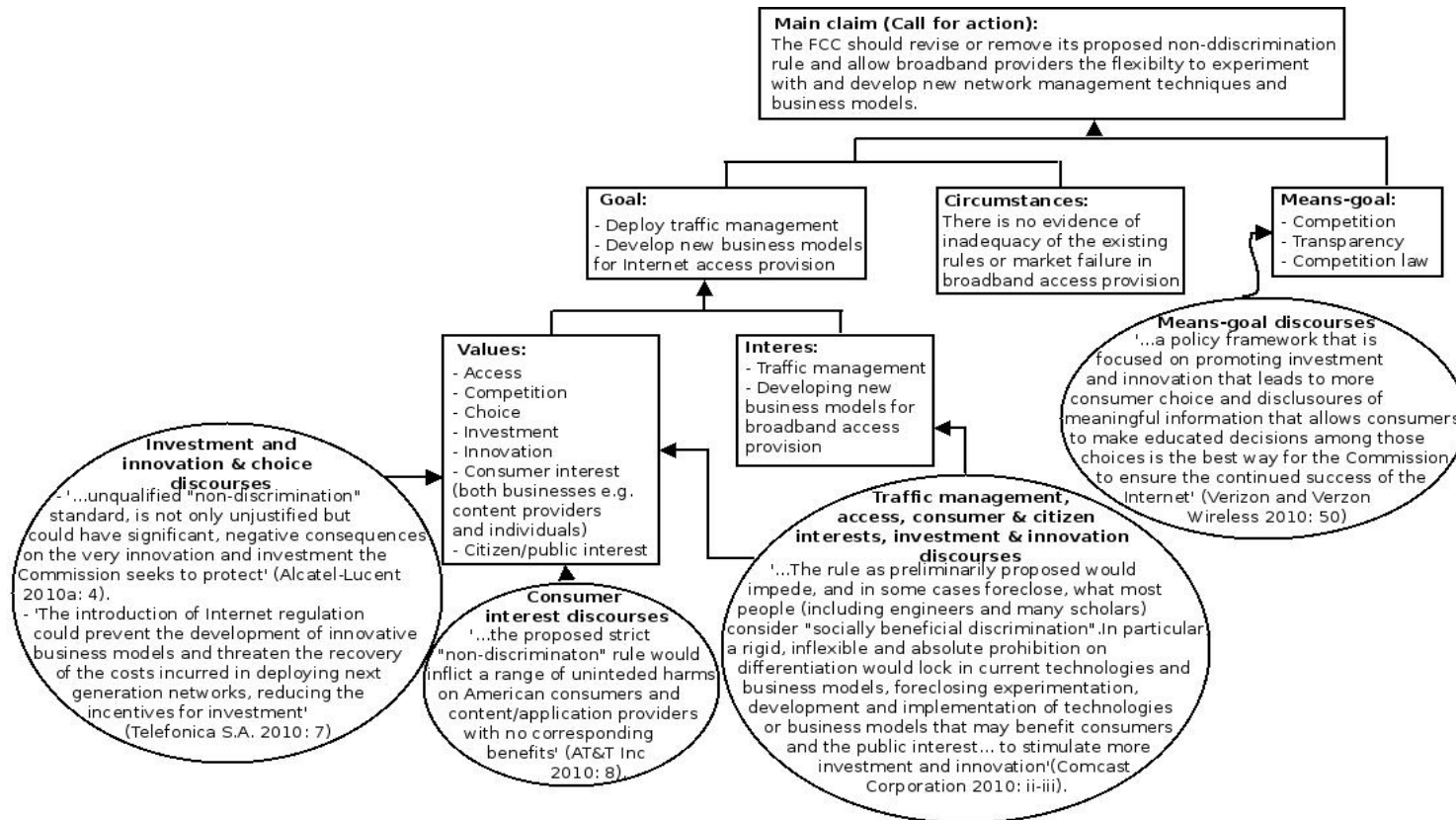
The pro-traffic management discourse structure visualised in Figure 12 indicates a policy position that contradicts the FCC policy objectives and preferences. In the FCC consultation, policy actors advocating flexibility for traffic management construct their discourses by critiquing the FCC proposed non-discrimination rule, which sharply conflicts with their interests. The policy actors that take this position comprise mainly broadband providers and their supporting industry/trade groups.

In their discourses, the pro-traffic management advocates detail the negative impact of the non-discrimination rule on the FCC core values and interests, comprising mainly provision of broadband access, investment, innovation, consumer and public interests. This discourse structure indicates that the pro-traffic management advocates are trying to convince the FCC to do away with the non-discrimination rule by representing the adoption of such rule as a detriment to the regulator's own values and interests. This representation is an exercise of the second face of power (Bachrach and Baratz 1970: 40) by disguising the conflict of their actual interests with FCC interests and objectives. By representing their actual interests as constitutive to FCC values and interests, the pro-traffic management advocates mobilise FCC biases (institutionalised values, interests and regulatory objectives) to breakdown its barriers against the advocates' competing interests and objectives. Given the rival interests involved, this exercise of power also exemplifies resistance to the FCC exercise of the second face of power discussed in 6.1.

Figure 13 UK/EU-based pro-traffic management and self-regulation discourse structure

Main claim (Call for action):
Broadband providers should be free to deploy traffic management and optimise the performance of applications using their network and experiment with new business models for Internet access provisions.

Goals:
- Deploy traffic management.
- Develop new business models for Internet access provision.

Circumstances:
- Competitive market.
- Sufficient regulatory tools to address traffic management concerns.

Means-goal:
- Self-regulation
- Competition
- Transparency
- Competition law

Competition discourse
'Imposition of a minimum quality could damage competition using service as a differentiator...'
(BT 2010: 7).

Values:
- Access
- Consumer interests
- Citizen interests
- Investment
- Innovation
- Choice

Interests:
- Traffic management
- Network investment and asset optimisation

Circumstance discourse:
'We support the view that there is currently no need for ex ante regulation to prohibit traffic management and innovation is alive and well...'
(GSMA 2010: 8).

Means-goal discourse
'...network capacity investment is better stimulated by a vibrant market at servie provider level rather than a tightly constrained or regulated one'
(BT 2010: 3).

Access, consumer interest, choice, investment and innovation discourses
- '...traffic management is likely to constitute a key cacilitator of innovation going forward and will become increasingly essential to sustainable network investment ... thus maintaining the cost of consumer broadband access at an acceptable level'
(Virgin Media 2010: 3).
- '... Access has continued to attract new investment and expanded, and innovative consumer choices have been offered'
(BSkyB 2010: 10).

Traffic management, consumer benefits, innovation & investment discourses
' Alcatel-Lucent considers most forms of traffic management offer potential benefits for consumers and citizens in the form of new services, greater investment in networks, and cheaper prices for basic Internet users'
(Alcatel-Lucent 2010: 4).
- 'Adaptable networks- Internet access providers should be free to deploy techniques to manage congestion and optimise the performance of the various applications using their networks... A variety of commercial models will develop some of which may include customers or applications providers paying for enhanced capability, such as prioritised delivery' (BT 2010: 9)
- ' Traffic prioritisation and carriage charges are perfectly normal and legitimate business practices that benefit consumers... This non-neutrality has been a key factor in driving innovation and investment...'
(Talk Talk 2010: 2).

The UK/EU-based policy actors that support self-regulation comprise the same group of policy actors, broadband providers and the supporting industry/trade groups as the ones advocating traffic management flexibility in the US. The structure of their discourses displayed in Figure 13 indicates that they use similar techniques as their US counterparts in representing their preferred policy measure. However, they enjoy the privilege of the alignment of their policy measure with the state-policy actors and use it to justify their chosen policy measure. They represent their interest in deploying traffic management in a way that supports the Ofcom, the British government and the European commission core values and interests. These include provision of affordable broadband access, consumer interest, choice (of broadband access), investment and innovation.

In these discourses, free speech is either absent or narrowly discussed in terms of its economic equivalent of choice given how it is framed by the British government and EU legislation. A brief reference to free speech in the BBC consultation response (2010: 6) and the Talk Talk representation of free speech (2010: 6), in line with the UK government position deeming that the value is irrelevant, exemplifies state policy actors' power to limit the scope of policy discussion, shape non-state policy actors' discourses and exclude certain values. This power is rooted in the genres of consultation, political system and practice that privilege state policy actors to define problems and frame the scope and emphasis of the subsequent debate and discourses. State policy actors' exercise of this power and non-state policy actors' response to such power exercise evident in the non-state policy actors' discourses highlight the interaction between structure and agency underpinning this research framework guided by the concept of dialectical policy network.

The Talk Talk representation of free speech exemplifies its mobilisation of state policy actors' biases in forms of core institutionalised values and interests to justify its pro-traffic management advocates' policy principle. It also allows them to align their interest in traffic management to the state policy actors' core values and interest and thus avoid being criticised for self-interested behaviour. This alignment creates a sense of consensus between the UK pro-traffic management advocates and the state-policy actors. The consensus empowers both the state and non-state policy actors' discourses. It also highlights the structured inequality that benefits policy actors whose interests and objectives align with those of the state-policy actors and reinforces it by isolating competing interests and objectives.

Figure 14 US-based pro-net neutrality and pro-regulation discourse structure

Main claim (Call for action)
FCC should codify the proposed open Internet rules to ensure non-discriminatory broadband Internet access.

Goal:
- Maintain the non-discriminatory broadband Internet access

Circumstances:
- Insufficient competition in the retail broadband access market.
- Antitrust law is insufficient to police broadband providers' behaviours.

Means-goals:
- Regulation:
  - Non-discrimination rule
  - Transparency
  - Competition

Values:
- Non-discriminatory access
- Investment
- Innovation
- Choice
- Competition
- Public interest
- Consumer interest
- Diversity of content and services
- First Amendment Right (Free speech)

Interests:
- Non-discriminatory access to viewers/ users
- Non-discriminatory access to content and services

Public interest, choice, innovation, diversity & free speech discourses
- 'The absence of such a rule that will result in less innovation, and a decrease in quality and quantity of independent content and applications, translating to less choice and vital discourse for the American public' (Independent Film & Television Alliance 2010: 14).
- 'The proposed rules will allow for content-neutral, viewpoint-neutral platforms for free expression, thus helping to fulfill the mandate of the First Amendment, which states that government should seek to promote the public's right to have access to diverse and varied social, political, and artistic expression (Media Access Project 2010: 3).

Non-discrimination, investment and innovation discourses
- 'Discrimination in today's concentrated market place by broadband providers against applications, services and content providers raises broadband access costs, inhibits private and public innovation and investment in applications, content and software and imposes direct costs on consumers' (Google Inc 2010: 59).
- '...The principles of non-discrimination and transparency are especially critical in preventing broadband providers from relegativing to "slow lanes" certain lawful content or applications in favor of self-owned or affiliated content and applications under the guise of "network management practices' (Independent Film & Television Alliance 2010: 3).

Access & choice discourses
'Openness rules designed to ensure that consumers can use applications with and attach devices of their choosing to broadband access networks...will help provide applications developers and device manufacturers with the certainty needed to invest in designing new and innovative products... consumers will have the confidence that they will be able to use devices and access content applications, and services of their choice...' (Skype Communications S.AR.L. 2010: 3-4).

Circumstance discourse
'... the current level of competition in the broadband market is not sufficient to ensure that broadband network operators do not engage in conduct that would put the tremendous economic and social benefits generated by the open Internet at risk' (Vonage Holdings Corp 2010:I).

Means-goal discourses
- 'Google supports the Commission's proposed rule of transparency and agrees that accurate information concerning a last-mile providers' practices... encourages competition, innovation, low prices and high quality of services' (Google Inc 2010: 64).
- 'By adopting these rules... the Commission will help assure that the Internet remains a force for innovation, commerce and consumer choice' (Netflix Inc 2010: 3).
- '...openness rules are needed to protect innovation regardless of the specific level of competition in the network (Skype Communications S.AR.L. 2010: 10).

The pro-net neutrality discourse structure illustrated in Figure 14 indicates that the discourses operating under the FCC consultation are fundamentally different from those of the UK and EU due to the state-policy actors' distinct perceptions of traffic management and discrimination. As discussed in section 6.1, the FCC represents traffic management and discrimination as policy problems. The discourses submitted in response to this consultation, therefore, revolve around these subjects. In line with the FCC, US-based net neutrality advocates rationalise that the harm from traffic management and discrimination outweighs the benefits of traffic management. The advocates represent these practices as being detrimental to the values and interests that underpin the FCC claim for action (see 6.1). These values and interests include access, innovation, public and private interests, non-discrimination, transparency, investment and innovation.

By identifying harm from discrimination, net neutrality advocates responding to the FCC consultation, justify their support for the regulator's proposed open Internet rules, particularly the non-discrimination rule. This representation allows the US-based net neutrality advocates to take advantage of the privilege gained from sharing the same policy principles with the FCC. The alignment of these policy actors' interests also supports the FCC exercise of the second face of power through the mobilisation of the existing infrastructure regulatory criteria in support of the best-effort or the net neutrality principle as it creates an impression of consensus.

Figure 15 UK/EU-based pro-net neutrality and pro-regulation or co-regulation discourse structure
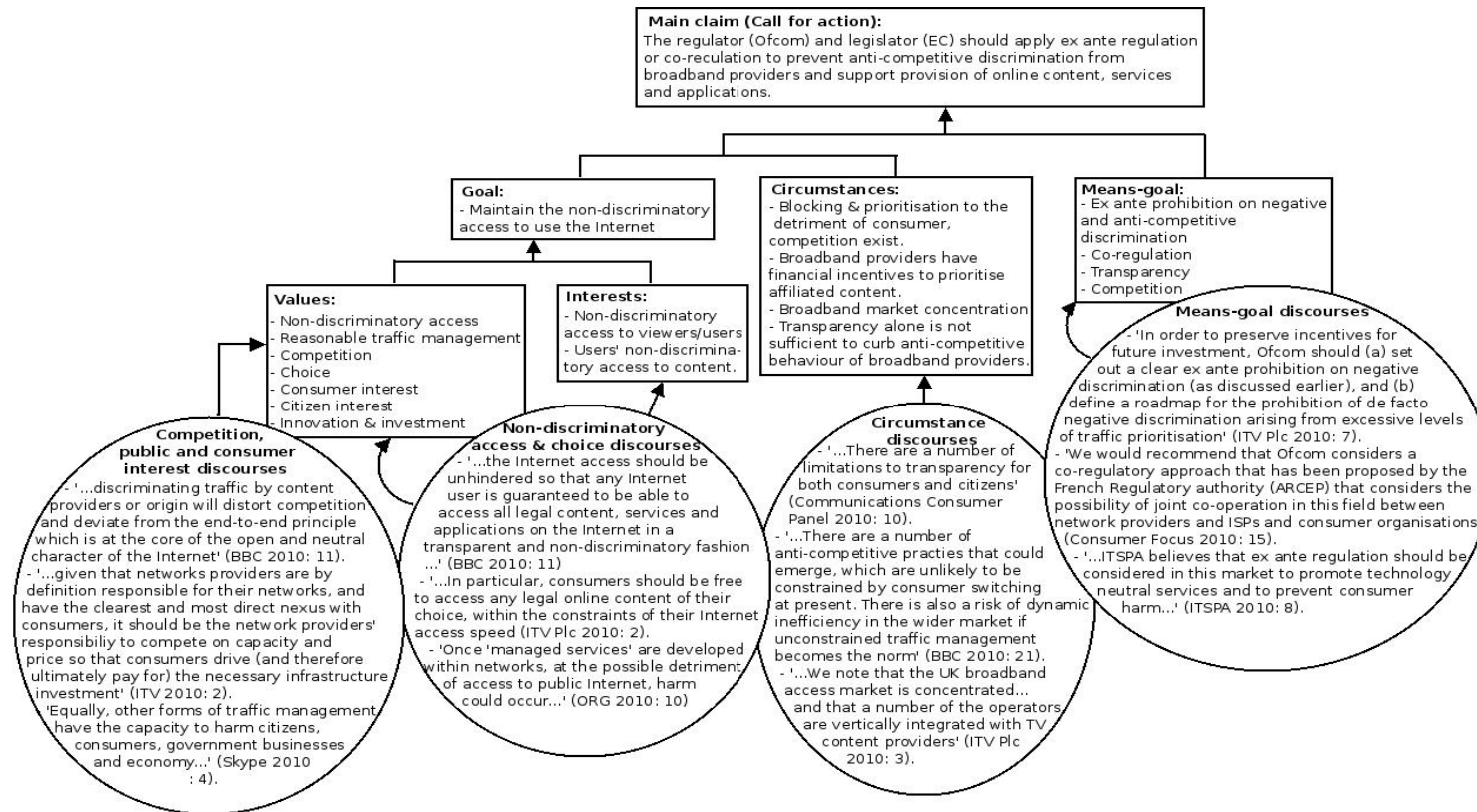
However, the UK/EU pro-net neutrality discourses reflect a more flexible and well-rounded view of traffic management. Their discourse structure (Figure 15) demonstrates a calculation of both the harm and benefits of traffic management for consumers, before concluding that the harm outweighs the benefits of such management. This representation does not frame traffic management and discrimination as outright problems or latent conflicts between the actual view on traffic management of pro-net neutrality advocates and the stances that Ofcom and the EC hold (see 6.1). Such representation minimises the chance of these UK-based net neutrality advocates' actual interest in non-discriminatory access being completely excluded from the consultation.

In critiquing traffic management and discrimination, the UK-based net neutrality advocates represent these practices as being harmful to the values, interests and goals underpinning state policy actors' consultation objectives. These include access, non-discrimination, competition, consumer and citizen interests and transparency. Having critiqued the state-policy actors' net neutrality approach, these advocates represent their actual interest in non-discriminatory access to viewers and (for users) to content, regulation and co-regulation as alternatives that better support the state-policy actors' objectives. Such representation fits the description of the second face of power (Bachrach and Baratz 1970: 40).

It is worth noting that in stark contrast to the US pro-net neutrality discourses, free speech hardly appears in those of the UK. As discussed in 5.1, free speech is deemed irrelevant to the UK policy debate by the UK government and, where it is recognised, free speech is represented more as an economic value of choice or user contractual right to access and impart content of their choice. The BBC (2010: 6) and ITV (2010: 2), for example, represented free speech as a benefit of the Internet, portrayed as a platform that enables and fosters such concept (Figure 15). This representation of free speech connotes that the concept is only relevant to the net neutrality policy discourses insofar as the need to ensure their online presence.

The status of free speech in the UK and EU suggests that the political climate in these jurisdictions does not carry as much weight as in the US. UK net neutrality and regulation advocates, therefore, deem that free speech is not a bias important enough to decision-makers to mobilise in order to increase chances for their actual interests to be considered by the state-policy actors. Hence, free speech is almost absent in the UK discourses.

From the discourse analysis in this section and the comparison between the discourse structures of the consultation responses and of the consultation objectives (section 6.1) emerges the interaction between structures and agencies. This interaction confirms the concept of the policy network. In this case, the structures observed include the consultation genre, the state policy actors and the institutionalised communication infrastructure regulatory criteria. The comparison between the discourses of consultation documents (section 6.1) and the responses to the consultations demonstrates that the consultation genre determines the 'turn' (Fischer and Gottweis 2012) policy actors take to exchange their discourses in the process to achieve an agreeable policy outcome.

In the consultation genre, state policy actors are privileged by the protocol of this communication to take the first turn to put forward their discourses. With this privilege, discourse analysis of the consultation documents, responses and interview data indicates that state-policy actors selectively build in policy precedents and non-state policy actors' inputs leading up to the consultation to shape the scope and emphasis of their consultation objectives. Given the consultation genre, these consultation objectives shape the discourses of consultation responses.

The influence of the discourses of the consultation objectives on the discourses of the consultation responses is evident in the similarity of the scope and emphasis of these two sets of discourses. This similarity also illustrates power relations between state and non-state policy actors and their roles in the consultation genre. In this genre, state-policy actors, representing the state as an institution, are responsible for developing a mutually agreeable set of rules for broadband Internet access service provision. As agents, the state policy actors take advantage of the first turn of the argumentation and pursue their institutionalised values and interests by defining the scope and emphasis of the consultations in ways that privilege these values and interests over others.

The discourse analysis of non-state policy actors' formal responses to consultation demonstrates that they represent their actual interests in broadband access and regulatory preference in ways that appear supportive of the institutionalised values, interests, objectives and policy precedents underpinning the state-policy actors' consultation objectives to persuade the state policy actors to support their interests in broadband Internet access. The non-state policy actors' discourse fits the description of the second face of power. Through this exercise of power, non-state policy actors attempt to reshape state-policy actors' discourses to benefit their interests. The non-state policy actors' discourse construction and exchange can also be read as resistance to the dominance of the state policy actors' discourses where the interests of state and non-state policy actors conflict.

Where the interests and objectives of state and non-state policy actors align, the discourse analysis of the consultation responses shows that non-state policy actors perpetuate state policy actors' exercise of the second face of power. By representing their interests and objectives as being aligned with the state-policy actors, these non-state policy actors create a sense of consensus which advances both their and the state policy actors' courses. This reinforces the dominance of state policy actors' discourse which has already been privileged by the structured inequality embedded in the formal genre of policymaking and the broader political system.

Nonetheless, the resistance from the non-state policy actors, whose actual interests compete with the state policy actors' objectives and interests, exemplify the critical pluralists' thesis that despite structured power concentration among state-policy actors, absolute domination cannot be secured. To what degree non-state policy actors can reshape the state-policy actors' discourse in favour of their interests will be investigated in the following section.

6.3. The discourses of net neutrality policy decision: A consensus?

Here the discourses of net neutrality policy decisions in the US, UK and EU are compared with the discourses of the consultation objectives (see 6.1) and responses (see 6.2) to explain the policy outcomes and their implications for broadband Internet access provision and connected interests. The documents examined in this section present the turns the FCC, Ofcom and European Commission take to communicate their decisions back to other policy actors, having considered both their formal and informal inputs in policymaking. These documents mark the completion of the formal consultation process.

The implications of the net neutrality policy decisions for relevant interests also indicate the level of influence different policy actors have on policy outcomes. The way the net neutrality discourses are shaped and reshaped throughout the formal policymaking process shows that structural factors play an important role in shaping the policy outcomes. These structural factors include the policymaking genre, broader political system, institutions and regulatory precedents embodying ideologies, institutionalised values, objectives and interests. The application of CDA and argumentative turn to the policy documents throughout the three stages of the formal consultation genre demonstrates that these factors reinforce certain values and interests and sideline others. The analysis in this section contributes to the existing net neutrality literature and fulfils this research framework (Figure 2, page 86) by reflecting on the interaction between structural factors and policy actors in

relation to policy outcomes. In doing so, it explains how policy actors mobilise structural factors to carve out the net neutrality policy that best serves their demands, resulting in different policy outcomes.

In the US case, the latest net neutrality decision is the 2015 Open Internet Order (FCC 2015a). This decision resulted from the second round of net neutrality consultations following the verdict of the Court of Appeals for the District of Columbia Circuit to vacate the open Internet rules published in the Federal Register on 23rd September 2011. The 2011 rules marked the end of the first round of US net neutrality policymaking. The 2015 rules have tougher net neutrality regulation than the 2011 rules and apply to both fixed and mobile access technologies. The new rules are expected to come into effect on 12th June 2015, 60 days after having been published in the Federal Register on 13th April 2015 (Wood 2015). The rules, however, remain subject to legal challenges during those 60 days. US Telecom, a group of US telecom providers, is the first to have used this opportunity to appeal to the D.C. Circuit Court for the 2015 Open Internet Rules to be subject to judicial review on the grounds that they are 'arbitrary, capricious, and an abuse of discretion' (Wood 2015). Regardless of the outcome of this review, the analysis here emphasises the policymaking process that has resulted in the 2015 decision.

In the UK, the consultation initiated by Ofcom completed with the Ofcom approach to net neutrality (Ofcom 2011). The policymaking process, however, covers the development of the Open Internet Voluntary Code of Practice initiated by the Communications Minister Ed Vaizey on 16th March 2011. The Code is designed to guide the government's and regulator's self-regulation for traffic management oversight (BSG 2014). The development of the Code, in the UK case, is part of a policy process that runs almost in parallel to the Ofcom consultation. It illustrates the British political system and tradition, which indicate strong executive dominance as observed by Marsh (2008: 263; 2002: 29). Given this political tradition, participation in policymaking is filtered by the government's objectives and interests. This section examines both the Ofcom approach to net neutrality (Ofcom 2011) and the Code (BSG 2014) and treats both documents as a conclusion to UK net neutrality policymaking at the national level.

Since Britain is subject to EU legislation (European Communities Act 1972), net neutrality policymaking at the EU level will override national policy decisions. The latest outcome of the European legislative process is, therefore, reviewed in this section for its implications for UK policy outcome. The documents that represent the EU legislative outcome include: 1) the European

single-market proposal for electronic communications (COM (2013) 627 final) drafted by the European Commission and based on the consultation responses and 2) the European Parliament legislative resolution (P7_TA-PROV(2014)0281) of 3rd April 2014 on the proposal for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC, 2002/22/EC, and Regulations (EC) No 1211/2009 and (EU) No 531/2012 (COM (2013)0627) – c7-0267/2013/0309 (COD)).

These documents imply that the consultation conducted by the European Commission is in the input stage of the European legislative procedure. As members, the British government and the non-state policy actors engaging in the UK net neutrality consultation also respond to the European Commission's consultation. Beyond the consultation is the negotiation or decision-making process. At this stage, non-state policy actors work with their government to have it negotiate on their behalf. The resolution of 3rd April 2014 is the result of this first round of negotiation, which is on-going and will finally close with the approval of the Council of the European Union. So far, the Council remains undecided over the extent of the non-discriminatory principle of Internet access (Giacomelli 2014: 10).

Given the scope and emphasis of formal net neutrality policymaking (see 6.1 and 6.2), the policy decisions concern: 1) the traffic management principle for broadband access and 2) the regulatory oversight for such practice. These decisions are summarised in Table 14.

Table 14 Summary of policy decisions

Policy principles & measures	FCC	Ofcom	European Commission/Parliament
Blocking	✖	Highly undesirable (in cases of blocking of alternative services)	✖
Discrimination	✖	✔ *On grounds of non commercial rivalry	✔ *As long as the enhanced services do not impair in a recurring or continuous manner the general quality of the public Internet access service
Specialised services	✔ *Only IP-services that do not travel over broadband Internet access service (FCC 2015: 19742).	✔	✔
Transparency	✔	✔	✔
Policy measure	Bright-line rules	Self-regulation guided by the Open Internet Voluntary Code of Practice	High-level regulation

According to Table 14, the state policy actors in the US, UK and EU have adopted slightly different policy principles. Although they all adhere to the principle of open Internet or net neutrality, the definition of this principle varies across these jurisdictions. The FCC 2015 Open Internet Order bans blocking, throttling and paid prioritization of lawful traffic (FCC 2015b: 19740). It allows for 'reasonable network management', but restricts such practice to technical and engineering purposes only (ibid.: 1741).

The definition of Open Internet adopted by Ofcom, the UK government and the European Commission, as reflected in the Ofcom approach to net neutrality, the Open Internet Code of Practice and the European Commission's Single Market proposal for electronic communications, is much more flexible. Ofcom regards blocking of alternative services as 'undesirable' (Ofcom 2011: 7). In its policy statement, the regulator stated that it intends that the managed and unmanaged services co-exist (Ofcom 2011: 3). The managed services, here, include the specialised services provisioned both on best-effort and managed networks operating on the same infrastructure. The UK voluntary Open Internet Code of Practice also allows for traffic management and discrimination so long as such practices are not used to specifically target any particular individuals or businesses (BSG 2014: 1).

In the European Commission proposal (COM (2013) 627 final) and the amended version as approved by the European Parliament on 3rd April 2014, blocking of lawful content is banned as

prescribed by Article 23(5). Article 23(2) of the proposal also states that traffic management and specialized service is permissible so long as they 'shall not impair in a recurring or continuous manner the general quality of Internet access service' (COM (2013) 627 final: 51). Amended and adopted by the European Parliament, Article 23(2) now permits specialised services 'only […] if the network capacity is sufficient to provide them in addition to Internet access services and they are not to the detriment of the availability or quality of Internet access services' (P7_TA-PROV(2014)0281). Based on these statements, the limit to traffic management, discrimination and specialised services in the UK and Europe depends on their interference with user Internet access and competition in the online content market.

The latest net neutrality regulatory developments in the UK and the EU stand in stark contrast to the US net neutrality policy decision. Their net neutrality approaches allow for prioritisation, while the FCC 2015 Open Internet Order bans traffic prioritisation. These different net neutrality approaches are rooted in the perception of traffic management in connection with circumstances, particularly the broadband market condition, value and problem definition discussed in section 6.1. In its consultation objective, analysed in 6.1, the FCC represents traffic management, given the circumstances, as a problem, while Ofcom and the European Commission represent traffic management only as a potential problem. The restriction imposed on traffic management in the UK and the European Commission policy decisions is therefore not based on the practice, but on the impact of discrimination and traffic management on users' Internet access and online content competition.

The analysis and comparison of discourses of the consultation (6.1), responses (6.2) and outcome (6.3) indicate an alignment of discourses of the consultation objectives and outcomes. Despite the change in the policy measure from self-regulation to regulation, the European Commission's objective and the benchmark for regulatory intervention remain consistent with the consultation objective and proposed solutions. This is evident in the high-level principles enshrined in the regulatory proposal. The discourse analysis of policy outcomes indicates that these policy decisions are based largely on the problem definition and proposed solutions in the consultation objectives discussed in 6.1. The policy decisions as they stand, therefore, prove that problem definition (Braman 2004: 154) and the framing of a particular issue and value as worthy of public policy attention (Freedman 2010: 354 - 55) privilege certain regulatory solutions over others in the decision-making process and shape the policy outcome.

As summarised in Table 14, the FCC has chosen to adopt what it refers to as 'bright-line rules' (FCC 2015b: 19737) prohibiting blocking, throttling and paid-prioritisation. Ofcom and the British government, on the other hand, opted for self-regulation, guided by the voluntary Open Internet Code of Practice and supported by competition and traffic management transparency (BSG 2014; Ofcom 2011: 7 - 8). Although the European Commission decided to impose regulations, its traffic management restriction is based on the impact of traffic management on Internet access and access quality to the open Internet, which are user rights. Here, users include individuals in the role of both consumers and citizens and Internet dependent businesses. In this respect, Ofcom's net neutrality approach, the BSG-facilitated voluntary Open Internet Code of Practice and the Commission's proposed net neutrality provisions are unlike those of the FCC in that their approaches to net neutrality are not prescriptive.

The implications of these policy decisions for all the policy actors participating in the net neutrality policymaking process are embedded in the discourse structure of the policy outcomes featured in Figure 16-18.

Figure 16 Discourse structure of the US policy decision
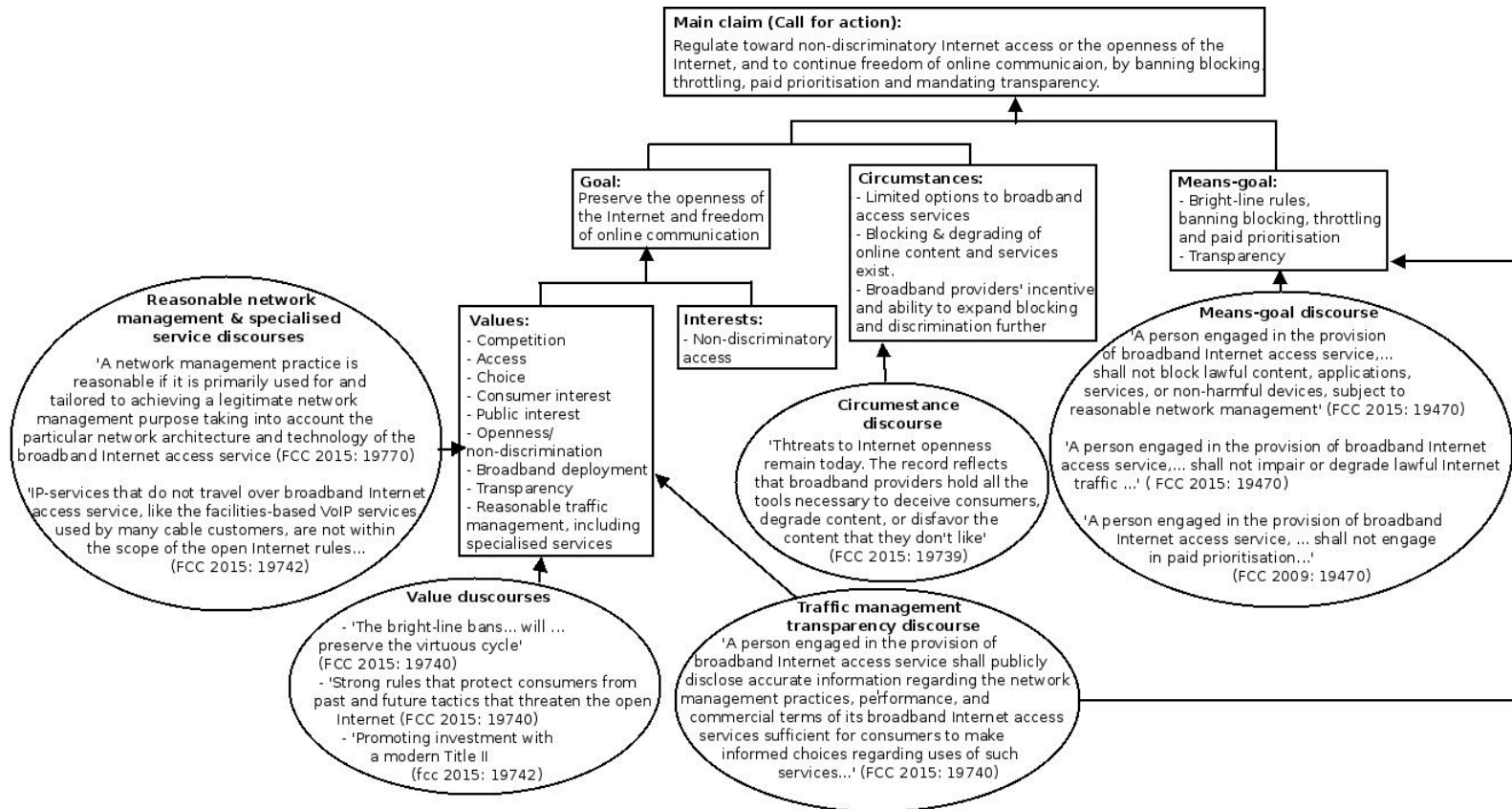
In the US, the 'bright-line rules' that indicate the FCC's strong intention to ensure non-discriminatory access to broadband Internet privilege the interests of users, both businesses and individuals. Discourse analysis of the 2015 open Internet rules summarised in Figure 16 shows that the ban on blocking, throttling and paid-prioritisation is designed to protect business users' interest in non-discriminatory access to their viewers and individuals' interest in accessing content, applications and online services of their choice. The rules, however, run contrary to broadband providers' interest in traffic management. They restrict broadband providers' ability to manage traffic on their network to 'reasonable network management' and specialised services provision. These rules, unlike the vacated open Internet rules (FCC 2011), apply to both fixed line and mobile or wireless broadband access services. In the regulations, 'reasonable network management' is described:

> A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service (FCC 2015b: 19770).

In the same context, specialised service is referred to: 'IP-services that do not travel over broadband Internet access service, like the facilities-based VoIP services used by many cable customers, are not within the scope of the open Internet rules, which protect access or use of broadband Internet access service' (FCC 2015b: 19742).

The FCC's definition of permissible traffic management or 'reasonable network management' only allows for technical management of the network, which is more restrictive than the UK and EC definition. Although the exemption for 'specialised services' provides broadband providers with flexibility to offer managed services, the range of service provision allowed is limited only to the additional managed services that typically rely on proprietary application protocols to transport data packets from end to end, although such traffic may be transmitted on the same physical infrastructure.
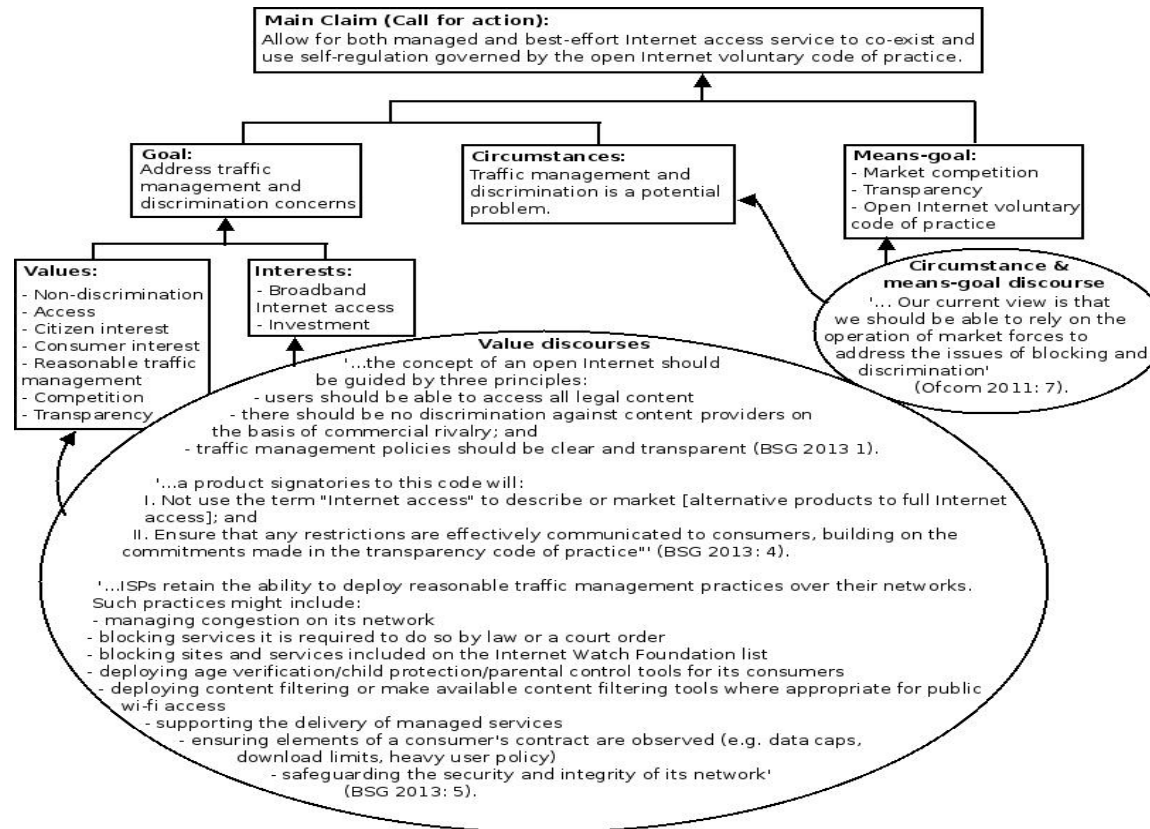
These exemptions point to the FCC intention to balance the interests of users with those of broadband providers by allowing these providers some traffic management flexibility. However, the definitions of reasonable traffic management and specialised service are very limited. The

enhanced transparency rule serves as a direct benefit to consumers of broadband Internet access service as it intends that the information supplied to consumers empower them to use the market mechanism to influence broadband providers' service provision (FCC 2015b: 19781). However, the rule is not designed to function as a core mechanism to control broadband providers' behaviour, whereas the 'bright-line rules' are.

Compared to the proposed rules in the first consultation document (section 6.1), the 'bright-line rules' that the FCC has adopted maintain the same policy principle, intention and regulatory options as the ones originally proposed. Despite strong resistance from broadband providers, the supporting industry/trade groups and legal challenges, the non-discriminatory principle has been adopted as the core principle shaping the chosen policy measures. The transparency rule is represented as a supporting measure (FCC 2015b: 19781).

In response to the 2014 D.C. Circuit court verdict highlighting the absence of FCC authority to subject broadband providers to common carrier rules, the regulator reclassified broadband Internet access as a telecommunications service under Title II of the Communications Act 1934 (FCC 2015a: 18). The reclassification of broadband service addresses the limitations that past decisions (see 5.1) placed on the FCC's ability to adopt strong behavioural rules to implement the non-discriminatory access principle. This decision marks a policy change, i.e., a slow-down on deregulation since the Telecommunications Act 1996, to promote the neoliberal value of competition in both the infrastructure and content sides of the communications market.

Figure 17 Discourse structure of Ofcom policy decision

Main Claim (Call for action):
Allow for both managed and best-effort Internet access service to co-exist and use self-regulation governed by the open Internet voluntary code of practice.

Goal:
Address traffic management and discrimination concerns

Circumstances:
Traffic management and discrimination is a potential problem.

Means-goal:
- Market competition
- Transparency
- Open Internet voluntary code of practice

Values:
- Non-discrimination
- Access
- Citizen interest
- Consumer interest
- Reasonable traffic management
- Competition
- Transparency

Interests:
- Broadband Internet access
- Investment

Circumstance & means-goal discourse
'... Our current view is that we should be able to rely on the operation of market forces to address the issues of blocking and discrimination'
(Ofcom 2011: 7).

Value discourses
'...the concept of an open Internet should be guided by three principles:
- users should be able to access all legal content
- there should be no discrimination against content providers on the basis of commercial rivalry; and
- traffic management policies should be clear and transparent (BSG 2013 1).

'...a product signatories to this code will:
I. Not use the term "Internet access" to describe or market [alternative products to full Internet access]; and
II. Ensure that any restrictions are effectively communicated to consumers, building on the commitments made in the transparency code of practice"' (BSG 2013: 4).

'...ISPs retain the ability to deploy reasonable traffic management practices over their networks. Such practices might include:
- managing congestion on its network
- blocking services it is required to do so by law or a court order
- blocking sites and services included on the Internet Watch Foundation list
- deploying age verification/child protection/parental control tools for its consumers
- deploying content filtering or make available content filtering tools where appropriate for public wi-fi access
- supporting the delivery of managed services
- ensuring elements of a consumer's contract are observed (e.g. data caps, download limits, heavy user policy)
- safeguarding the security and integrity of its network'
(BSG 2013: 5).

Unlike the FCC, Ofcom stated clearly in its policy statement (2011: 7 - 8) that transparency serves as the key measure to enable the market mechanism, competition, to shape broadband providers' treatment of Internet traffic. The Ofcom discourse structure (Figure 17) shows that transparency serves as a self-regulatory measure. This policy option (Ofcom 2011: 7) suggests closer alignment with broadband providers' interest in flexibility to manage Internet traffic than with users' interest in non-discriminatory access. The discourse of the objective of the voluntary open Internet Code of Practice (BSG 2014: 1) marks the government's intention to reassure users of non-discriminatory broadband Internet access. The principles of the code create an impression that the code supports access from the service provision and user perspectives, non-discrimination, and transparency.

Generally, these principles are similar to the principles underpinning the FCC 2015 open Internet rules. The Code, however, differs from that of the FCC non-discrimination regulation in its definition of the non-discrimination rule (BSG 2014: 4). Here, the non-discrimination rule targets discrimination against specific content, applications or content providers on the basis of commercial rivalry. This suggests that broadband providers operating in the UK can manage traffic so long as such practices are applied equally to all the traffic of the same type regardless of its origin. Also, where enhanced or specialised services are offered, they need to be made available equally to all broadband customers. In this respect, the non-discrimination provision allows more flexibility for broadband providers to manage the Internet traffic than the FCC's 2015 rules.

The UK code requires signatory broadband providers to refrain from blocking legal content, applications and online services. Exemptions are made, however, for 'reasonable traffic management' (BSG 2014: 4). Here, reasonable traffic management is defined by its objectives. These include maintenance of network functionality and integrity, enabling user control and compliance with legal requirements (e.g., blocking content and services as required by law or court order). The exemption concurs with the Ofcom stance that 'blocking of alternative services…is highly undesirable' (Ofcom 2011: 7), but does not ban blanket blocking.
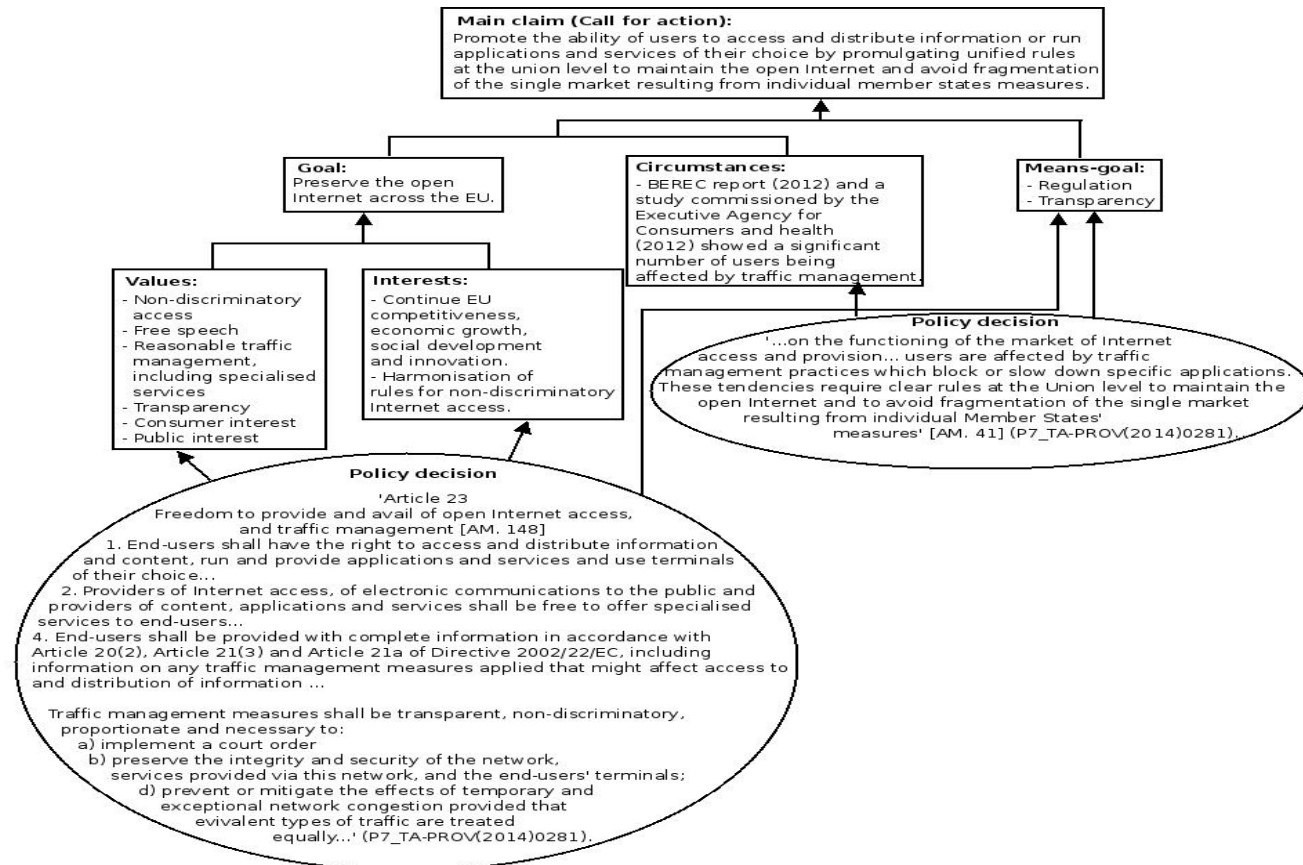
The Code also includes specialised service as 'reasonable traffic management' and does not subject such service to any technical definition the way the FCC 2015 rules do. This classification of specialised service allows the UK-based broadband providers to offer enhanced services, such as prioritisation and guaranteed delivery services, on both the Internet and proprietary or managed networks. The restrictions on traffic management and discrimination applied by the Code are based on the principle of non-commercial rivalry. This gives the UK-based broadband providers more

flexibility to develop new broadband access services and experiment with different business models than the FCC rules. The flexibility given to broadband leaves the delivery of non-discriminatory Internet access to market competition enabled by broadband providers' commitment to traffic management transparency (BSG 2014: 4; Ofcom 2011: 7). Such heavy reliance on market mechanism implies weaker protection for user interests in non-discriminatory Internet access than the FCC 2015 rules.

Compared to Ofcom's original discourse structure that of the policy outcome (Figure 14) indicates that the regulator's policy position remains unchanged. Compared to the DCMS minister's statement on open Internet delivered to the British Parliament on 17th November 2010, the discourse analysis of the voluntary open Internet Code of Practice (BSG 2014: 1) shows that the government's positions on Internet traffic management and its regulatory oversight remain consistent. Both the Ofcom and government decisions demonstrate their continuation of policy precedents that favour competition over state interference as a policy measure and objective. Such policies, according to Michalis (2007: 143 - 44), are the product of the neoliberal ideology that has become dominant in Europe and the UK since the mid-1980s, replacing the old Keynesianism (See section 2.3).

The UK Code, however, recognises user interests in non-discriminatory Internet access and provides a degree of protection for such interests. This recognition implies the government's attempt to balance user interests with the interests of broadband providers and support the industry/trade groups. As such, the UK open Internet Code reveals some influence from the discourses put forward by Internet users and those representing their interests. Although the discourses put forward by these policy actors (section 6.2) indicate that their actual interest is in having regulation as a means to ensure non-discriminatory Internet access, which competes with the UK government's and regulator's preference for self-regulation, their interests in regulation have not been completely ignored. On the discursive level, the UK Code indicates a degree of inclusion and attempts to balance: 1) the interests of the British regulator, government and broadband providers in using self-regulation with the interests of users and their supporters in regulation and 2) the interest of broadband providers and their supporters in traffic management flexibility with the interest of users and their supporters in non-discriminatory access.

Figure 18 Discourse of EU policy decision

Main claim (Call for action):
Promote the ability of users to access and distribute information or run applications and services of their choice by promulgating unified rules at the union level to maintain the open Internet and avoid fragmentation of the single market resulting from individual member states measures.

Goal:
Preserve the open Internet across the EU.

Circumstances:
- BEREC report (2012) and a study commissioned by the Executive Agency for Consumers and health (2012) showed a significant number of users being affected by traffic management.

Means-goal:
- Regulation
- Transparency

Values:
- Non-discriminatory access
- Free speech
- Reasonable traffic management, including specialised services
- Transparency
- Consumer interest
- Public interest

Interests:
- Continue EU competitiveness, economic growth, social development and innovation.
- Harmonisation of rules for non-discriminatory Internet access.

Policy decision
'...on the functioning of the market of Internet access and provision... users are affected by traffic management practices which block or slow down specific applications. These tendencies require clear rules at the Union level to maintain the open Internet and to avoid fragmentation of the single market resulting from individual Member States' measures' [AM. 41] (P7_TA-PROV(2014)0281).

Policy decision
'Article 23
Freedom to provide and avail of open Internet access, and traffic management [AM. 148]
1. End-users shall have the right to access and distribute information and content, run and provide applications and services and use terminals of their choice...
2. Providers of Internet access, of electronic communications to the public and providers of content, applications and services shall be free to offer specialised services to end-users...
4. End-users shall be provided with complete information in accordance with Article 20(2), Article 21(3) and Article 21a of Directive 2002/22/EC, including information on any traffic management measures applied that might affect access to and distribution of information ...

Traffic management measures shall be transparent, non-discriminatory, proportionate and necessary to:
a) implement a court order
b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminals;
d) prevent or mitigate the effects of temporary and exceptional network congestion provided that evivalent types of traffic are treated equally...' (P7_TA-PROV(2014)0281).

Similar to policy outcomes in the UK and US cases, the transparency requirement in the EC proposal (COM (2013) 627 final) and the amended version as approved by the European Parliament on 3rd April 2014 (P7_TA-PROV(2014)0281) serves as a means to empower Internet users. By making informed purchasing and operator switching decisions, these users can influence the market and broadband providers' behaviour. The revised and upheld (by the European Parliament) Article 23(1) prescribes a high-level principle that protects Internet user rights to access, distribute and run content, applications and services of their choice (Figure 18). Yet, the proposal offers broadband providers the flexibility to deploy reasonable traffic management and provide specialised services.

Article 23(1) protects and promotes user interest in non-discriminatory Internet access. However, it runs contrary to the interest in self-regulation of Ofcom, the UK government and the UK-based broadband providers and their supporters. If the Council of the European Union, or the Council, approves all the amendments to the European Commission's proposal, the net neutrality provisions will be transposed into UK law. In compliance with the protection prescribed in Article 23(1), the traffic management restrictions include a ban on blocking, throttling, degrading and discriminating against specific content, applications, services or specific classes of services (Recital 47 [Am. 43] in P7_TA-PROV(2014)0281).

Despite these restrictions, the European Parliament legislative resolution (P7_TA-PROV(2014)0281) provides some legal certainties for the provision of specialised services and contractual agreements on data volumes or speeds for Internet access service in Recital 47 [Am. 43], Article 23(2) and Article 23(5). Similar to the UK Code, the proposal defines reasonable traffic management based on the purposes of traffic management deployment. The purposes of traffic management practices warranted by these provisions include deployment to implement court orders, preserve network integrity and security and manage temporary network congestion (Article 23(5)). In line with the UK code, but contrary to the FCC rules, the proposed definition of discrimination adopted by the European Parliament is based on the impact such practice has on users. This suggests that if the Council approves such definition, the EU-based broadband providers, which include UK-based providers, can discriminate against certain traffic so long as such discrimination is not targeted at specific content, applications, services or providers.

The extent of specialised services allowed is also based on the impact they have on the capacity and integrity of the Internet (Article 23(2)). This indicates that the EU-based broadband providers can provide specialised services so long as such provision does not interfere with or undermine the

availability and quality of Internet access services. Unlike the FCC's rules, the legitimacy of specialised service as prescribed in the proposal does not rest on its transport protocol or technical definition. The basis of these provisions for EU broadband providers' traffic management flexibility implies the commission's recognition of the inter-relationship between transmission infrastructure and content. This recognition points to a cyclical relationship between policies and technology advancements in that polices encourage technology developments and evolve with them (section 2.2). This approach to traffic management and specialised service provision also highlights dependence on what Michalis (2007: 176 - 77) observes to be the Commission's perspective of technological convergence of telecommunications, computing and broadcasting that competition has encouraged since just before 1998. The approach to convergence in EU communications policy means user competition is the main homogenous measure for regulating both transmission infrastructure (broadband) access and associated services.

Compared to the FCC 'bright-line rules', the net neutrality provisions in the Commission's Connected Continent proposal are not as prescriptive. The restrictions on broadband providers' traffic management only applies when such practice 'impair[s] in a recurring or continuous manner the general quality of Internet access services' (COM (2013) 627 final: 51) or when such practice undermines the availability or quality of Internet access services (P7_TA-PROV(2014)0281). The proposed net neutrality policy objective and measures continue the 2009 revised electronic communications emphasis on consumer protection and reliance on transparency to support competition as a tool to safeguard user rights to access, distribute and run online content, applications and services of their choice. These regulatory proposal adopted by the European Parliament demonstrate a shift away from the Commission's original means-goal and a change in discourse structure favouring market mechanism to high-level principle regulation. However, the Commission's shift toward the regulation is not entirely ground-breaking in terms of policy tools. According to Michalis (2007: 191 - 215), this decision and the Commission's commitment to non-discriminatory access (Recital 47) should be read as path-dependence on the use of regulation and as a tool to achieve harmonisation of regulations across all technology platforms for communication.

Recital 45 suggests that the Commission is continuing its dependence on the values of competition, economic growth and innovation ([Am. 41] in P7_TA-PROV(2014)0281). These values, according to Michalis (2007: 193), emerged in the second half of the 1990s and have since underpinned European communications policies. They are designed to ensure that the Internet serves as a means to improve economic growth (ibid.). Given the institutional relationship between the UK and EU,

the proposal, if approved, will override the UK approach to traffic management oversight. These policy and regulatory trends highlight the evolutionary aspect of policies in response to technology advancements and adoptions, competing demands and its potential to continue driving future developments.

The discourse analysis of the net neutrality policy outcomes across the US, UK and EU analysed in this section shows a high degree of resemblance to consultation objectives (section 6.1) and reflects some of the discourses of the consultation responses (section 6.2). This similarity between the discourses of policy outcomes and consultation objectives confirm the Braman (2004: 154) and Freedman (2010: 355) observation that problem definition and framing play an important part in shaping policy outcomes. The changes observed in the discourses of policy outcomes, including some discourses of consultation responses, indicate a degree of success in policy advocacy of non-state policy actors. The embodiment of both state and competing non-state policy actor discourses in policy outcomes demonstrates that discourse circulation in policymaking is an exercise of power through idea mobilisation. The shaping and reshaping of discourses throughout the formal policymaking process illustrates the operation of the concept of intertextuality and argumentative turn (see 3.2.3).

In this case, net neutrality as an idea for a network management principle emerged as a result of policy precedents (see 5.1) and was built into the state policy actors' consultation in the informal process of policymaking (see 5.2). In subsequent formal policymaking processes, responsible state policy actors are privileged by this genre of communication to define the consultation objectives based on their problem definitions, policy precedents and ideas suggested by non-state policy actors. This privilege allows the state-policy actors to favour their policy objectives, solutions, values and interests over others by framing the scope and emphasis of the following policy discussion in a way that minimises challenges to these objectives, solutions, values and interests.

Nonetheless, the formal consultation genre provides the opportunity for non-state policy actors to respond to the state-policy actor proposals and through this channel strengthen or reshape state-policy actor discourses. The formal consultation genre also gives the responsible state policy actors the advantage of representing their final policy decisions after having considered the non-state policy actor responses. In this turn of argumentation the responsible state policy actors' final policy positions may or may not be further challenged, depending on the broader political system.

Built on the policy precedents and informal policy inputs discussed in Chapter 5, the discourse analysis of policy documents in this section confirms that net neutrality, as a principle for broadband network management, has gained varying degrees of dominance across all the cases studied through a discursive process of policymaking. The core values embedded in the net neutrality principle include access, non-discrimination and transparency. As discussed in 6.1, access is not only a value, but also a regulatory objective and is connected to several other values and interests. The interpretation and definition of the non-discrimination value vary across the US, UK and EU, based on the problem definition in each jurisdiction.

The trajectory of net neutrality, as an idea for a network management principle, shows that the dominance of this principle results partly from the communication protocol of policymaking. This finding supports Freedman's argument that policymaking power remains concentrated among small numbers of 'decision-making elites' (2008: 87). This power concentration is the product of what Marsh (2002, 2008) calls structured inequality in the policymaking process. Given the relationship between genres (see 5.2) and discourses, this structured inequality lies in the power relations among the policy actors participating in the consultation and is shaped by the broader political system and policy practices. Consequently, state-policy actors are privileged by the formal consultation genre (structural factor) to selectively build in the pre-consultation inputs to its consultation objectives, which then frame the scope and emphasis of the formal policymaking in a way that sidelines the ideas and discourses that compete with the state-policy actors' discourses. The policy actor response to this structured inequality in policymaking will be examined in Chapter 7.

Despite the power concentration among state-policy actors, the selective inclusion of non-state policy actor values and interests in the policy outcome discourses indicates that the dominance of the state-policy actor discourses is not absolute. By submitting their responses to consultation, the non-state policy actors, within the limits of the genre, political systems and ideologies exercise their power to mobilise and inscribe their values, interests and ideas into state-policy actor policy decisions. The extent of their success in so doing varies depending on other structural factors to be explored in Chapter 7.

Evidence for agency resistance includes the shift in the non-state policy actor approaches to net neutrality. In the US case, one of the non-state policy actors advocating self-regulation and traffic management flexibility appealed the FCC 2011 Open Internet rules to the D.C. Circuit Court of Appeals. The Court heard the oral arguments between Verizon and the FCC on 9th September

2013 and ruled in favour of Verizon, vacating the no-blocking and non-discrimination rules on 14th January 2014. Determined to complement the remaining transparency rule with behavioural rules, the FCC launched another consultation proposing even stronger rules and subsequently adopted them. Following the FCC's decision to adopt the 2015 open Internet rules, US Telecom appealed to the D.C. Circuit Court for the rules to be subject to judicial review on grounds that they were 'arbitrary, capricious, and an abuse of discretion' (Wood 2015).

In the UK case, the open Internet voluntary Code of Practice proves that the government has to create the impression that the competing interests of users in non-discriminatory broadband access is protected. The Code, both as a measure and a principle, suggests a compromise position accepted by both sides of the debate. In the EU case, the Commission's shift away from self-regulation supported by competition law and traffic management transparency to regulation indicates resistance to the dominance of pro-self-regulatory discourse.

The policy outcomes also demonstrate state policy actors' attempt to balance their policy objectives, values and interests against those of non-state policy actors. In the US case, interviews with Ms Weiner and Mr Del Nero show that a similar effort can be seen in the FCC launch of the second open Internet NPRM to establish rules to provide stronger protection for user interest in non-discriminatory access in addition to the transparency rule. In the UK, it can be inferred from the interview with Mr Milton that the DCMS minister assigned the BSG to lead the industry's development of the open Internet Code of Practice in order to balance content providers' and consumer groups' interest in non-discriminatory broadband access with broadband providers' interest in self-regulation and traffic management flexibility.

The compromise made at the EU level is evident in the continuous adaptation of the net neutrality provisions in the connected continent regulatory proposal awaiting the second reading by the Council. The principles of the proposed net neutrality provision as approved by the European Parliament demonstrate the intention of the law to accommodate both competing interests of broadband providers in traffic management flexibility and that of users in non-discriminatory access. However, the Commission's policy measure, regulation, runs contrary to the interests of the UK- and EU-based broadband providers. The immediate impact this potential outcome will have on broadband providers is arguably reduced flexibility in developing new services involving traffic management.

The analysis of the net neutrality discourses submitted at different stages of policy development and interviews with policy actors so far indicates strong institutional and structural influence on policy outcome. This influence stems partly from the formal policymaking process, i.e., consultation, which concentrates power among state policy actors. Other structural factors that shape policy include institutionalised values of access, non-discrimination, competition, transparency, investment and innovation. The interaction between structure and agency emerging from the analysis of discourses circulated in the formal policymaking process supports the critical pluralist thesis that despite power concentration in policymaking, absolute dominance of certain ideas, objectives, values and interests cannot be achieved. The interaction between structure and agency in policymaking will be further explored in Chapter 7 with greater emphasis on agency and policy actors' engagement in policymaking.

Chapter 7

Net neutrality policy engagement practices, how ideas travel

Based on the analysis of interview data, this chapter illustrates how policy actors work within the limits of the structural constraints (see Chapter 6 and 5.2) and the politics involved (see 5.1) to inscribe their values and interests in net neutrality policy. Guided by the dialectical policy network approach (see 3.2.5), the analysis here focuses on how policy actors develop their formal and informal policy engagement strategies based on their perception of the policy precedents, political system and practices discussed in Chapter 5, their interests and objectives. The policy engagement practices discussed here complement the discourse analysis in Chapter 6 by demonstrating how ideas, values and interests are mobilised through the discursive process and finally inscribed into the policy.

7.1. Net neutrality policy network

This section examines the relationship policy actors develop with one another given the communication protocol (see 5.2), their objectives and interests. The analysis here is based on the net neutrality policy precedents (see 5.1), the public responses to FCC, Ofcom and EC consultations and interviews with selected net neutrality policy actors. From this analysis surfaces an outline of policy networks and power relations among the policy actors engaging in this specific policymaking process that function as both structure and agency. This finding supports Marsh and Smith's concept (2000) of policy networks through identification and analysis of such networks operating in the specific case of net neutrality policymaking. The structural aspect of the net neutrality policy networks is the roles state and non-state policy actors play in policymaking, which privilege certain policy goals, values and interests over others. The agency aspect of the policy networks lies in the collective actions of agents in the network in pursuit of their goals and interests.

The US Case

The FCC archive of official submissions to the regulator's initial net neutrality consultation, officially referred to as the open Internet NPRM, indicates an expansive network of policy actors.

The sheer number of comments submitted and the variety of individuals and entities authoring those comments illustrates the nature of American representative democracy based on the concepts of pluralism and liberalism. This finding serves as an example supporting the literature reviewed in section 3.3.3, which indicates that the American political system emphasises participation and competition. The policy precedents discussed in section 5.1 and policy actor interviews suggest that the multitude of participants in the US net neutrality policymaking process results from two main factors: the number of centres of decision-making power and the number of vested interests in broadband Internet access due to the expansion and convergence of communications industries. This finding concurs with the Freedman's observation that the media policymaking network in the US is expansive (2008: 81 - 82).

Analysis of the interview data reveals that policy actors have been trying to inscribe their ideas, objectives and interests into net neutrality policy through various means, but mainly lobbying, at various decision-making platforms. The Counsel for Ad Hoc Telecommunications User Committee, Ms Boothby, states that the FCC decision to reclassify cable modem and DSL Internet services resulted from heavy lobbying by the regulated companies. She explained that the FCC also received competing pressure and interest from Congress, led by a particular senator, to treat broadband Internet services as 'telecommunications services' due to an interest in source of revenue to support universal service. Similarly, the AT&T V.P. for Federal Regulation observation, Mr Hultquist, and the former Google executive, Mr Whitt, indicated in their interviews that both the telecom and technology companies have attempted to push net neutrality legislation through Congress. Concurrently, these companies contributed both formally through the FCC rulemaking process and informally through meetings with responsible officers at the FCC in the quest for regulatory certainty concerning traffic management and net neutrality.

The former and present affiliates with Verizon, Google, AT&T, Comcast, Ad Hoc, Netflix and Media Access Project interviewed believe that the net neutrality policymaking process is political and polarised due to the US political culture and structure. They observed that net neutrality was an issue repeatedly passed between the FCC and Congress, finally resting with the FCC when legislation failed. According to Mr Hultquist, prior to the FCC adoption of open Internet rules, the regulator had discussions with key net neutrality policy actors, such as AT&T, Verizon, cable companies, Google and the Open Internet Coalition. The AT&T V.P. for Federal Regulation, a former Google executive and the Netflix Head of Global Government Relations indicated in the interviews that they have engaged members of Congress to clear through legislation the ambiguity

concerning the FCC jurisdiction in regulating Internet services. However, they all noted that the legislative attempts failed because the issue was polarised and a consensus was difficult to achieve.

Verizon's former executive, Edward Shakin, observed that the FCC is 'a political entity'. This observation reflects the structure of the organisation in that it is directed by five commissioners who are appointed by the President and confirmed by the Senate. Based on this comment, it appears the FCC's organisational structure lends itself to political influence, as the majority of the FCC commissioners are likely to be swayed by the majority party in Congress while the representation of the minority may just be an empty formality. Despite this organisational structure, Mr Shakin thinks that the FCC 'is pretty independent' and that no one has a monopoly of the FCC in terms of being listened to.

Additionally, academics contribute to the policymaking process through research and the resultant journal publications. An example of such academic contribution includes a journal article examining the concept of net neutrality in relation to telecommunications policy which sets out the initial definition of net neutrality (Wu 2003). These academic contributions serve as resources supporting policy actors' calls for action.

Media Access Project's director, Mr Schwartzman, also noted that the FCC 'is an intentionally political, politicised body by design'. He further explained that of the five commissioners, 'no more than three can be from the same political party'. This, he said, 'means that the President and the executive branch can influence the FCC by selecting three members who are of the same party'. However, he continued, 'there are always going to be two members who are potential dissenters who would disagree and this makes for a quasi-legislative process where the five members can horse trade to try to reach a consensus'. In this respect, the FCC has 'a clear predilection based on the majority membership and basic ideology' in line with that of the president.

Mr Schwartzman, however, noted that the FCC's decisions and actions are also influenced by 'recognition of the political consequences' of their actions and 'the responsiveness to Congress that controls the FCC's budget and conducts oversight'. This organisational structure, he remarked, is different from that of Ofcom, which makes the British regulator directly and completely responsible to the government. However, similar to Mr Shakin, Mr. Schwartzman said, 'For the most part anyone can engage in a dialogue through meetings and written submissions to the FCC as the policy issue is refined and sharpened to influence the FCC's decision.' In that respect, despite

the politically induced predilections of the FCC chairman, the commissioners and the staff, the FCC's decisions can be 'influenced with respect to the particulars'.

In support of the point about political influence, Ms Boothby observed that the discussion, friction debates, matters of interest and court decisions concerning net neutrality had not gained much media coverage until President Obama was elected. She indicated that it was understood that 'during the Bush years there would be no regulation, period.' At the change of administration from Republican to Democrat, she added, the carriers or telecom providers became nervous that the new Democratic FCC would be keener on regulation than it was under the previous Republican administration. Since then, the competition between the telecom and the technology companies to influence policy and regulation has intensified. The former has an interest in maintaining the regulatory status quo concerning net neutrality. The latter is keen to make up for their vulnerability to the exploitation of market power over terminating Internet access with regulations.

Ms Boothby further noted that the technology companies appear to be enjoying support from public interest organisations with 'good reputations'. These organisations advocate free speech and reclassification of Internet access to bring it back to 'telecommunications services'. According to the interviewee, support from public interest groups in American politics creates a perception of public support. In addition to such groups, Ms Boothby noted that academics have also joined this line of advocacy.

Corresponding to Ms Boothby's account, an interview with the Netflix Head of Global Government Relations, Mr. Christopher Libertelli, suggests that net neutrality is a polarised policy and for that reason the FCC policy decision depends largely on the political party in power. It can be inferred from the interview that policy actors and the industries would anticipate a reversal of the net neutrality policy or no enforcement of the policy under a Republican president who would appoint the FCC chair.

The application of CDA to policy actors' accounts of US net neutrality policymaking indicates that the political system, culture and particularly party politics play an important role in shaping both the discursive practice, or policy actors' behaviour, and discourses. This finding concurs with the view that policy process is both 'circumscribed by institutional, economic, technology and governmental dynamics' and driven by policy actors in pursuit of their objectives and interests (Freedman 2008: 4). The change in discourse from no-regulation to regulation resulting from a change of

government distinguishes the US policy tradition from the UK culture in that the difference between party positions on regulation as a policy measure is more polarised in the US than in the UK.

From policy actors' perceptions of net neutrality policymaking and the number of responses to the FCC open Internet NPRM, an outline of the US net neutrality policy network emerges as illustrated in Figure 19.

Figure 19 US net neutrality policy network
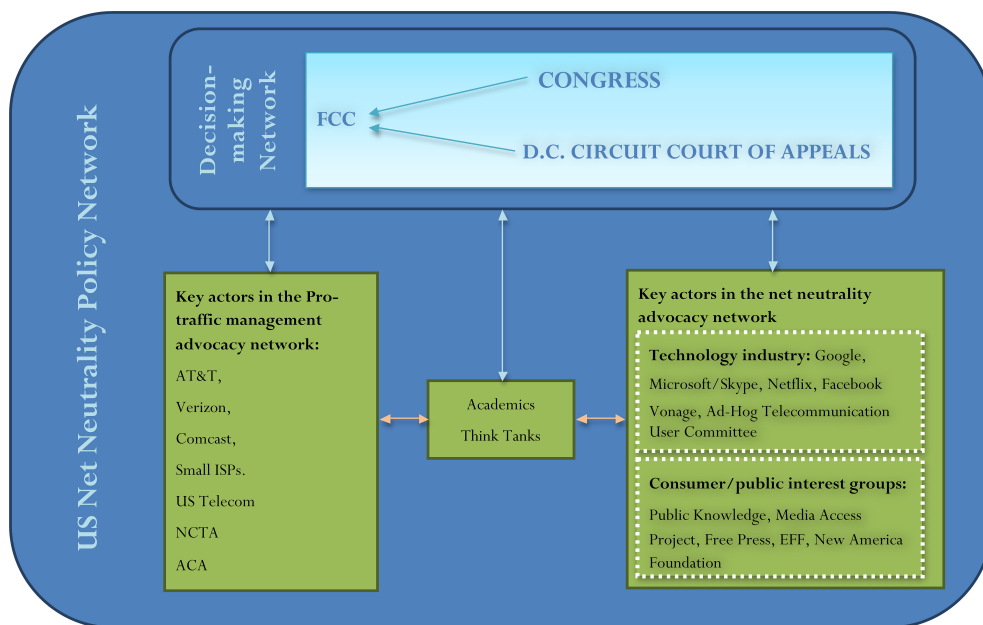
As illustrated in Figure 19, the US net neutrality policy network comprises a wide range of entities. These include the regulator (FCC), the Congress, broadband providers, content providers (mostly technology companies), public interest groups, academics and industry groups. The net neutrality discourses analysed in Chapter 6 indicate two polarised arguments. Ms Boothby and Mr Schwartzman indicate that this difference is rooted in the business models of the two interconnected industries. Mr Whitt referred to these competing thoughts as 'the telco-head and the net-head'. So, the US net neutrality policy network is partly based on the competing business relationships and competing business interests of broadband providers' technology companies. This observable difference in rationales and their implications for policy reiterates what Garnham (1996: 248) calls a 'regulatory dilemma', which is one challenge convergence poses for communications policy development.

This broad view of the US net neutrality policy network is built on the relationship that policy actors have with one another and shaped by the broader political system in which the network operates. The size of the US policy network established here confirms the observations of Freedman (2008: 81 - 82), Dahl (2005, 1961), Polsby (1980) and Truman (1971) that the US political system, influenced by pluralism, produces a multitude and variety of policy actors. The analysis of the interview data indicates that within this expansive network operate sub-networks which are circles of policy actors that share common policy positions, values and interests. Ms Boothby, Mr Whitt, Mr Libertelli and Mr Kasper commented that these policy sub-networks are also strategic. The examples they provide to support their claim include coalitions among technology companies (the open Internet coalition) and the coalition between the technology companies and public interest groups.

Mr Kasper commented that public interest groups contribute a broader scope of discussion to the policy debate, for example, the civic aspect of free speech. He also speculated that without this civic aspect, the net neutrality policy debate would have been merely a competition of interests between over-the-top-providers, or content providers, and broadband providers. It can be implied from his comment that without the civic aspect of free speech, there may not have been sufficient support for net neutrality rules. Mr Libertelli also indicated that his company worked closely with a set of academics and public interest groups who represent a sense of civil society. Ms Boothby explained that support from public interest groups represents public support. The importance of public support echoes the Hartz's notion (1991: 5 - 14) of American natural liberalism that requires the government and its agencies to serve the people.

From the analysis of the interview data and the document analysis also surfaces greater insight into the cross-interest sub-network operating in the specific case of net neutrality policymaking. An example of this is the cooperation between Google and Verizon to achieve an agreement on net neutrality. They filed a joint submission on the Open Internet GN Docket No. 09-191; WC Docket No. 07-52 during the 2009 open Internet NPRM process. In this document, Google and Verizon set out common high-level net neutrality principles. Then, on 9th August 2010, Google announced on its public policy blog that the company had been developing a 'principled compromise' concerning net neutrality. According to Mr Whitt, this cooperation was a failed attempt to push for 'a legislative proposal'.

From the combination of the number of filings they made under the FCC rulemaking process, their

market share and policy actors' perceptions, AT&T, Verizon, Comcast, Free Press, Public Knowledge, Netflix and Google are identified as key influencers in the US policy network. According to the FCC electronic comment filing record of the first open Internet NPRM (Proceeding number 09-191), Free Press filed 69 submissions. Public Knowledge filed 51 submissions, AT&T filed 48 submissions, followed by Verizon with 41 submissions, Comcast with 13 submissions, Netflix with 10 submissions and Google with 7 submissions. The market share (see Figure 4, page 97) that Comcast, Time Warner, AT&T and Verizon have indicates that these companies have a huge stake in net neutrality policy and therefore are likely to be very active in the policymaking process.

In Mr Hultquist's perception, Google is the key actor among the net neutrality advocates and he refers to AT&T, Verizon, the cable companies and members of the Open Internet Coalition as active policy actors in the FCC rulemaking process. Ms Boothby referred to AT&T, Verizon, the cable companies, Google and public interest groups, such as Free Press, as active policy actors on the subject. Mr Whitt refers to Public Knowledge as one of the active public interest groups.

The US policy network mapped out in this section provides a blueprint for power relations in US net neutrality policymaking shaped by a broader political system and policy actors' objectives and interests. This analysis reflects the dialectical relationship between network, institutional or structural factors and agency (policy actors) observed by Marsh and Smith (2000). The operation of this policy network and their discourses discussed here concur with the authors' argument that policy networks influence policy outcome. Examples of the influence of the American political system include the organisational structure of the FCC and its relationship with the President and Congress, which indicates a structure of executive network, and the coalition among policy actors with common objectives and interests.

The analysis of interview data indicates that the net neutrality policy network serves partly as a structure that privileges certain policy values and interests which are the ones belonging to net neutrality advocates. Given the power concentrated in the executive network, the privileged goals, values and interests are the ones belonging to net neutrality advocates, which align with those in the executive network. The discourse analysis in Chapter 6 indicates that competing sets of objectives, values and interests of self-regulation and traffic management flexibility are considered yet compromised.

The agency aspect of the US policy network is evident in the coalition between technology companies, public interest groups and a cross-interest coalition between Google and Verizon. The interview analysis indicates that the coalition between technology companies and public interest groups serves as a strategy to compete with the influence of broadband providers. These policy actors perceive that telecom companies have greater influence over the FCC and Congress due to the telecom companies' economic importance, long standing relationship with the regulator as regulated companies and technical expertise in Internet infrastructure.

Based on the net neutrality advocates' account of their policy engagement, the coalition also contributes to the network change in a way that advances their advocated aims. In this case, the change as perceived by the tech companies and public interest groups materialises in a form of access to the executive network, which they deem heavily occupied by the telecom companies. Another example of an agency change observed by policy actors interviewed that affects the network is the change from a Republican to a Democratic president. This agency change tipped the power hierarchy in the executive networks and the overall net neutrality network in a direction that favours the objectives and interests that align with the Democratic president's preference for regulation. These examples reiterate the concept of dialectical policy network (Marsh and Smith 2000).

The FCC decision to launch another consultation and prescribe new open Internet rules (see 6.3) confirms that policy network is one of the important factors that shapes the net neutrality policy outcome in the US. However, the legal challenge (*Verizon. v FCC* (2014) 740 F.3d 623) and the new suit filed against the FCC 2015 open Internet rules exemplify the influence of the American political model (see 3.3.3), which allows for the FCC's power to be counter-balanced or challenged through the judicial system. This on-going challenge against the FCC decision highlights an interaction between structure and agency that has continued throughout the process and even after the policy decision has been made.

The portrait of the US net neutrality policy network and power relations established here supports the argument put forward by Freedman (2008: 81 - 82), Dahl (2005, 1961), Polsby (1980) and Truman (1971) that the US political system, influenced by pluralism, results in an expansive network of policy actors. The policy network functions and behaviour discussed in this section contribute another effect of the US political system to the existing literature and suggest that a significant amount of time is required for a consensus to be reached. Together with the policy outcome analysed in section 6.3, the analysis of the interview data confirms the critical pluralists'

thesis on power in policymaking in the capitalist democratic states (section 3.1.3) that despite the plurality of agents influencing net neutrality policy, power remains concentrated. This power concentration is evident in the FCC determination to prescribe stronger net neutrality rules. However, Verizon's success in challenging the 2011 open Internet rules and other suits filed against the 2015 rules show that despite the power concentration, the FCC does not have complete dominance over the rulemaking process. As such, the power struggle in net neutrality policymaking in the US continues.

UK Case

The stark differences between the US and UK net neutrality networks include the comparative sizes of the network due to the volume of consultation responses and the hierarchical complexity in decision-making due to the influence of EU legislation. Compared to the US net neutrality policymaking process, the UK process (at the national level) involves many fewer participants. This observation is based on the responses submitted to the Ofcom net neutrality consultation (2010): 97 submissions, compared to over 10,000 submissions to the FCC initial open Internet NPRM (2009). The submissions to the FCC initial consultation continued even after the official closing date.

The analysis of policy documents (Chapter 6) and the interview data here indicate that there are more decision-making bodies involved in the UK net neutrality policymaking process than in the US. These include the European Commission, the European Parliament, the Council of the European Union, the British government (departmental and ministerial levels) and Ofcom. The European institutions listed are the core legislative organs for net neutrality policymaking at the EU level. At the national level, the DCMS is the policy home for net neutrality; Ofcom is a regulatory body responsible for implementing the policy.

Based on the statutory provision, Ofcom answers to the British government and is responsible for implementing the net neutrality provisions in the 2009 revised regulatory framework for electronic communications. Ofcom's net neutrality consultation, the 'discussion document', was published on 24th June 2010. The consultation followed the publication of the interim report of *Digital Britain* (DCMS and BERR 2009: 22) rejecting net neutrality legislation in the UK and the EU 2009 revised framework effective date (Figure 16). These policy precedents and the discourse analysis of the Ofcom consultation document (2010) indicate three inter-dependent sources of structural influence on Ofcom's consultation: the government's approach to net neutrality, the regulator's

duty as prescribed by the UK Communications Act 2003 and the EU 2009 revised framework.

Similar to the US case, interviews with the UK/EU-based policy actors suggest that the UK and EU formal policymaking process emerged in response to the policy precedents discussed in section 5.1. The informal policymaking process started before the formal policymaking process and continued throughout the formal process. However, contrary to the practices in the US, the UK/EU-based policy actors interviewed noted that the net neutrality policymaking process in the UK is a top-down procedure.

Ms Parry observed that the UK net neutrality policy objective 'was set by government'. She explained that the industries later came together to develop a common self-regulatory principle to implement the policy objective. Similarly, Mr Sahel commented that an interest in net neutrality in the UK and EU started around 2006 partly because the subject was hotly debated in the US. At the time, Mr Sahel was working for the UK government. He said that the government conducted an 'internal analysis' and consulted the regulator, Ofcom, before having decided at a ministerial level that no further action would be required to address the anti-competitive abuse from traffic management.

Sky's Head of Regulatory Policy at BskyB, Grant Forsyth, and Virgin Media's Senior Regulatory Advisor, Andrew Wileman, identified the European Commission and the UK government as the 'sources of policy' in the UK. Mr Forsyth added that the UK government, from the departmental level (DCMS) and the ministerial level (politicians: Ed Vaizey and Maria Miller), provided input into the Commission in Brussels. Mr Banner noted that Ofcom is not the key decision-maker in UK-based net neutrality policymaking; DCMS and the government are. Likewise, the ISPA Council Member and Treasurer, James Blessing, commented that despite attempts from policy actors to shape policies, 'Whitehall' appears to be a definitive force in policymaking. He further commented on the EU legislative process that despite a different concept of civil servants in the European Commission, it, as opposed to a political party, is the policy driver.

The analysis of the interviews with Mr Milton, Mr Olivier and Mr Stuckmann indicates that decision-making power in the UK process is concentrated among state-policy actors. Mr Milton said that in the case of net neutrality, the policymaking is 'purely internal'. He observed that policy discussions were limited to the 'policy people in government' with some external influence from expert communities, such as BSG, who had already had experience in developing the traffic

management transparency code of practice for the broadband industry. The government, he added, looked at practices and similar debates in other jurisdictions, such as the US and continental European countries. In this respect, the UK government filters in the expertise from outside the government to help it develop its policy position and measures. In other words, the government chooses who and what to listen to.

Mr. Milton further explained that the level of public engagement in policymaking depends on the nature of the policy being developed. If the policy is likely to result in considerable regulation, he said, there would be a number of consultations and participants involved. In the case of net neutrality, he revealed, the government did not issue an official proposal stating what it planned to do and in that respect; there was 'no actual formal consultation' for the net neutrality policy. The DCMS minister's speech, which was developed by the responsible DCMS civil servants, was used as a 'Green Paper'. Given the circumstances, the government's net neutrality discourse mainly shaped the policy outcome. As Ofcom answers to the government, the government's net neutrality discourse also shapes Ofcom's consultation discourse and other discourses operating in Ofcom's consultation. This practice serves as an explanation for the findings from the discourse analysis in Chapter 6 wherein the government's objectives and interests remain uncompromised throughout the process.

According to Mr Olivier, Ofcom's net neutrality consultation does not fit Ofcom's standard consultation procedures because Ofcom was not setting out policy objective. This implies that the net neutrality 'discussion document' (2010) was just a formality carried out in compliance with the regulator's own regulatory principles. Mr Olivier further explained that in publishing the consultation document, Ofcom was 'seeking to set out our understanding of competing arguments in relation to the regulatory oversight of ISPs with a view to consider whether a specific intervention might be appropriate'. This comment implies that Ofcom's decision on broadband traffic management oversight was made prior to the consultation. This decision shaped Ofcom's consultation discourse, the discourse of the consultation responses and policy outcome as demonstrated throughout Chapter 6.

However, as an EU member, the UK policy decision can be over-ruled by EU legislation because EU members are obliged by the European Communities Act 1972 to transpose EU legislation into national law. This legal requirement distinguishes the UK from the US in terms of autonomy in policy decision-making and complexity of the overall policymaking process. The analysis of

interviews with the UK-based policy actors indicate that all UK policy actors are aware that the 1972 Act and the politics of the EU legislative process involving 28 member countries can, to some degree, compromise the UK policy decision. The analysis of policy actors' policy engagement accounts also suggests that the EU legislative process adds more layers of power hierarchy to policymaking in the UK. This situation expands the UK net neutrality policy network beyond its borders, i.e., the UK enjoys less decision-making autonomy than the US in this specific policymaking process since the centres of US policymaking power are within its own borders, while the UK decision-making power is diffused beyond national borders.

The legal implications of EU legislation for UK policies, regulations and their development process, therefore, require UK-based policy actors to engage in the legislative process at the EU level. For this reason, policy actors' accounts of their engagement in policymaking at the EU level are also valuable to this research. The interview with Mr Stuckmann indicates that the European Commission filters in external inputs to formulate its legislative proposals. He explained that the consultation serves as an open platform for the industry and the general public to contribute to the Commission's development of policy and legislative proposals.

However, the analysis of this interview with Mr Stuckmann suggests that the Commission also engages and negotiates directly with, for example, industries and consumer organisations through policy working groups and private meetings. Since net neutrality provisions form part of the EU connected continent regulatory proposal, which is co-legislation, these negotiations continue. Such negotiations, said Mr Stuckmann, have resulted in amendments made to the Commission's original draft before the amended draft was approved by the European Parliament on 3rd April 2014 and are likely to result in 'a compromised text' from the Council. Mr Stuckmann also indicated that there is 'the so-called trialogue' where the three institutions (the Parliament, the Council and the Commission) negotiate to find a political agreement. As such, net neutrality policymaking, a part of the co-legislative process, at the EU level receives considerable input beyond public responses to the consultation. From Mr. Stuckmann's account of EU policymaking, the key inputs that shape the policy come from the selected industry policy actors, consumer organisations, the Commission's policy objectives, the European Parliament and the European Council.

The analysis of the UK/EU-based policy actors' net neutrality policy engagement experience discussed so far highlights a fundamental difference between the US and the UK political systems. This experience indicates, in support of observations by Jordan and Richardson (2013: 90), Pollack

(2010: 30), Young (2010); Freedman (2008: 263) and Jordan and Richardson (2013: 90), that UK and EU policymaking is a top-down decision-making style which supports strong executive dominance. Based on these policy actors' experience, participation is either a formality or a strategic invitation.

Therefore, contrary to the US policy process, the UK and EU executives set the policy agenda for the public and invite selected members of the public to participate in delivering such policy objectives. In this respect, the actual net neutrality policy decisions are made outside the consultation process, rendering the consultation a procedure put in place merely to fulfil the remit of the regulator and legislature. This situation confirms the analysis in section 5.2 that Ofcom and EU consultations actually serve only as a sounding board for the intended policy decisions of government, regulator and legislature.

Given the UK-based policy actors' engagement experience, the British government is the formal representative and advocate of the UK-based policy actors in the EU net neutrality policymaking process. Their experience implies that the British government has the ability to choose whose and which interests are represented as national interests in such process. The British government's role, as a representative of these collective interests in the EU legislative process, reinforces power concentration within the policymaking cores: the government and Ofcom. This finding supports the observation that power in the UK policymaking process is concentrated among decision-making executives (Freedman 2008: 86 - 87; Marsh 2008: 263, 2002: 29).

Aside from convincing the government to build their interests into the national interest, some UK-based non-state policy actors directly engage in the EU policymaking process. Mr Killock and Mr Sahel perceive that EU institutions can also be seen as decision-making platforms that counter-balance the influence of the UK government on net neutrality policies. All the UK-based policy actors interviewed indicated that they either directly engage with the European Commission and MEPs or indirectly through their counterparts in Brussels. This policy engagement practice implies that UK/EU-based policy actors interviewed share Mr Killock's and Mr Sahel's view on the EU policymaking process.

The UK/EU-based policy actors' engagement in the EU legislative process implies that they are also subject to the EU political system of indistinct separation of powers. This system, according to Pollack (2010: 30), embodies a degree of executive dominance as a result of the interconnection

between the legislative and executive branches. Therefore, UK-based policy actors are likely to face a similar challenge of appealing to the interests of the Commission's executives and the MEPs to have their interests considered by the decision-making core. This situation, as it does in the UK case, contributes to power concentration in policymaking. Given the circumstances, this research argues that despite the forum-shifting opportunity it provides, the EU policymaking process makes the UK process even more exclusive to decision-making elites.

The UK policy actors interviewed are all aware that they have to compete with policy actors from 27 other member countries for the policymaking elites' support. The multitude of policy actors, objectives, values and interests make EU net neutrality policymaking even more complex and challenging for the UK/EU-based policy actors to secure support for their proposals. Given EU politics and the political system, the UK/EU-based policy actors are faced with political structures that are very competitive. This finding supports Jordan and Richardson's observation (2013: 86) that the EU policymaking process is competitive.

From the UK policy actors' engagement experience analysed here, policy precedents (see 5.1) and the discourse analysis of the consultation documents emerges an outline of the UK net neutrality policy network, visualised in Figure 20.

Figure 20 UK net neutrality policy network
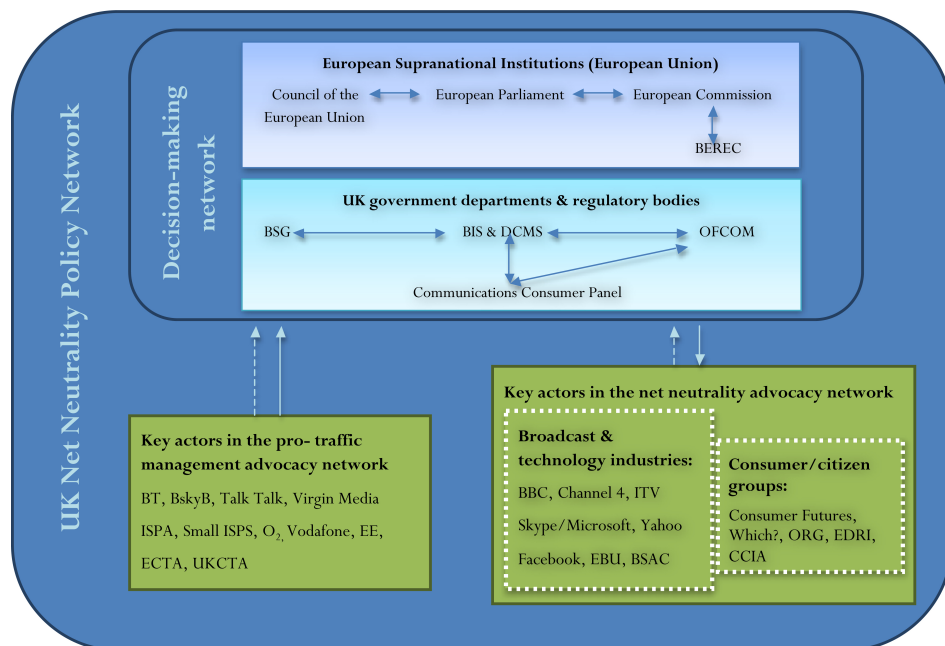
Based on the analysis of the interview data and consultation documents, the UK net neutrality

policy network comprises a smaller number and range of participants, but a more complex power hierarchy, when compared to the US network. These participants include the European Commission, the European Parliament and the Council at the top of the network order, followed by the UK government, regulator (Ofcom), broadband providers, content providers (a mix of broadcasters and technology companies), public and consumer interest groups and academics. The components of this policy network are also significantly different from those of the US, i.e., they comprise more of the actual content producers (broadcasters) than technology companies who are content aggregators and intermediaries, while in the US policy network it is the other way around. While broadcasters and technology companies operating in the UK formed a coalition to support their calls for action, no such coalition was found in the US case. This implies different business models and relationships between broadband providers, as carriers, content providers and technology companies.

The difference between the UK and US policy network components, according to the AT&T V.P. for Federal Regulation, Mr Hultquist, may have resulted from the sentiment of content companies that technology companies, acting as content aggregators, are piracy enablers. Mr Hultquist's comment implies different business models and broadcaster concerns separate the UK and US. His observation suggests that the US broadcasters do not emphasise online audio-visual content distribution and are more concerned about copyright infringement than the UK broadcasters. Mr Libertelli also commented that TV broadcasters did not participate in the US net neutrality policymaking process because online distribution of their content had never been in their business model and is still not. He contended that they therefore think that the open Internet rules that the FCC is developing do not apply to them.

The UK broadcasters, on the other hand, are active participants in the UK net neutrality policymaking process and the expansion of their online video on demand (VoD) services, such as BBC iPlayer, ITV Player and 4oD. The BBC Head of International Policy, Daniel Wilson, stated that the BBC recognised that a higher value was placed on on-demand content delivered via IPs, such as iPlayer, and that the demand for such service was growing 'at a very fast rate'. Likewise, Ms Parry indicated that the ITV online service was 'very important' and that the organisation saw 'exponential growth in Internet delivery and demand for [ITV's] catch-up services, ITV Player'. Ms Parry's comment indicates ITV sees the Internet as a platform on which new revenue sources and services can be developed and experimented with. Channel 4, according to its European Affairs Manager, Mr. Khalid Hadadi, is also increasing their online presence. Mr. Hadadi observed that a

number of their audiences watched their catch-up services, the 4oD. These policy actors' reading of market trends are mirrored in the Communications Market Report (Ofcom 2014b: 141 - 48), which shows that both the adoption and roll-out of online VoD services are rapidly increasing.

Another distinction between the UK and US broadband policy networks is in the number of public and consumer interest groups participating in the policymaking process. The document and interview analysis indicate that the UK policy network comprises only three active participants representing consumer and citizen interests. These include Consumer Futures, Which? and Open Rights Group. This difference in the policy network component, according to the Director of Media Access Project, Mr Schwartzman, results from the political system in which the network operates. He explained that there were two fundamental characteristics of the US system, the procedure of judicial review and the First Amendment, that create a rich ecosystem for public interest groups and activities to prosper more so than in other jurisdictions.

Mr Schwartzman observed that the judicial review system made available the option that a court could reverse a federal agency's decision. This is evident in the *Verizon. v FCC* (2014) 740 F.3d 623 case. This leverage, he said, 'empowers private sector organisations, both industry and public interest organisations, to participate actively in the deliberations'. In that respect, the government agency's decision is not a '*fait accompli*' as is the case in the UK. He added that this condition provided a much greater opportunity to influence the outcome and, thus, businesses and public interest groups were motivated to participate in the policymaking process. The First Amendment, Mr Schwartzman explained, 'creates a system in which the right of the public to speak and to be heard and to have access to a broad array of information is very strong'. He added that this system 'makes public interest organisations feel empowered to be active, to speak, to express their point of view'.

As an alternative to Mr Schwartzman's ideal version of the democratic function of policymaking, Mr Killock offered three explanations for the difference in the number of public interest or civil society organisations participating in the net neutrality policymaking process in the US and UK: 1) the size of the country and population affects the cost-effectiveness in setting up civil society organisations, 2) the 'political failure of having centre right parties that do not easily represent new perspectives' in the US require heavy persuasion from civil society for new or competing ideas to be taken seriously, while the same degree of challenge does not apply to Europe and 3) specific to net neutrality policymaking, Europe has lower 'political and cultural investment' in the Internet

compared to the US, which may contribute to Europe's fewer civil society organisations, operating on more limited resources, being less motivated to engage in the policymaking process than their US counterparts.

Mr Killock also commented that the public was only 'technically included' in the UK policymaking process through consultation. As discussed earlier, the net neutrality policy decisions have already been made prior to the consultation. Therefore, public participation, given the small number of consumer and public interest groups operating in the UK, is not likely to create enough noise for the decision-makers to listen. This finding supports the observation by Marsh (2008: 263) and Freedman (2008: 86 - 87) that the UK political system discourages participation and thus reinforces power concentration in policymaking.

The interview analysis also finds that there is much less resistance to the government and Ofcom net neutrality policy decision from the non-state policy actors than there is in the US case. This lower level of resistance, Ms Parry observed, may have resulted from the 'pragmatic approach' taken by the government. Agreeing with Ms Parry, Mr Milton said that the government mainly focuses on UK market conditions in relation to anti-competitive traffic management. These comments indicate that problem definition, based on the impact of policy precedents on market condition and practices, frames the policy debate in such a way that it neutralises the competing interests of broadband providers and users. Such problem definition and framing are more conducive for achieving a consensus despite similar groups of discourses produced (e.g., the US ones) due to the underlying conflict of interests between broadband providers and users (see Chapter 6).

The UK-based policy actors' accounts of their engagement analysed in this section provides an outline of the UK net neutrality policy network. Concurring with the observation made by Marsh (2008, 2002) and Freedman (2008: 87), the interview analysis demonstrates that the UK network, its functions and impact are shaped by the broader political system and the relationships policy actors have with one another. In contribution to the literature, the analysis in this section produces a specific example of the UK net neutrality policy network that exemplifies the authors' observations.

Based on this analysis, the British political system and the EU membership have created a trans-national network of policy actors and added another layer to the decision-making hierarchy that complicates net neutrality policymaking and shapes policy outcome in the UK. The analysis

indicates that the UK political system, based on the notion of limited liberal representative democracy, makes the number of participants in the policymaking process in the UK much smaller than in the US. It also results in a smaller number of consumer and public interest groups participating in the process.

Based on the interview data, competing commercial interests of broadband providers and content providers also contribute to the formation of sub-networks within the UK net neutrality network. Policy actors in these sub-networks gravitate together due to their commercial interests. This is why broadband providers co-ordinate their discourses in support of traffic management flexibility and self-regulation, while content providers work together to advance their advocacy on traffic management restriction and regulation (see section 6.2). Politics and strategies also help create another sub-network of content providers and consumer and public interest groups. These networks within the overall net neutrality policy network are clearly visible in the development of the UK open Internet code brokered by the BSG.

The net neutrality policy network can also be seen as a cross-interest network in which policy actors with interconnected yet competing objectives and interests work together to achieve an acceptable agreement. The analysis of interviews with Ms Parry, Mr Wilson, Mr Hadadi, Mr Sahel, Mr Killock and the Consumer Futures Policy Manager, Marzena Kisielowska-Lipman, indicates that they work together to increase the impact of their advocacy. They said that the coalition between content providers and consumer groups represents a unified voice of the industry and consumers supporting their common policy objectives and that coalition members also benefit from information sharing.

There is also evidence of a cross-border network for the purpose of resource sharing and enhanced advocacy. This is seen in the coalition of ORG and ISPA, which operates in the UK, and their counterparts, European Digital Rights (EDRi) and the European ISP Association (EUROISPA). Mr Killock and Mr Blessing said that EDRi and the EUROISPA advocated the same policy positions on traffic management and regulation in the net neutrality legislative process at the EU level. Both Mr Killock and Mr Blessing perceive that this partnership with their EU counterparts compensates for their limited resources, allowing them to extend their advocacy to Europe. This type of network, however, is not evident in the US case because the US policy decision-making is contained within its border.

From the interview analysis and policy actors market influence, key influencers within the UK policy network can be identified. Given the size of their market share (see Figures 5-6), BT, Virgin Media, BSkyB, Talk Talk, BBC, ITV and Channel Four hold a huge stake in net neutrality policy and are therefore likely to be most motivated to actively engage in both national and EU policymaking processes. Interview analysis indicates that all UK/EU-based policy actors engaging in the UK and EU net neutrality policymaking understand that the UK government and the European Commission are the centres in which the policymaking power is concentrated.

According to Mr Stuckmann, decision-making power is concentrated in the three EU institutions: the Commission, the Parliament and the Council. Mr Milton stated that specific to the UK net neutrality policymaking process, the minister, Ed Vaizey, drove the process. Mr Olivier indicated that the regulator participated actively in the EU policymaking process through BEREC. These interviewees' descriptions of the policymaking inter-relationship between the UK and EU outline two inter-connected networks: the national policymaking network comprising the UK government and Ofcom and the supranational policymaking network involving the aforementioned European institutions.

The former BSG CEO, Pamela Learmouth, identified BBC, Skype, Yahoo, ITV and Channel 4 as active policy actors from the content side of the broadband value chain. Mr Blessing identified the CEOs of major broadband providers as having significant power to direct 'certain bits of the government' on policy. He also identified BT as having significant market power. However, he added that such market power in the context of traffic management deployment is curbed by the BBC due to the organisation's status as a publicly funded PSB. He perceived that BBC's bargaining power protected its content and similar content from others because exempting only the BBC's online content from traffic management would constitute anti-competitive discrimination and consequently activate regulatory intervention. The BBC, said Mr Wilson, sees itself as being 'among the louder voices on the content and service provider side of the broadband value chain.'

The relationship of UK net neutrality policy actors emerging from the interview analysis demonstrates that the expansive Internet value chain is also another structural factor that shapes the UK policy network, discourses and outcome. Complementing the discourse analysis in Chapter 6, the analysis here also highlights a co-relation between the power structure underlying the UK policy network and the privilege the UK government enjoys from initiating the net neutrality policy discourse in the interim report of *Digital Britain* and later in the Minister's speech. As Mr Milton

observed, the Minister's speech triggered the debate and policymaking process. This practice implies that the UK net neutrality policy debate and process is initiated by the government, but industries and individuals then continue driving the process. Consequently, this power relation, shaped by a broader political system, forms the decision-making sub-network that privileges the policy objectives and interests that align with those of the government. In this case, broadband providers' objectives and interests enjoy an advantage. However, the open Internet roundtable and BSG working group on the voluntary open Internet code of practice discussed here supports the Jordan and Richardson (2013: 86) observation that there is a functional necessity for negotiation in policymaking. These negotiations allowed for some of the net neutrality advocates' objectives, values and interests that competed with those of the government and Ofcom to be considered and accommodated in the outcome.

The link between UK net neutrality policymaking power relations established here and the circulation of UK net neutrality policy discourses analysed in Chapter 5 confirms the argument that the relationships between network and structural factors and agency are dialectical (Marsh and Smith 2000). The UK and EU political system and the Internet ecosystem shape the power relations among net neutrality policy actors operating in these jurisdictions. Based on these power relations, the UK net neutrality policy network and sub-networks are formed. These networks then become structures that filter in the objectives, values and interests that align with those of the decision-makers. Then, through negotiation, which is an element of agency's power exercise, some competing objectives, values and interests are included in the outcome.

Similar to the US case, the interview analysis suggests that UK network and sub-networks are also shaped by policy actors' strategy for increasing their negotiating power with the decision-makers. The coalition serves as an example for the dialectical aspect of the relationship policy actors have with the network and the connection between network and structures. The analysis also indicates that power inequality embodied in the relationships among policy actors' network and structure leads to the formation of a coalition between PSBs, technology companies and consumer and public interest groups. With this coalition, a sub-network is formed and changes part of the decision-making structure as evident in the inclusion of organisations with vested interests in non-discriminatory Internet access to the open Internet roundtable discussion hosted by the DCMS and the BSG open Internet code working group. These changes resulted in a compromised policy outcome that all parties can accept. The alternative would have left the net neutrality advocates with even fewer protections against abuse of their interest in non-discriminatory Internet access.

Despite some leverage discussed in the previous paragraph, continued dominance of the pro-self-regulation and pro-traffic management discourses, initiated by the government and described in Chapter 6, shows that power remains concentrated among the DCMS and Ofcom executives. The dominance of state-policy actors' discourse supports the argument that policy decisions in the UK are actually made outside the consultation process (Freedman 2008: 91). This research further argues, based on its interview and policy document analysis, that the UK/EU-based non-state policy actors have less impact on challenging or changing policy outcome than US-based non-state policy actors. This situation results from the British political system that deems that the decisions of the government and its agents are '*fait accompli,*' leaving little room for policy actors to influence the policy outcome.

The UK net neutrality decision-making network, therefore, perpetuates what Marsh (2008, 2002) refers to as structured inequality that privileges the policy objectives, values and interests that align with those of the decision-makers over the competing ones. This situation exemplifies the critical pluralist thesis on policymaking power (see section 3.1.3). It also confirms Freedman's argument that the number of policy actors participating in the policymaking process is irrelevant to the outcome in the UK (2008: 86 - 87). As such, power concentration in UK policymaking continues and has a more definitive impact on policy outcome than the power concentration in the US system.

In the case of net neutrality policy, the analysis in this section identifies the European supranational decision-making network as the only structural factor that can really challenge the British executives' decision. This network, as established here, exhibits a degree of power concentration and appears to be driven by executives in the European Commission. The net neutrality policy outcome in the UK, therefore, results from two layers of power concentration: one at the national level and the other at the European supranational level. Thus, UK net neutrality policy and measures have been developed in a top-down manner with selective input from non-state policy actors.
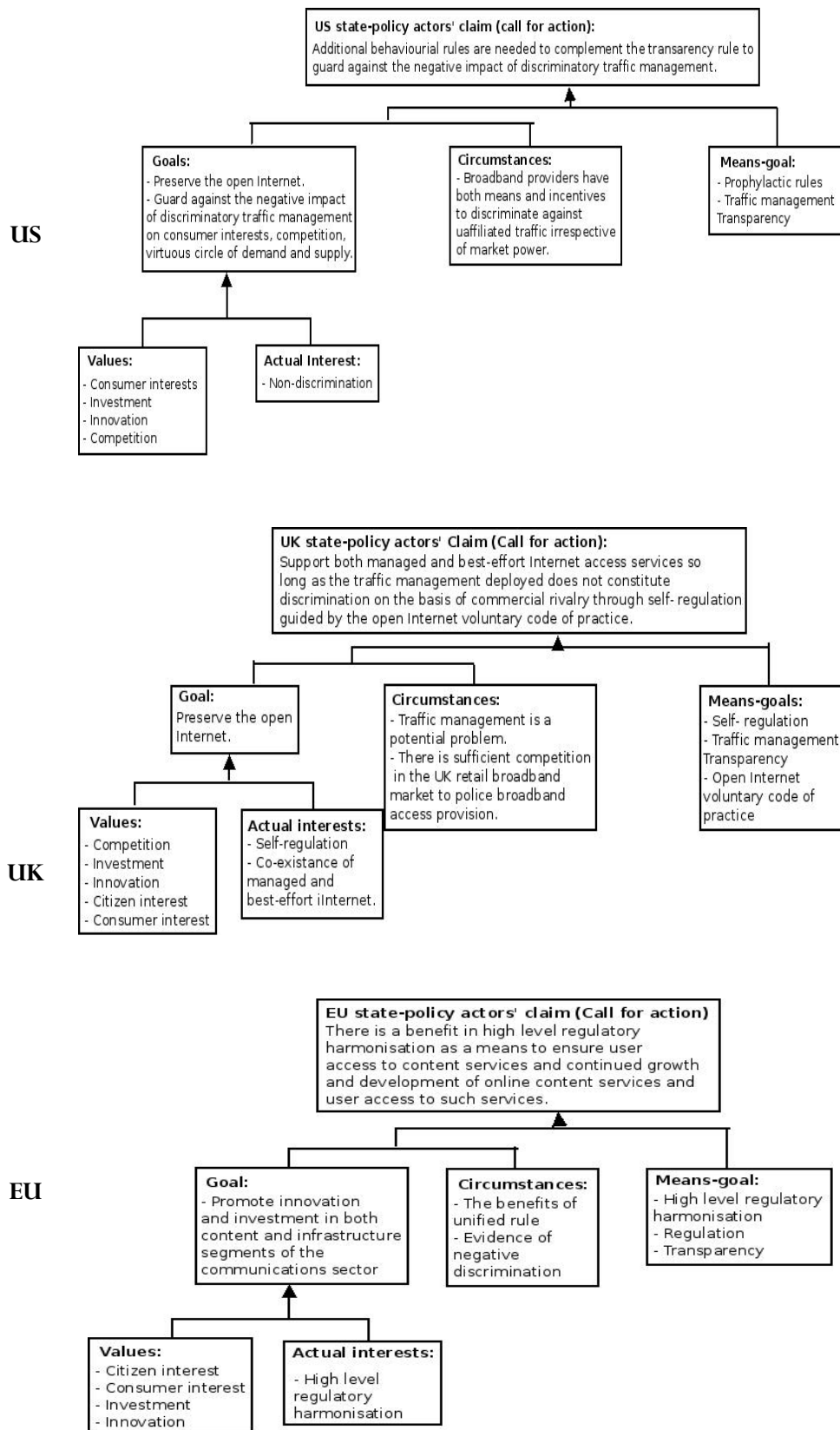
7.2. Ideas, interests and actions

Guided by the concept of dialectical policy network (Marsh and Smith 2000), this section emphasises the agency aspect of such concept by explaining how ideas and interests shape policy actors' discourses (see Chapter 6), policy networks (see 7.1) and their policy engagement strategies (see 7.3). This explanation provides specific examples of net neutrality policy framing in support of

the switchman analogy (Weber 2009: 64 - 64) and the argument that ideas can shape policy agenda based on policy actors' accounts of their actions, objectives, ideas and interests (John 2012: 126 - 27).

Interview analysis contributes an insight into policy actors' interpretation of policy precedents in relation to the interests of state-policy actors, traffic management or net diversity advocates and net neutrality advocates that constitute discourses of the consultation responses and outcomes analysed in Chapter 6. The traffic management advocates include broadband and converged providers and their supporting industry groups, while net neutrality advocates comprise content providers, their supporting industry groups and consumer and public interest groups. The function of these interests in policy actors' discourses is featured in Figures 21-23.

Overall interviews with state policy actors on both sides of the Atlantic indicate that they are most interested in promoting market competition, generating investment and innovation in both broadband and content segments of the communications market. These interests reflect the strong influence of neoliberal ideology. Corresponding to the discourse analysis of the policy documents in Chapter 6, the analysis of the interviews with state-policy actors indicates that they construct their policy proposals or calls for action based on their values, interests and the circumstances the actors find themselves in. Since all the state policy actors interviewed share common interests that connote a commitment to neoliberal ideology, the circumstances in which they diversify their calls for action are market conditions and practices (see Figure 21).

Figure 21 State policy actors' actual interests and claims for actions

US

US state-policy actors' claim (call for action):
Additional behavioural rules are needed to complement the transarency rule to guard against the negative impact of discriminatory traffic management.

Goals:
- Preserve the open Internet.
- Guard against the negative impact of discriminatory traffic management on consumer interests, competition, virtuous circle of demand and supply.

Circumstances:
- Broadband providers have both means and incentives to discriminate against uaffiliated traffic irrespective of market power.

Means-goal:
- Prophylactic rules
- Traffic management Transparency

Values:
- Consumer interests
- Investment
- Innovation
- Competition

Actual Interest:
- Non-discrimination

UK

UK state-policy actors' Claim (Call for action):
Support both managed and best-effort Internet access services so long as the traffic management deployed does not constitute discrimination on the basis of commercial rivalry through self- regulation guided by the open Internet voluntary code of practice.

Goal:
Preserve the open Internet.

Circumstances:
- Traffic management is a potential problem.
- There is sufficient competition in the UK retail broadband market to police broadband access provision.

Means-goals:
- Self- regulation
- Traffic management Transparency
- Open Internet voluntary code of practice

Values:
- Competition
- Investment
- Innovation
- Citizen interest
- Consumer interest

Actual interests:
- Self-regulation
- Co-existance of managed and best-effort iInternet.

EU

EU state-policy actors' claim (Call for action)
There is a benefit in high level regulatory harmonisation as a means to ensure user access to content services and continued growth and development of online content services and user access to such services.

Goal:
- Promote innovation and investment in both content and infrastructure segments of the communications sector

Circumstances:
- The benefits of unified rule
- Evidence of negative discrimination

Means-goal:
- High level regulatory harmonisation
- Regulation
- Transparency

Values:
- Citizen interest
- Consumer interest
- Investment
- Innovation

Actual interests:
- High level regulatory harmonisation

In the US case, Mr Del Nero and Ms Weiner said that both sets of the proposed FCC open Internet rules were designed to guard against the negative impact of discriminatory traffic management on consumer interests, competition and the virtuous circle of supply and demand. The concept of the virtuous circle of demand and supply, they contended, placed users or consumers in the driver's seat for broadband and content service generation. They envisioned that consumer demands for such services would attract investment and support innovation on both sides of the market.

The interviewees indicated that the proposed rules are based on the findings that broadband providers have both means and incentives to manage the Internet traffic in such a way that discriminates against unaffiliated traffic irrespective of market power. This circumstance threatens the regulators' interest in competition, investment and innovation on the content side of the market. As analysed in section 6.1, the FCC represents this circumstance as a problem and thus proposed to regulate broadband providers' provision of broadband Internet access service *ex-ante*. Given the perceived nature of the problem, the regulator prescribed no-blocking and non-discrimination rules to directly address the problem at its root and complement those rules with the traffic management transparency requirement to empower consumers in their purchasing and provider-switching decisions.

Committed to promoting competition, consumer interests, investment and innovation, Mr Del Nero and Ms Weiner indicated that the FCC is keen to adopt additional behavioural or conduct rules to support the transparency rule, although the regulator recognises the benefits of the transparency rule. The behavioural rules that the FCC adopted in 2011 together with the transparency rule were struck down in the D.C. Circuit Court's 2014 net neutrality ruling in favour of Verizon. Verizon is one of the broadband providers advocating network diversity and self-regulation. Driven by the concept of the virtuous circle of supply and demand and the perception that market mechanism is not sufficient to sustain this concept against broadband provider behaviour, the FCC followed their idea of prescribing behavioural rules by launching another consultation and finally decided to adopt the rules on 26th February 2015.

Interviews with UK-based state policy actors indicate a broad interest in competition, investment, innovation and self-regulation (see Figure 21). These policy actors include Ofcom, the UK communications regulator, the Department of Culture, Media and Sports (DCMS) and the Broadband Stakeholder Group (BSG). The BSG, according to Ms Learmouth, serves as 'a forum to bring different parts of the industry together with government and regulator to discuss policy issues

that impact broadband and broadband related issues'. As depicted in section 6.1.2, the formal top-down relationship between the UK government (DCMS) and regulator (Ofcom) as well as the advisory board (BSG), means that both Ofcom and BSG answer to the government. Thus, these organisations' decisions and engagement in this policymaking process are partly shaped by the government's objectives, values and interests and partly by their internal interests or obligations.

The former BSG CEO and the former DCMS Senior Regulatory Policy Advisor, Philip Milton, perceived that the DCMS minister had always intended to allow traffic management deployment so long as such practice does not constitute discrimination on the basis of commercial rivalry. Mr Milton and the Chairman of the House of Lords Select Committee on Communications, Lord Inglewood, observed that the UK government had always preferred self-regulation as a measure to implement policies. This preference indicates a path-dependency on preceding regulatory practices and the strong influence of neoliberal ideology. In addition to the default regulatory preference, Mr Milton indicated that the government chose 'a laissez faire' approach because the DCMS minister, Ed Vaizey, and civil servants did not perceive traffic management as a problem. The minister, according to Mr Milton, picked up on the issue because net neutrality or traffic management 'was seen [by the minister] as a bit of a sexy issue to tag onto'.

Given their relationship with the government, BSG and Ofcom admitted to building the government's ideas into their discourses. According to Ms Learmouth, BSG carried out the minister's assignment to 'develop a further agreement on the open Internet which would reflect the commitments already made in respect of transparency' and address the issues of 'provision of open Internet products and discrimination against content providers on the basis of commercial rivalry'. This implies that the actual BSG objective is to facilitate the implementation the UK government net neutrality policy objective and means-goal. This objective drove the organisation to broker an agreement among broadband providers, content providers and consumer/public interest groups on the UK principle of the open Internet.

Similar to the BSG, Ofcom constructs its discourses based partly on the government's policy objective, regulatory options and its statutory obligations to 'further the interest of citizen' and 'consumers' (Communications Act 2003). Mr Olivier indicated that Ofcom's role in the net neutrality consultation and policy process is primarily to promote the interests of citizens and consumers concerning access to the Internet, according to its statutory duties. The regulator treats the Internet as a platform for free speech, innovation and competition. Mr Olivier explained that

Ofcom takes an *ex-post facto* approach or self-regulation supported by traffic management transparency requirements because the regulator perceived that competition in the fixed-line broadband access service is effective. The evaluation criteria for such perception include consumer broadband access choices and available service providers. He noted that the choices and competition in the fixed-line services resulted from the success of the Local Loop Unbundling (LLU) policy, which failed in the US.

Interviews with Mr Sahel and Mr Milton highlight an internal communication and exchange of ideas between Ofcom and the responsible government department (DCMS). According to Mr Olivier, Ofcom also uses an industry-led approach in developing and implementing the transparency requirement. It does so by signalling to the broadband providers to develop a transparency code of practice instead of imposing the code developed by the regulator on the providers. Ofcom's choice of policy measure indicates a path-dependent decision influenced by neo-liberalism, which prioritises market mechanism over state in delivering communications services.

Mr Olivier also represented freedom of expression as an example of a social benefit from the open Internet or net neutrality principle. He indicated that the regulator viewed the Internet as a platform for enabling innovation and the creation of services which brought both economic and social values to users in the roles of citizens and consumers. Consistent with the Ofcom consultation document and statement, he did not represent traffic management as particularly harmful. He confirmed the Ofcom official position that the regulator intended for both the managed and unmanaged principles to co-exist. This position aligned well with that of the government.

The regulator's recognition of the social benefit of the open Internet or the best-effort principle of the Internet reflects its statutory obligation under the Communications Act 2003 to promote citizen and consumer interests and ensure a wide range of electronic communications and a plurality of high quality audio-visual services are available in the UK. These obligations embody both broadband and content provider interests in their service provision. They function as values underpinning Ofcom's claim for action. The regulator's regulatory principle (Ofcom 2002) highlights its actual internal interest in self-regulation. Driven by these values, interests and problem definition, Ofcom decided to support both the managed and unmanaged network management principles with self-regulation.

Mr Olivier commented in the follow-up interview in response to the Commission's Connected Continent regulatory proposal that the UK contribution to the development of the net neutrality provisions in the connected continent proposal is a government decision. He said that Ofcom 'welcomes a strengthening of the powers NRAs have to impose net neutrality obligations on communications services providers'. However, Ofcom remains 'concerned that the imposition of these obligations directly through a regulation poses risks of unintended consequences' due to 'the technical complexity of the network operations in question and the definitional difficulties involved'. He added that Ofcom 'would prefer that enhanced powers be devolved by individual NRAs to impose specific obligations as and when appropriate'.

The interview with Mr Stuckmann indicated that the European Commission's actual objective is to promote innovation and investment in both content and infrastructure segments of the communications sector. He explained that these objectives are based on the concept of a virtuous circle of supply and demand which places consumers at the centre, where user demands incentivise businesses to invest and innovate. This objective, in the context of broadband service provision, embodies the inter-related yet competing interests of broadband service providers and users, both businesses and individuals. It can be inferred from this interview that the Commission treats citizen interest in broadband access as a broad objective and benefit of the open Internet or the best-effort network management principle. He explained that the Commission relates consumer interests to the benefits from the commercial relationships between broadband providers and consumers (both individuals and businesses) of such services.

The interview indicates that the Commission did not begin its net neutrality consultation with a pejorative view of traffic management. In line with the Commission's consultation document, analysed in 6.1, the interview implies the Commission's preference for competition as a means to implement its open Internet objectives. Mr Stuckmann indicated that competition was used as a determiner for reasonable or unreasonable traffic management because competition formed part of consumer interests. However, the policy outcome, the connected continent regulatory proposal, demonstrated that the Commission had turned away from its original position on traffic management oversight.

In addition to the discursive practice during the consultation process, Mr Stuckmann observed that the Commission's internal interest in regulatory harmonisation plays an important part in reshaping the Commission's decision on the policy measure. He explained that the concept of harmonisation

was to have a common rule that applied throughout the European Union. The open Internet provisions in the connected continent regulatory proposal, according to Mr Stuckmann, are 'full harmonisation', at least on the principles. He indicated that the Commission sees the benefit of this level of harmonisation given the borderless nature of the Internet and electronic communications services for both service providers and users. This interest ties back to the Commission's objective to promote investment and innovation using the consumer centric approach. Mr Stuckmann's account of the Commission's drive to develop net neutrality provisions confirms the analysis in Chapter 6 that the Commission's actual objectives, values, interests and problem definition play an important role in shaping the EU policy outcome.

Interviews with the US and UK based pro-traffic management or network diversity advocates confirm the analysis in section 6.2 that their interests in the net neutrality policy and broadband service provision lie in traffic management flexibility. These advocates include broadband providers, their industry groups and some consumer/public interest groups. It can be inferred from the interviews that their actual interest is born from the idea that broadband providers need this flexibility to experiment with different levels of access service and pricing models in order to stay competitive in the market and be incentivised to invest in network upgrades. This idea aligns with the Sidak (2006) and Yoo (2005, 2004) economic arguments in support of network diversity (see 4.2.2).

Given their actual interest, these policy actors oppose *ex-ante* regulation. Driven by this business idea, they represent traffic management as business necessity and user benefits, as opposed to a problem. They also represent competition in the retail broadband access market condition as efficient in order to disqualify *ex-ante* regulation as an aspect of regulatory oversight for their services. Their actual discourse structure is featured in Figure 22.

Figure 22 The actual pro-traffic management and self-regulation discourse structure
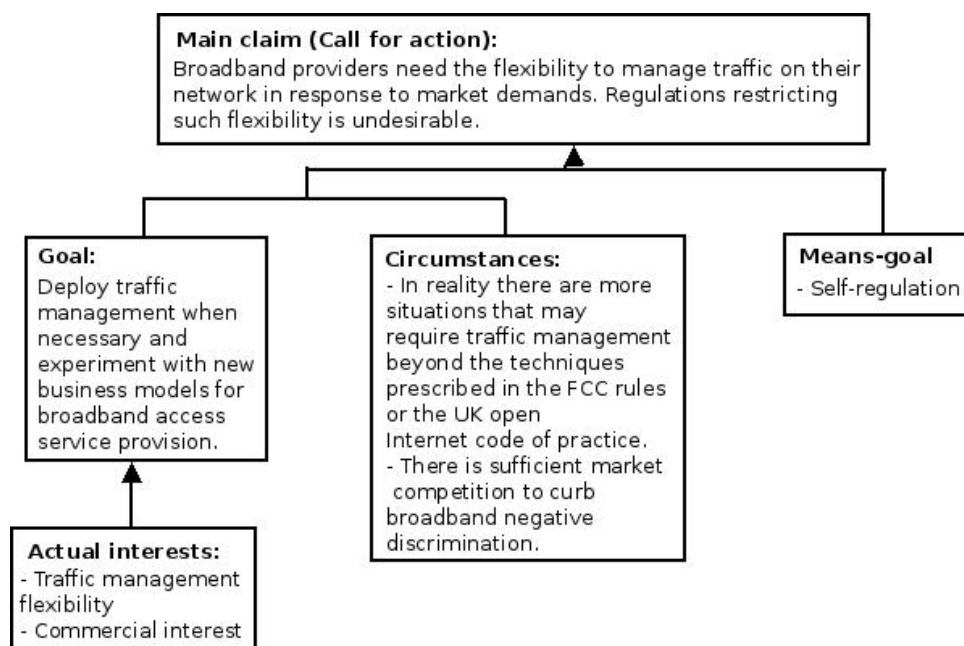
According to Mr Hultquist, AT&T regards traffic management flexibility as a 'need' to be able to respond to the demands in the market. He stressed that this need does not necessarily imply a particular business model that broadband providers want to pursue. This 'need', he said, stems from the fact that broadband providers 'don't know what business model there is going to be a demand for'. Both the 2011 and 2015 open Internet rules, therefore, compete with AT&T's actual interest. Yet, the company did not challenge the 2011 rules because the company, said Mr Hultquist, perceives the exemption of wireless broadband from the non-discrimination rule as 'a decent compromise'. This compromise, he indicated, gives AT&T sufficient traffic management flexibility and does not produce what it considers to be a 'too heavy-handed' set of regulations. However, AT&T joined other telecom companies and trade associations to overturn the FCC decision to reclassify broadband services as Title II utilities (Takala 2015).

Verizon's former executive, Edward Shakin, commented that '[broadband providers] have every incentive to want to make sure that their product is as robust as demand requires'. He further remarked that the FCC 2011 rules, particularly the non-discrimination rule, reasonable traffic management and specialised service are 'very foggy'. The lack of clarity, he said, makes broadband providers 'very nervous'. His comment implies that the lack of clarity undermines the flexibility

that the FCC intends to provide for broadband providers through its exemption for 'reasonable traffic management' and 'specialised services'.

Unlike AT&T, Verizon challenged the FCC 2011 rules. The oral argument on the case was heard at the D.C. Circuit Court on 9th September 2013. In its argument, Verizon questioned the FCC's authority to stipulate the open Internet rules and the validity of the no-blocking and non-discrimination rules. The company argued that these rules bear the characteristic of the common carrier obligations, which had long been abolished and thus cannot be reapplied to broadband providers. This type of regulation, it contends, restricts broadband providers' freedom to manage the traffic on their broadband networks. Mr Shakin commented on the oral argument regarding the non-discrimination rule that the challenge to the rule had nothing to do with the details of the rule. The prohibition of imposition of common carriage obligation on broadband providers and the fact that the non-discrimination rule verges on such obligation forms the basis of the Verizon argument.

The analysis of the interview with the Senior Vice-President for Regulatory and State Legislative Affairs at Comcast, Kathryn A. Zachem, indicates that Comcast shares the Verizon view that the non-discrimination rule embodies the characteristic of a common carrier rule. Comcast, however, did not challenge the 2011 open Internet rules. It can be inferred from the interview with Ms Zachem that Comcast had no interest in challenging the 2011 rules because it has a different business portfolio from Verizon. Neither Verizon nor Comcast were party to the legal challenge against the FCC 2015 rules (Takala 2015), though Verizon is alleged to have been preparing a plan to bypass the 2015 net neutrality rules using data caps (Reed 2015).

The UK-based broadband providers and the supporting industry group share with the US providers the same interests in traffic management flexibility and no (or self-) regulation. According to the interviews with Mr Banner, Mr Heaney, Mr Wileman and Mr Forsyth, broadband providers' actual interest in traffic management flexibility is rooted in their commercial ideas. These ideas include provision of broadband access service at a quality that is compatible with users' expectation and provision of a variety of services in response to consumer demands. Mr. Heaney stated that 'generally, if somebody is offering TV content to one of our customers over our network, it is in our interest to make sure that the delivery of that is good'. Mr Wileman explained that a broadband provider needs the flexibility to manage its network because 'in reality, there are more situations that may require traffic management beyond only those very exceptional circumstances detailed in the Code of practice or legislation, given that broadband networks are a finite, shared resource'.

Counter-arguing the potential harm from traffic management, Mr Forsyth said that BSkyB has no incentive to discriminate against rival content providers. He explained that 'if we made [our customer choice] less than optimum they would move and take BT broadband or Talk Talk or someone else'. His explanation echoes the UK state policy actors' argument in support of self-regulation and a preference for competition as a means to deter a converged provider such as BSkyB from discriminating against unaffiliated traffic or content to the detriment of consumers. BSkyB's preference for competition as a means to regulate broadband service provision aligns well with the other broadband providers interviewed. Broadband providers' interests and regulatory preference reflect the influence of neoliberal ideology. Both the interests and regulatory preference are satisfied by the UK net neutrality policy outcome, but not by the European Commission's approach.

Mr Forsyth commented that BSkyB welcomed the UK's self-regulation governed by the open Internet Code and the principle of the EC's net neutrality provisions in the connected continent regulatory proposal. However, he said that the company perceived the Commission's means-goal, regulation, as a 'major concern' because it restricted the company's flexibility to adapt to market changes. Mr Banner and Mr Heaney indicated that BT and Talk Talk shared the same position as BSkyB on both the UK and the Commission approach to traffic management oversight. Mr Banner remarked that EU regulation requires member countries to apply the law word for word; thus, 'people get more animated about what is going to be in the regulation'. He thought that this would make it even more challenging to reach an agreement on the content and wording of the regulation being developed. He therefore believes that it would have been easier if the Commission had opted for a directive or recommendation to allow member countries the flexibility to devise appropriate measures for their specific context to achieve the regulator objective.

Mr Heaney commented that in the area of the Internet, legislation 'is a blunt tool'. Since the policy process at the EU level is not yet complete, these policy actors indicated that they would continue to advocate self-regulation through the UK government and direct contact with MEPs and the commissioners. Mr Wileman noted that the company did not oppose the principle of the UK code, but has not yet signed on for the code because '[the company] didn't think it was the right time to do so'. Like other UK-based broadband providers, Virgin Media objects to regulation. The company, he said, welcomed the specialised service provision and accepts the consumer protection provisions in terms of consumer access to lawful content and traffic management transparency.

Mr Wileman further suggested that there was a broader connection between broadband providers' interest in traffic management and investment. He explained that in reality the investment in the upstream capacity is generally not dimensioned in such a way that provided for all end users to utilise their maximum capacity at the same time. To provide for all the maximum capacity of all the last-mile connections combined, he commented, would mean to over-capacity provision for most of the time and there was no economic case to do that.

Agreeing with these providers, Mr Blessing, commented on the Commission's net neutrality provisions and regulatory option that they are designed 'to solve a problem that is not actually a problem in the UK'. Mr Blessing further indicated that the different levels of market competition in the US and Europe (including the UK), provided incentives for UK and EU-based broadband providers to not charge content providers for carrying their traffic, except in cases of commercial arrangements. Such cases, he said, were beyond the power of regulation unless the legislature was prepared to interfere with contractual negotiations between broadband and content providers.

In competition with broadband providers is the actual interest in non-discriminatory broadband access of content providers (broadcasters, content intermediaries and over-the-top service providers), consumer and public interest groups. Such interest applies to all policy actors in this category across the Atlantic. Overall, the preferred means to promote this interest is regulation or co-regulation. Driven by this interest, all net neutrality advocates define traffic management as a problem and contend that such practice does more harm than good to their actual interests. They also represent competition in the retail broadband access market condition as insufficient to police broadband providers' service provision. They therefore prefer regulation or co-regulation as a measure. Their actual discourse structure is featured in Figure 23.

Figure 23 The actual net neutrality and pro-regulation discourse structure
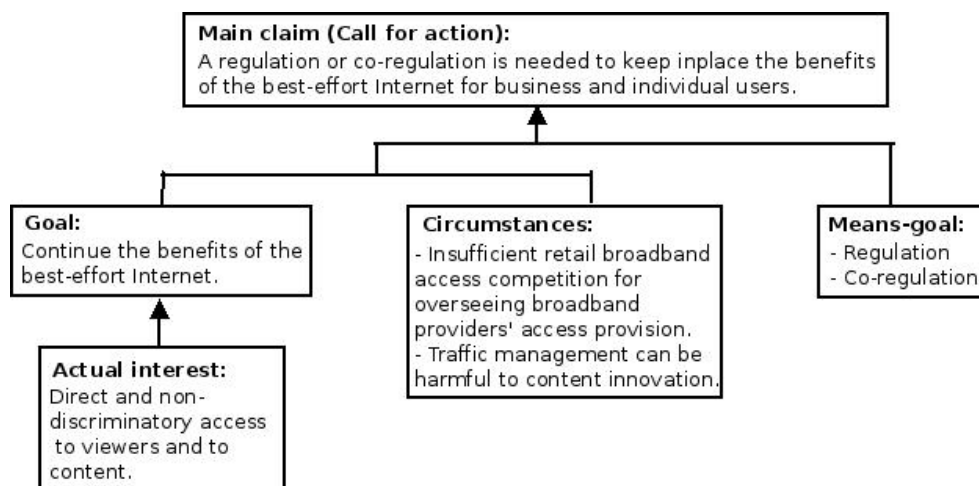
Interviews with Mr Whitt, Mr Libertelli and Mr Kasper indicate that the US-based content providers are most concerned about broadband providers' discrimination against unaffiliated traffic. Consequently, their actual interest lies in non-discriminatory access to their customers via the Internet. This interest is shaped by their business ideas and models. The concern highlights the competing interests of broadband providers to deploy traffic management and of content providers in the best-effort Internet that allows them equal and direct access to their viewers or individual users. These providers represent traffic management as harms to users' interest in access to online content and service of their choice. To protect their interests, the US-based content providers advocate regulation as a means to oversee broadband providers' traffic management practices. They back their claim for *ex-ante* regulation by representing competition in the US broadband access market as inadequate to prevent harms from traffic management. This representation indicates a driving perception, noted Mr Libertelli and Mr Kasper, that the transparency rule and market competition are insufficient.

Given the content providers' actual interests, these policy actors are disappointed with the D.C. Circuit Court ruling on the *Verison v FCC* case delivered on 14th January 2014. Overall, these providers support the 2011 rules. However, Mr Kasper cautioned that the 2011 rules do not recognise the difficulty of individual users to detect broadband providers' discriminatory practice and barriers to file complaints. This can undermine the enforcement of the rules. Mr Libertelli indicated that NetFlix is concerned about the exemption of wireless Internet access service from a number of the rules. He contends that all the rules should be extended to broadband access provision on wireless networks. Mr Kasper's concern has not yet been fully addressed by the 2015

open Internet rules as the enforcement measure (FCC 2015b: 19742) remains the same. Mr Libertelli's concern, however, has been addressed by the 2015 rules.

Google, according to Mr Whitt, maintains that provision of broadband access service on wireless networks is more complicated than on fixed-line networks and understands that wireless providers may need more flexibility to manage traffic on wireless networks. Google's empathy for wireless broadband providers is interpreted by a former fellow at the New America Foundation, James Losey, as a sign of the company's interest in tightening its grip on the wireless and Android markets. Mr Losey participated in developing the organisation's response to the FCC net neutrality consultation. He observed that, aiming to become a dominant operating system, Google moved downstream from search to operating system, 'make[ing] it easier for people to access Google services and depend on the services for their everyday life. So wireless broadband as a platform is very important to the company'. His comment implies that Google's actual interests in direct access to users through wireless connection may have driven the company to compromise on its position concerning the wireless platform. This interest, again, is shaped by Google's business ideas.

The US-based consumer and public interest groups are interested in non-discriminatory access to online content and services of their choice. In advocating for such interests, these groups emphasise the societal benefit of individual users' broadband access. These, according to EFF's Media Relations Director and Digital Rights Analyst, Rebecca Jeschke and Mr Schwartzman, include free speech and diversity of broadband access and content choices. Like content providers, these groups perceive traffic management as a threat to their actual interest and represent such practice as a problem which the market mechanism, competition, fails to address. To promote their interest, most of the policy actors support the FCC's adoption of the open Internet rules. Mr Swartzman explained that the benefit of *ex-ante* regulation is that it is 'self-enforcing', is likely to allow fewer problems to emerge and can prevent regulatory delay.

Despite general support for the principle of the rules, Mr Weinberg warned that the rules are 'burdensome to collect evidence' to construct a complaint against a violation. This, he said, undermines the efficacy of rule enforcement. Ms Boothby indicated that the organisation 'supports regulation where there is no competition'. She contends that broadband access service creates a 100% monopoly on all incoming traffic and websites because once the individual user picks a service provider, content providers have no choice but to reach that consumer via that same broadband providers. However, Ms Jeschke indicates that EFF holds a different opinion toward

regulation, fearing that the FCC might use the rules as opportunities to justify regulation of online content as well.

The UK-based net neutrality advocates, comprising mainly broadcasters, over-the-top service providers and consumer and public interest groups share the same actual interest in non-discriminatory broadband access as their US counterparts. The way they represent their actual interest, however, differs due to the emphasis of the debate and the politics surrounding the subject matter. These differences are demonstrated through discourse analysis in Chapter 6.

In their formal response to the consultation, they advocate *ex-ante* regulation and the exercise of the *ex-ante* power prescribed by the 2009 revised electronic communications package, such as the imposition of the minimum quality of service requirement. However, interviews with these policy actors reveal that they are not as animated about the policy outcome in the UK, which competes with their formally expressed interest in *ex-ante* regulation. Neither are they excited about the EC's connected continent regulatory proposal, which is likely to provide stronger protection for their actual interest in non-discriminatory access.

Interviews with Mr Wilson, Ms Parry, and Mr Hadadi indicate that these public service broadcasters' (PSBs) actual interest is in 'direct access' to the audience. This interest is connected to their universality remit. Despite their official statements (see 6.2), none of these broadcasters indicated in the interviews that they would foreclose the use of specialised service as a means to deliver their online content to viewers. They all said they prefer to rely on the best-effort principle of Internet network management for their online content distribution. However, Ms Parry indicated in the interview that ITV might explore the specialised service route 'in cases where the traditional open Internet failed to deliver'. Corresponding to ITV's position, the ACT Director, Ross Biggram, noted 'Broadcasters [both UK and EU-based] would like to leave room for a commercial arrangement for specialised service and prioritisation'. Mr Sahel, however, said that Skype stands against both negative and prioritisation on the best-effort Internet. He said that the organisation accepts prioritisation carried out as part of specialised or managed services, which run parallel to the Internet, or 'on top of the Internet', such as Virgin Media's streams of online gaming, video on demand and their TV channels.

Given PSBs' actual interests, Mr Wilson, Ms Parry and Mr Hadadi did not object to the UK government's decision to address traffic management concerns with self-regulation guided by the

open Internet voluntary code of practice. However, both question the efficacy of the code because not all the broadband providers signed up to it. Ms Parry added that it remains to be seen whether the code is enforceable as, to date, violations of the code by signatories have not yet surfaced. Mr Wilson also raised another concern that the low level of consumer traffic management awareness and provider switching difficulty may undermine the efficacy of the code.

Given the UK code, PSBs do not immediately expect to have a regulation. Mr Wilson cautioned that there is a risk of over-regulation. He commented on the Commission's regulatory proposal that its original draft 'is too detailed and should be stripped back' so that the basic principles about no-blocking, non-discrimination and reasonable traffic management become high level principles that can be enshrined in the EU law without being inflexible.

Ms Parry commented on the Commission's net neutrality provisions in the connected continent regulatory proposal that, with the UK market condition and the self-regulatory code in place, the Commission's regulation is redundant. She added that the idea of a regulation sounds great as it enshrines the open Internet proposal further, but ITV is 'slightly pragmatic' about the final policy outcome in that it is difficult to predict how many of the open Internet provisions will be watered down. She also foresaw challenges in securing consensus on the substance of the connected continent proposal. She remarked that it was uncertain to what extent the provisions would be diluted as they go through the legislative process. As such, although the regulation would provide Internet users with stronger protection, the substance or the language of the law may be compromised. Mr Hadadi said that Channel 4 agrees with the Commission's net neutrality provision and accepts that there should be specialised service, but that these services 'should not crowd out the best effort Internet'.

Mr Sahel, however, is not convinced that the telecom sector will respond positively to self-regulation. He remarked that the fact that not all the UK broadband providers signed up to the UK code could undermine its efficacy. He added, 'The UK experience has shown that for self-regulation to work, you really need to see that the government and the regulator are behind the process and that if we don't get the satisfactory outcome in self-regulatory process, the government will introduce legislation'. However, he did not think that there was enough pressure from the government or the regulator to encourage these providers to play fairly. He indicated that Skype, now owned by Microsoft, would continue to advocate for regulation at the European level to compensate for what it perceives as a weakness in the UK approach to traffic management

oversight. The industry's reactions to the net neutrality principle and the approaches of the UK government, regulator and the Commission contribute specific examples in support of the switchman analogy (Weber 2009: 63 - 64) that ideas, in this case business ideas, shape interests and drive actions.

Consumer and public interest groups' actual interest also lies in non-discriminatory access, but for end-users to access the online content and service of their choice. According to Ms Kisielowska-Lipman, such groups, instead, are concerned about the impact of specialised services on the provision of best-effort Internet and the affordability of premium services delivered through managed networks for low-income users. Driven by this interest, the organisation officially advocates for the implementation of a minimum standard of service 'to ensure that vulnerable consumers can access the Internet at an affordable price' (see 5.2). The Senior Policy Advisor at Which?, Sumedha Pathak, is more concerned about traffic management transparency and consumers' ability to switch providers as a means to ensure that consumers receive suitable broadband service for their demands. ORG, said Mr Killock, is interested in stronger regulation to guard against the service provider and user detriment as a result of 'discrimination against a particular service'.

Consumer and public interest groups question the efficacy of the UK self-regulatory code due to the absence of universal commitment from all the UK broadband providers, users' low level of traffic management awareness and provider switching barriers. Mr Killock views the UK 'voluntary self-regulatory agreement' as being 'highly problematic' because the principles that such measure can implement are likely to be limited within the perceived interests of the companies working together to achieve an agreement on the principles. The interviews with these policy actors indicate a demand for stronger protection, which is supported by the Commission's open Internet provisions in the connected continent regulatory proposal. Thus, ORG, according to Mr Killock, welcomes the Commission's proposal as amended and approved by the European Parliament. He interpreted the intention of the amendments as attempts to 'reduce the damage and remove some of the worst aspects of traffic management and discrimination from the original proposal'.

Compared to the values, interests, and circumstances that policy actors use to construct their discourse, the actual interests of policy actors that surfaced from the interviews highlight the ideas that shape the interests. These ideas are classified into three groups: 1) state-policy actors' ideas for policies and regulation, 2) industries' business ideas for competition, innovation and investment

incentives, 3) users' and civil society's ideas for their contractual relationships with content and broadband service providers. All these ideas are connected to market provision of communications services and state policy actors' oversight of such provision.

Policy actors' actual interests shaped by the ideas that emerge from the interview analysis explain, from an agency perspective, the discourse structure and construction that surfaced in the analysis in Chapter 6. The connection between interests, ideas and discourse illustrated in this section exemplifies Weber's argument (2009: 63 - 64) that ideas shape both interests and actions. Here, the interests being shaped by the three sets of ideas identified in the previous paragraph are the interests of 1) state policy actors in regulation (FCC) and self-regulation (Ofcom), 2) broadband providers in self-regulation and traffic management, 3) content providers in non-discriminatory access to their audience and 4) individual users in non-discriminatory access to content. These interests drive actions in the form of discourse.

Mapped with the power relations among policy actors portrayed in the policy networks (see 7.1), policy actors' discourses circulated in both the formal and informal policy process are exercises of power with an aim to mobilise and inscribe ideas which shape interests and objectives in net neutrality policy. Discourses constructed to mobilise ideas, exchanged, shaped and reshaped throughout the policymaking process, therefore, serve as examples confirming the observation that ideas can be mobilised to shape policy agenda (John 2012: 126 - 27). Based on its discourse analysis in Chapter 6 and the interviews here, this research further argues that ideas can also be mobilised to shape policy outcome.

7.3. Policy engagement and strategies

Highlighting the interaction between the input and decision-making stages in the research framework (Figure 2, page 86), this section explains policy actors' engagement strategies in relation to policy precedents (see 5.1), genre of communication (see 5.2), network and power relations in policy making (see 7.1) and the relationship between ideas, interests and actions (see 7.2). In contribution to the existing net neutrality literature, the analysis here reveals how policy actors mobilise ideas or biases within the limits of structural constraints to achieve their preferred policy outcome. This analysis exemplifies the interaction between structure and agency in the concept of policy network and argument that John (2012) made: ideas can shape action.

7.3.1. State-policy actor engagement practice: The rules of the game

This section explains how state policy actors interpret policy precedents: 1) APA (1946) for the US case and 2) the European Community Act (1972), the 2009 revised regulatory package for electronic communications, the Communications Act (2003) and Ofcom's regulatory principles for the UK case and how such interpretation shapes the rules of policy engagement in the US and UK.

The US case

In the US, the APA (1946), a federal statute, defines the procedures for the administrative agencies of the US federal government in their proposal and establishment of regulations. The basic requirements of this act include: 1) informing the public, 2) providing for public participation in the rulemaking process, 3) establishing a uniform standard for the rulemaking and adjudication practices and 4) defining the scope of judicial review.

Governed by the act, the FCC, according to Mr Del Nero, developed its rulemaking procedures, a three-step process comprising the development and publication of the notice of rulemaking (NPRM), the initial comment period, which invites people to submit their initial response to the NPRM and the reply comment period, during which people can reply to what others have said. He added that the public is allowed to meet the decision-makers at the FCC through a proceeding called 'permit but disclose' or ex-parte, provided that a letter summarising the matters discussed in the meetings is submitted and made publicly available in the FCC achieve. He stressed that the objective of the process is to gain 'input' from the public' so that its views can be accounted for in the final rule. According to Ms Weiner, the ex-parte process is prescribed by the regulator's own regulation to ensure openness and transparency in the process. She added that the act also required the FCC to make decisions and take actions based on facts in an objective manner. The act, said Ms Weiner, obliged the FCC to explain the basis for adopting the rules with reference to the legal authority under which the rules were proposed or adopted, arguments and evidence submitted in the proceeding.

In practice, the FCC, according to Mr Del Nero and Ms Weiner, issues the NPRM, sets out the initial comment and the reply comment periods and meets with interested parties. After the meeting, they said, these policy actors submitted a summary of their meeting with the FCC. The regulator, they note, also runs workshops and hosts panels of experts with a variety of views on the

issues in cases of rules of major importance. In developing the final rules, the FCC considers all the arguments and evidence filed; then, the five commissioners 'vote on what the appropriate rules should be'.

Both the APA and the FCC's own regulation, shaping its rule-making procedure, indicate strong value for participation, although there remain restrictions on the subject and scope of discussion set by the FCC (see section 6.1). The APA requirement for FCC decisions to be based on facts places an obligation on policy actors attempting to influence FCC decisions to find scientific evidence to support their arguments. In this case, policy actors also need to reference the legal authority and other evidence that justifies the FCC promulgation of the rules it develops. Given the state policy actors' account of the rule-making procedure, the rules governing US policy engagement make the net neutrality policymaking in the US resource intensive.

The UK case

In the UK, state policy actors' accounts of their roles and the rules of engagement in policymaking exemplify the concept of limited liberal representative democracy, which Marsh (2008, 2002) observed to have resulted in power inequality in policymaking. Mr Milton indicated that as far as the government is concerned, there was no formal consultation in the case of net neutrality policy. He observed that the UK net neutrality policy debate started with the DCMS minister's decision to give a speech on the open Internet based on his political interest and the popularity of the topic. The speech, he explained, then became the equivalent of a green paper, laying out the government's position for feedback and subsequently attracting a large number of responses.

In developing the speech, Mr Milton noted that the department had an internal assessment of the subject, looking into similar cases in the US and other European countries. He added that the department relied on the experience and expertise of the staff engaging in the policymaking at the EU level and recommendations regarding traffic management transparency from the BSG. He observed that there was some lobbying from the net neutrality advocates, such as Skype, but not a great deal from broadband providers, who were in a 'defensive position'.

Based on the discourse analysis in Chapter 6, broadband providers' position on both the traffic management principle and regulatory oversight align well with the government's position. Given the UK political system and the way the decision-making network operates (see 7.1), this alignment

of policy positions may be the reason why broadband providers appear to be less aggressive in their lobbying. Mr Milton noted that the government started to involve the businesses and other organised interest groups because there were obvious disagreements with the speech. This is evident in the joint open letter to the minister regarding the open Internet (Lynn et al. 2010).

In response to this resistance, Mr Milton said, the department housed a ministerial roundtable discussion, involving participants representing all viewpoints. From the roundtable discussion, he observed that there was 'quite firm disagreement about things' and that without a steer from the government, a consensus would not have been achieved. That 'steer', he explained, was the Minister's assignment to BSG to facilitate the development of the open Internet voluntary code of practice. The code is meant to prescribe three principles: access, non-discrimination on the basis of commercial rivalry and traffic management transparency (BSG 2014). The development of the code opened up a platform for negotiation among all stakeholders. Both the roundtable discussion and the subsequent BSG working group to develop the open Internet code can be interpreted as the government involving the public in its decision-making. However, Mr Milton's description of the process indicates that public participation in both forums is by invitation only. This limited invitation to participate distinguishes the UK process from that of the US where the barrier for public participation in the process lies in the resource intensiveness of the process.

Almost parallel to the BSG working group is the Ofcom consultation. According to Mr Olivier, there are three regulatory precedents that shape this consultation: the revised 2009 regulatory package for electronic communications, the Communications Act (2003) and Ofcom's own regulatory principles. The first two prescribe the regulator's duty in matters concerning provision of broadband Internet access. The last defines how Ofcom carries out its duties. Based on its regulatory principles, Ofcom started a consultation, which can be interpreted as a formal engagement with other policy actors and serves to ensure that Ofcom's consideration of other policy actors' input is 'appropriate'. Ofcom's regulatory principles, according to the Office of Communications Act (2002), also prescribes that the regulator's decisions and interventions be 'evidence-based, appropriate, consistent, accountable and transparent in both deliberation and outcome'(Ofcom 2002).

In practice, Mr Olivier explained that the regulator issued the discussion document (Ofcom 2010), received the responses to the consultation, considered these responses and held further meetings with certain policy actors where necessary. Ofcom's decision then went through internal reviews

within relevant groups and was reviewed by Ofcom's board. He recalled that there were 'heavy board discussions' during the review.

Ofcom's consultation procedures and practices appear to share similar principles to those of the FCC, particularly in terms of openness, participation and evidence. Ofcom's regulatory principles require policy actors to substantiate their claims and arguments with factual evidence. However, Ofcom's policy position and objectives set out in its discussion document (2010) were shaped by the government's position and approach to net neutrality rather than public input in the way that the FCC's policy position was. According to Mr Sahel, who worked in what is now the DCMS about the time net neutrality began to emerge, the government's position was formed partly from Ofcom's input regarding the efficacy of its regulatory power and existing legal infrastructure.

In addition to the national policymaking procedures and policy practice, UK policies are also influenced by EU legislation and its legislative procedures thanks to the European Community Act (1972). The binding of the EU legislation motivates both the UK government and other UK-based policy actors to engage in EU legislative procedures to defend their objectives, values and interests. The UK government, according to Mr Milton, engages directly with the European Commission to ensure that the Commission's position is not too different from that of the UK government. The interview analysis indicates that other UK-based policy actors either attempt to influence the UK government while it is formulating its position or both the government and the Commission as well as other MEPs.

In the case of net neutrality, Mr Stuckmann explained that the Commission started off with an internal review of the problem, comparing the situation in Europe with that in the US and kept monitoring its development. He noted that the situation in the US served as evidence of the consequences of a market with fewer choices of service providers. When the Commission decided to 'co-ordinate' the net neutrality issue with the development of the connected continent regulatory proposal, the legislature asked BEREC to conduct a study to evaluate the problem. BEREC studies, Mr Stuckmann observed, serve as a 'kind of stocking exercise', allowing the Commission to evaluate the severity of blocking and throttling and limitations posed on the open Internet. The BEREC finding, he said, indicated that there 'were some issues' with limitations to users' Internet access services. Based on that finding, the Commission then decided to take further steps to address the problem.

Mr Stuckmann added that the Commission also conducted consultations concerning traffic management and regulatory oversight and organised policy and technology working groups as part of their development of the regulatory proposal. The purpose of these procedures, he explained, is 'to give all interested parties and the public the opportunity to give their view on the issue'. The Commission then analysed them and evaluated all the input against the Commission's knowledge, run additional studies and obtained expert input. He said the Commission might have organised 'an impact assessment' to evaluate the effect of the policy and regulatory options that the Commission is considering on its objectives and decided on 'the best option' for European society and economies.

Mr Stuckmann observed that the industries (telecom and content) are active participants in the process and that there were quite a lot of lobbying activities going on during the procedure. Such activities, he noted, take the form of private meetings. The policy working groups provide experts the opportunity to engage directly with the Commission. The analysis of the interview with Mr. Stuckmann indicates that the Commission's decision is based on evidence of traffic management and Internet access restrictions, regulatory options and the Commission's own policy objectives. He further explained that since the connected continent legislative proposal is a co-legislative procedure, there are a number of negotiation sessions underpinning the process.

According to Mr Stuckmann, the Commission has the right to initiate the legislation and does so with its own agenda together with those of the member states and the European Council. In the case of the connected continent, he noted that the European Council called for a proposal by the Commission; the Commission then followed the standard procedure for developing the legislative proposal and subsequently submitted it to the European Parliament for the first reading. The proposal was amended and approved by the Parliament on 3rd April 2014. It is now awaiting the approval of the Council of the European Union (the Council). Once approved, the proposal will be returned to the European Parliament for the final approval. These negotiations and the shared legislative power between the EU institutions in the co-legislation supports Pollack's description of the EU political system (2010: 30), which contributes to executive dominance. Mr Stuckmann's account of the EU net neutrality policymaking process concurs with the Young (2010: 53) and Richardson (2006: 4) observations that the EU legislative procedure is competitive and resource intensive.

Both the UK and EU policy practices, from the perspective of state-policy actors, indicate a degree of executive dominance. This perspective supports the argument made in section 5.2 that the formal process of consultation in these jurisdictions actually serves as a means to test the water. The degree of executive dominance reflected in the state policy actors' account of the UK net neutrality policymaking process confirms the observations of Freedman (2010, 2008), Marsh (2008, 2002) and Marsh et al. (2003) that the decision-making power in UK policymaking remains concentrated among a few decision-making elites. This finding supports the argument in section 6.3 that the saliency of the UK state-policy actors' net neutrality approach throughout the policymaking process indicates power concentration within the policy-making sub-network.

The unexpected shift from a directive or recommendation to regulation as an outcome of the EU net neutrality policymaking process (see 6.3) and Mr Stuckmann's account of the EU net neutrality process, on the other hand, highlights a challenge the competition of ideas and interests pose to the executive dominance in the EU policymaking process. The executive dominance surfacing from the analysis in section 6.3 and the interview concur with the Pollack (2010: 30) and Young (2010: 53) observation. The competition reflected in the negotiations and multitude of interests and policy actors, observed by the state policy actor interviewed, supports Richardson's perception. The power relations, policy practices and requirements of facts and evidence to justify calls for action and the policy decisions discussed make the UK and EU policymaking process resource intensive.

7.3.2. Non-state policy actor engagement: Resources and strategies

This section explains non-state policy actors' engagement practice and strategy development based on their interpretation of policy precedents, rules of engagement and practices as observed by state-policy actors (see 7.3.1), ideas and interests that shape their actions (see 7.2). It argues, in contributing to the existing policy studies literature discussed in section 3.3, that these rules of engagement make policy engagement resource dependent and intensive to varying degrees. Thus, these rules and practices act somewhat as entry barriers for public participation in policymaking, leaving the decision-making exclusive to a handful of policymaking executives.

The US case

The US-based non-state policy actors indicated, in line with the state policy actors, that the APA sets a basic standard practice in policy engagement. Mr Libertelli describes the official written response to the FCC rule-making process as a 'lawyering process' because the comments and reply

comments that policy actors file read like legal briefs. He remarked, however, that decisions are not reached on the merits of the briefs alone; follow-up meetings, known as ex-parte presentations, are required to flesh out details of the arguments made in the briefs. To ensure fairness and guard against undue influence on decision-makers, the FCC's rules governing the ex-parte proceeding, Ms Zachem explained, require non-state policy actors to submit a notice of ex-parte, acknowledging the meeting and summarising the subjects discussed in the meeting so that other policy actors were aware of the developments on the subject and adjusted their actions accordingly. The benefit of ex-parte meetings, according to Mr Shakin, lies in the targeted discussion policy actors can have with the FCC, allowing policy actors to highlight the matters that the policy actors or FCC staff deem significant. The comments and replies to comments, he said, were much more general.

Despite its benefits and intention, the rules governing the ex-parte meetings, policy actors agree, make the policymaking process resource intensive. Mr Hultquist describes the production of notice of ex-parte for the 2009 open Internet NPRM as 'a bit of a cottage industry'. Similarly, it can be interpreted from the interview with Mr Shakin that the ex-parte proceeding is labour intensive because of the amount of information required in the ex-parte notice and the short period of time allowed. In fact, according to his description of what policy actors are required to do, keeping track of all the filings and developing responses to those filings and ex-parte meetings is resource intensive.

However, all the US non-state policy actors interviewed indicated that they have long been engaging directly with the FCC and members of Congress on matters concerning net neutrality beyond the context of the rule-making process. These meetings, they said, were not required to be made publicly available. They observed that there are no written rules to ensure that the meetings outside the formal rulemaking procedure are above board and fair, although these meetings can have influence on policy-makers' decisions. These unofficial meetings are known as lobbying. It can be inferred from interviews with Mr Whitt and Mr Libertelli that continuous lobbying over an extensive period of time concerning industry practices and oversight can lead to a 'regulatory capture'. This situation results from the FCC's familiarity with the business models and perspectives of the regulated companies and sympathy for what these companies are doing. Since lobbying takes place outside the rule-making procedure, the practice and its tentative effect on the regulator's perspectives are beyond the APA jurisdiction to curb.

In the context of net neutrality policymaking, the regulated companies are the telecom and cable companies who advocate no regulation and flexibility of traffic management. Mr Whitt and Mr Libertelli both perceive that these companies have long been engaging with the FCC staff on other matters as well as net neutrality and would have built close relationships with the staff. According to Ms Boothby the technology companies, on the other hand, only became 'more politically savvy' in the early 90s and started building relationships with the FCC and congressmen to defend their interests attached to carrier regulations or the lack thereof. The analysis of the interviews with representatives of technology companies and business users of broadband services indicates that these companies perceive the long term relationship between carriers, their regulator and congressmen as one of the advantages the telecom and cable companies have over them. They view the advantage broadband providers have as a contributor to power inequality in US net neutrality policymaking.

The US policy actors interviewed also perceive that the requirement for the FCC to make decisions based on facts requires them to dedicate considerable resources to establishing such facts to support their calls for action. Mr Hultquist noted that AT&T dedicated substantial resources to comply with this requirement so that the company's calls for actions and arguments were 'well-grounded in technical expertise, in economic validity and lawful'. An example he gave included AT&T's investment in its own research lab, internal lawyers, external counsels and a number of economists. He explained that research from the AT&T lab is used to 'educate' policymakers about how networks work and explain the rationale of the company's business operations. In this case, 'educate' connotes a form of lobbying in addition to private meetings with policymakers and their staff.

Mr Whitt and Mr Libertelli indicated that similar resources were needed to justify their calls for action. According to Mr. Whitt, Google also invested in technical experts to build its case. The interview with Ms Zachem implies that facts and findings are the basic necessities for calls for action due to the APA requirements. The US policy actors' commitment to and reliance on facts and findings to support their calls for action and the decisions described here and in section 7.3.1 verge on obsessive. This fixation, resulting from the intention to make the process fair, impartial and accountable, can hamper the FCC rulemaking objective toward public engagement. This requirement and practice risk excluding the discourses that are not well-grounded in facts, economic theories and legality due to insufficient resources. Corresponding to this observation, Ms Zachem indicated that most policy actors know how to participate in the process, but in general it

might be harder for smaller and less technically capable companies to advocate their proposals on their own.

The interview analysis indicates that policy actors form a coalition and seek representation from industry/trade organisations to equalise the inequality of power in policymaking as a result of inferior resources. According to Mr Swartzman, the benefit of a coalition lies in its connotation of a common cause and agreement, all of which appeals to policymakers at the FCC and in Congress. Agreeing with Mr Swartzman, Mr Weinberg commented that coalitions form a huge part of the organisation's strategy for issues like net neutrality and is 'critical' for successfully advocating the organisation's position. This strategy, he observed, requires policy actors to identify businesses and associations that share the same policy interests and positions, cultivate an alliance and coordinate policy advocacy with allies. This use of coalition or the structure of network serves as a strategy to influence policy and policy actors' leverage over those advocating competing policy options.

In this respect, the sub-networks born to coalitions act as an agency, advancing a particular discourse. These sub-networks in the US context are observable in the coalitions between technology companies and public interest groups and, according to Mr Hultquist, small broadband providers seeking representation in the rulemaking procedure through trade/industry associations. Examples of such associations include US Telecom, the National Cable and Telecommunications Association (NCTA) and the American Cable Association (ACA) to neutralise power inequality.

Mr Whitt noted that Google also worked in collaboration with the ISPs and the Broadband Technology Advisory Group, comprising Google, Verizon, AT&T, Comcast and several non-profit representatives, to develop appropriate technical solutions for traffic management concerns. He explained that these solutions were developed with an aim to reach an agreed solution to the technical problem that sparks net neutrality. Google's cross-interest network or coalition with broadband providers can be interpreted as policy actors' practical attempts to achieve a policy consensus on an extremely polarised issue in parallel to the political activities they are all involved in.

Mr Libertelli said that, similar to Google, 'Netflix worked very closely with a set of academics and public interest and consumer groups to equalise the relative inequalities between the company and major broadband providers. The aim of this coalition is to share information about the implications of traffic management for user access to the over-the-top (OTT) service of their choice and,

through the awareness created, activate these users to support the company's course'. The function

of coalition discussed here indicates two sources of power: knowledge (or facts) and public support.

The value of knowledge reiterates the importance of facts and findings in securing support and

influencing policies in the US policymaking process. The way Netflix mobilises public support

highlights another strategy widely used in the US to influence policy: public opinion shaping.

Mr Libertelli observed that given the strategic importance of public support, policy actors condition

public discussion and opinion through various PR mechanisms. These include publication of

whitepapers and other opinion pieces by think-tanks. The media, therefore, has a role in spreading

the news and contributes to awareness building, allowing policy actors to raise the profile of net

neutrality as a policy issue. The impact of public voices on policy decisions, i.e., Public Knowledge,

according to Mr Weinberg, rallies individuals to file comments during the rulemaking process as it

has armed them with information about the importance of net neutrality and how to engage in the

process. He commented that the number of people marshalled for or against a particular policy

decision carries sufficient weight to influence policies thanks to the US political system and its

underpinning concepts.

In addition to the actual public opinion fed into the rulemaking process, Mr Weinberg explained,

the coverage of the non-commercial press 'is highly suggestive of a high level of public

engagement'. In this respect both comments from the public on net neutrality and the coverage of

the issue by the non-commercial press serve as important tools for shaping policymakers' opinions

and decisions. Mr Weinberg's comment adds to Freedman's finding that media coverage

contributes to the shaping of policy discourses (2008: 87-88). In fact, on issues that attract

appreciable public attention like net neutrality, the ability to marshal a huge segment of the public

in support of the Public Knowledge discourse, he added, places the organisation on 'the same

general footing' as major businesses.

Policy actors such as AT&T, Netflix, Media Access Project and Public Knowledge are also aware of

the influence of discourse and narrative. This recognition supports the argument made in section

6.2 that policy actors represent their policy objectives, values and interests in a way that appears to

support state policy actors. AT&T, in its education campaign for FCC staff, for example, represents

their business models as conditions to network investment, which is one of the values underpinning

the FCC's policy objective. Similarly, Mr Libertelli indicated that the company also built the

economic impact of the over-the-top services into its discourse in support of net neutrality and

regulation to appeal to the regulator's economic values and interests. However, he recognised that the economic value in its discourses was weaker than that of broadband providers due to the greater volume of direct investment into network-rollout and upgrades compared to the cost-saving benefits of the OTT services. Similarly, public interest groups such as the Media Access Project and Public Knowledge build free speech rights into their discourse with an aim to appeal to the policymakers' commitment to societal values.

Non-state policy actors' engagement experience detailed in this section indicates that the US process emphasises lobbying, fact-finding and opinion shaping. All the policy actors interviewed regard lobbying the FCC staff, commissioners and congressmen as a norm. The APA requirements, from the perspective of non-state policy actors, result in an obsession with facts and findings among policy actors. This preoccupation makes US policymaking resource-intensive and can act as a barrier to policy actors with inferior financial and personnel resources to effectively engage in the process. However, policy actors have devised coalitions as a strategy to overcome this barrier and neutralise the power inequality due to inferior resources.

Opinion shaping is another strategy heavily used. Given the resources required to build up knowledge and publicise it, public opinion shaping appears to be a strategy available only to resource-rich policy actors or a coalition of policy actors, among which resources are shared. The opinion shaping and mobilisation of public support are powerful strategies for influencing policy, given the US political system. In a high profile case such as net neutrality, policy actors interviewed perceived that such strategies are among the determining factors for policy decisions. This is evident in the correlation between the amount of public support for net neutrality rules and the FCC decision to adopt tougher open Internet rules in 2015. This correlation indicates that public opinion shaping and public support are powerful strategies for counter-balancing the perceived power inequality between broadband providers, technology companies and public interest groups.

The UK case

The analysis of UK/EU-based policy actors' engagement experience indicates that the rules of engagement applicable to these policy actors are not as formally structured as those of the US. To the UK/EU-based policy actors, the Amsterdam Treaty and Ofcom's regulatory principles are the most concrete rules that apply. The former makes consultation and research, or fact-finding, a requirement for the EU legislative decisions; the latter prescribes consultation and evidence-based

decision-making by Ofcom. However, as established in sections 5.2 and 7.3.1, the UK and EU consultations serve more as formal platforms for the government, regulator and legislature to measure support for and resistance to their policy preferences. This actual function of consultation connotes a top-down decision-making process and degree of executive dominance. Given the circumstances, public participation in the UK case is not as ingrained and well-orchestrated in the process the way it is in the US. Based on policy actors' experience, the public is engaged only by invitation or when there is significant resistance to the government's proposal.

The actual function of consultation and its limited impact on policy outcome correlate with policy actors' emphasis on connections and lobbying as assets and strategies to influence policy. All the UK/EU-based policy actors interviewed indicated that meetings with the responsible DCMS civil servants and minister, the responsible Ofcom staff, the European Commissioners, the Commission staff and the MEPs are informal yet effective ways of communicating their policy positions to the decision-makers. Although these actors engage both formally through consultation responses and informally through private meetings with decision-makers, they place significant emphasis on the meetings.

Ms Kisielowska-Lipman commented that lobbying or a face-to-face meeting with decision-makers is crucial to ensure effective discourse circulation and idea mobilisation in the policymaking process at both the UK and EU levels. Interviews with executives at Which?, BBC, ITV and Channel 4 suggest that these companies share the same policy practice. Similarly, Mr Blessing said that ISPA resorted to lobbying when attempts to educate policymakers failed. By lobbying, he meant regular meetings with policymaking elites, approximately once a week or once a fortnight and dining at the House of Commons with MPs who have expressed concerns about ISPs and the Internet in general and bringing along the broadband providers so that together they can address their concerns directly to the interested MPs. Mr Heaney indicated that Talk Talk heavily engaged with the government and Ofcom. His engagement with the government involves regular meetings with 'someone from the government or somebody in Westminster once, twice or three times a week' to 'ensure that the outcome is right'. With Ofcom, he said that his past work experience at the organisation gave him access to and established relationships with the executives there. His connections enable him to 'do his job effectively'. Mr Banner perceived private discussions with the policymaking elites at the DCMS, Ofcom, the European Commission and the MEPs as 'the most appropriate mechanism' for policy engagement for UK/EU-based policy actors.

These accounts of policy engagement highlight the significance of the qualitative aspect of the relationship between policymakers and other policy actors. From the interviewees' experience, it can be interpreted that the effectiveness of lobbying depends on the quality of relationships between policymakers and policy actors. According to Mr Blessing, the quality of this relationship depends on identification of the people who 'understand and can appreciate' ISPA positions. To Mr Banner, a reliable relationship with policymaking elites needs to be cultivated and nurtured over time. Mr Heaney perceived that personal connections from shared work experience accounted for good relationships that allow policy actors to influence decision-makers. According to Mr Forsyth, the decision-making power of his contacts in the UK government, Ofcom and the EU institutions is what determines the quality of the relationship with policymakers.

From the perspective of a former government employee, Mr Sahel observed that the quality of relationship between policymakers and policy actors depended on the reliability, availability and accessibility of personnel dedicated to specific policy issues. Referring to his experience working in the government, he said that absence of reliable and specific contact points for government outreach undermined policy actors' influence on policy. Policy actors without a known contact point on specific issues for the government, he explained, would lose the opportunity to shape government's opinion on the subject when the government extends its invitation to contribute to the policy that it is developing. This, he said, was often the case with consumer groups as their resources are too limited to dedicate a specific contact point for every policy issue.

Mr Sahel also noted that the UK's policy engagement culture emphasises informality. Hence, private meetings serve as effective tools to achieve a policy consensus. Consultation processes, he commented, can be long and most of the time are used as a first step toward developing a regulation or legislation, not the decision-making itself. This explains the path-dependent preference for self-regulation in the UK and reliance on informal meetings and roundtable discussions to achieve consensus on the specific details of the self-regulatory principles.

The culture and function of private meetings in the UK and EU policymaking presented in this section require considerable resources to ensure efficacy. The culture and need for the UK policy actors to engage in the EU co-legislative process due to the binding effect of EU legislation makes policy engagement even more resource intensive for the UK policy actors. All the UK-based policy actors interviewed had to follow policy developments in the UK and EU so as to formulate their positions and identify the right contact points and key influencers to approach. With the added

decision-making hierarchy from the EU legislative procedure, the number of policymakers that these policy actors attempted to influence multiplied. This, Mr Sahel observed, made UK policy engagement resource intensive, so much so that the amount of resources required to influence policies can disadvantage policy actors with inferior resources, such as consumer and public interest groups. He also noted, in agreement with Mr Schwarztman, that there is a smaller resource-rich environment for such organisations to be as active in the UK policymaking arena as their US counterparts.

The UK consumer and public interest groups, according to Mr Sahel, do not have sufficient staff to keep track of all the EU policy developments as well as 'knocking on' the doors of 'the PM, DCMS, Ofcom, the Commissioners and the MEPs'. He therefore remarked, 'Consumer voice is not going to be listened to as much as the industry voice'. Corresponding to Mr Sahel's comment, Ms Kisielowska-Lipman perceived that limited resources constrain the level of engagement the Consumer Futures could afford. With the budget cut, she said, the organisation had to reduce their activities on net neutrality policy and refocus their strategy on developing Internet intermediaries, such as online comparison tools. She also noted that not having many consumer and public interest groups advocating the same policy principles could undermine their impact on policy. Similarly, Ms Pathak indicated that the organisation faced some resource constraints. The interview with Ms Pathak indicates a correlation between the fact that Which? did not stay 'at the forefront' of the net neutrality policy debate with the resources they have available. Nonetheless, Ms Pathak did not think that such resource limitation necessarily had a negative effect on ability of Which? to influence policy.

Mr Banner noticed a slight difference in the policy engagement culture in the UK and EU. He observed that policy engagement at the EU level requires a more formal approach than the UK one. This 'formal approach' involves a face-to-face meeting with a written case or proposal, 'preferably' detailing the problems and impact on 'consumers'. Mr Banner's description of BT's policy engagement indicates another important strategy: 'narrative'. He explained that to be heard, one had to 'direct [one's] concerns to the areas that will concern the person that [one] is speaking to'. For this reason, non-state policy actors build discourses of the government, regulators and legislator into their discourses. Consequently, the impression of common interest is likely to increase policy actors' chances of having their ideas and interests considered.

However, as demonstrated in section 6.2, narratives can also serve as a constraint on policy actors' ability to address concerns which fall outside policymakers' purview. This is the case exemplified by Mr Wilson. He perceived the predominant political narrative about economic growth and the Internet as an infrastructure for growth and innovation which emphasises investments as a challenge for advancing non-economic discourses. He remarked that the pro-net neutrality discourses built on cultural and societal values of Internet access were overwhelmed by the economic and commercial values of such access.

To overcome the constraints from resource limitations and narrative, policy actors devise strategies such as coalitions to advance their aims. When coalition serves as a strategy, the policy sub-network consequently formed acts as an agent pursuing their policy goals. Interviews with the UK/EU-based policy actors indicate that coalitions neutralise power inequality as a result of resource limitation and/or exclusion from the decision-making sub-network. An example for both cases is the coalition between content providers and consumer and public interest groups. According to Mr Sahel, coalition was a game-changer in the UK net neutrality policymaking process. 'A push by both the coalition of consumer groups, Internet companies and broadcaster,' Mr Sahel believed, changed the UK government's net neutrality policy decision, making it more inclusive of the net neutrality proponents which had originally been excluded. By the 'push' he meant the open letter to the minister signed by some 20 organisations, requesting 'some principles on net neutrality to be put in place'. Mr Sahel's view regarding the objective and impact of the letter indicates that the benefit of coalition lies in the force of number in support of the position put forward or a common cause, as opposed to private interests.

A similar approach was adopted during the subsequent open Internet Code, facilitated by the BSG. Ms Parry and Mr Hadadi indicated that the co-operation between broadcasters and Internet companies continued throughout the Code development process. They coordinated their policy positions and shared information. Both interviewees implied that the unity of policy position and arguments created an impression that net neutrality is an issue that has a wide impact on a broad range of industries, citizens and consumers. Mr Hadadi added that the way lobbying works at the European level requires policy actors to work through trade associations in order to 'build common causes' to create an impact on policy.

For the same reason, the BBC, according to Mr Wilson, works with the Computer and Communications Industry Association (CCIA), which represents the computer industry, the

European Broadcasting Union, the broadcasters' European trade body and the British Screen Advisory Council in its policy engagement at both the European and national levels. All these interviewees agreed that common cause appeals to decision-makers' judgement based on what is best for society's needs. In this respect, the coalition of consumer and public interest groups, Internet companies and broadcasters empowers their advocacy by broadening the issue beyond the conflicting commercial interests of broadband and content providers.

Mr Heaney and Mr Forysth indicated that the use of coalition is not limited only to content providers and consumer groups. In addition to directly meeting with policymakers, Mr Heaney said that Talk Talk advocated its policy objectives through associations, such as the UK Competitive Telecoms Association (UKCTA), which excluded BT companies, ISPA and BSG, as well as working in partnership with other operators such as BskyB. The company's choice of allies, he added, depended on the alignment of their business model and policy positions. Mr Forysth noted that besides direct engagement with decision-makers, BskyB liaised with associations such as the European Competitive Telecommunications Association (ECTA), BSG and the Association of Commercial Television in Europe (ACT) who represent the company on content related matters at the EU level. According to Mr Blessing, ISPA members get together to discuss technical problems and solutions before the association feeds these back into the government. He added that, at times, the government would reach out to organisations such as ISPA and BSG for technical input.

In addition to coalition, policy actors substantiate their arguments with research. Examples of such research include the Open Internet (a platform for growth (Williamson et al. 2011), or the Plum report, commissioned by the BBC), Blinkbox, Channel 4, Skype and Yahoo and Consumer Futures' research on consumer traffic management awareness (Kisielowska-Lipman 2012). The Plum report, Mr Hadadi commented, was 'one of the better studies anyone has ever done regarding net neutrality and the open Internet'. The report, he said, argued against the two-sided market argument driven by broadband providers by highlighting the economic inefficiency of the concept from the perspective of online content distribution and the subsequent consumer choice limitation. Agreeing with Mr Wilson, Mr Hadadi highlighted that the report created a huge policy impact by debunking the myths 'perpetrated by telecom operators and those who disagree with the open Internet and net neutrality'.

Similarly, Ms Kisielowska-Lipman indicated that the consumer research carried out allowed Consumer Futures to represent individual users in their policy engagement by highlighting the

actual problems concerning traffic management that undermined user Internet experience. Doing so, according to Kisielowska-Lipman, allowed the organisation to support their arguments for stronger consumer protection against traffic management and further develop user-friendly traffic management information delivery.

According to Ms Pathak, Which? 'engages consumers' to ensure representation of consumers in their policy statements and advocacy through online surveys and pledges for the changes the organisation is advocating. She explained that the organisation referred to and reviewed logged consumer complaints and used them to inform the Which? policy position. She also commented that this was an effective approach to influence policy because governments and regulators tended to listen to the identifiable and united voice of consumers.

Similar to the US policy actors, UK-based policy actors engage the media in their advocacy. Mr Wilson said: 'we are regularly appearing on public platforms to speak about the important of net neutrality. Our Vice-Chairman, Diane Coyle, has blogged about it'. Ms Kisielowska-Lipman and Mr Killock indicated that their organisations had some media presence and campaigned and raised awareness about the open Internet and traffic management. However, their main effort and resources are devoted to lobbying through private meetings with policymakers and taking part in the working group discussions in the UK and at the EU level.

Regardless of the changeable reliance on publicity, the interview with Mr Milton indicates that the media have some influence on the government's policy decisions. He explained that a high degree of media coverage on net neutrality in the US caught the attention of the DCMS minister. This implies that the minister turned net neutrality into a policy issue because he saw the benefit of the publicity from addressing this issue. The media, therefore, has an impact on policy insofar as the publicity it creates for the politicians' profiles and the issues. Thus, the media serves as a tool for influencing net neutrality policies. This finding concurs with Freedman's observation that in the UK 'policy initiatives are taken partly on the basis of their likely popularity in the media' (2008: 88).

The policy practices reviewed in this section demonstrate that, generally, policy engagement activities in the US and UK are similar. These activities involve responding to consultations, lobbying, (which generally refers to private meetings with policymakers and in some cases being part of the relevant policy working groups or workshops), commissioning research to support policy discourses, coalitions and securing media coverage. However, the practices in the US and

UK vary in their emphases. While the US rulemaking process emphasises formality, which is intended for ensuring transparency, fairness and accountability in decision-making, the UK process and practices highlight informality and close connections with decision-makers. For this reason, policy actors in the US are more concerned with fact-finding, while UK/EU-based policy actors are busy with meetings, building and nurturing their relationships with decision-makers at both the national and EU levels.

Both approaches are resource intensive in varying ways and degrees. The UK political system, which favours the informality of private meetings and negotiations coupled with the complexity of the decision-making hierarchy involving the supra-national institutions, increases the number of policymakers to meet and influence. The multitude of policymakers to influence and on-going developments in Brussels make policy engagement resource intensive for the UK/EU-based policy actors.

In addition to these key factors, the value of fact-based decision-making in both the UK and EU policymaking process requires that additional resources from policy actors be dedicated to research to support their policy positions. Nonetheless, the UK and EU research production culture is not as prominent as that of the US. According to Ms Parry, the much smaller scale of research in the UK and EU, compared to the US, results from the amount of financial resources available to UK/EU-based policy actors. She observed that policy actors in the US had 'much more money to throw at' policy advocacy than the UK/EU-based policy actors. The abundant resources the US-based policy actors can afford to dedicate to influencing the net neutrality policy, Ms Parry remarked, also contributed to the difference in the level of debates in these jurisdictions.

All the UK/EU-based policy actors interviewed observe that the resource intensive nature of policy engagement in the UK and EU can undermine policy actors' influence on policy. To compensate for resource inequality and ensure the efficacy of their arguments, the UK/EU-based policy actors, like their US counterparts, use coalitions. However, as established in section 7.1, there are many fewer consumer and public interest groups participating in the UK and EU policymaking process than in the US. The small number, advocating the civic and societal values of Internet access, co-relates with the near absence of such values in the UK and EU discourses as demonstrated in section 6.2. This co-relation reinforces the argument made in 5.1 that policy precedents and the broad political systems account for the different shape of net neutrality discourses in the US and UK.

The dominance of the state-policy actors' discourses (see Chapter 6) indicates that the efficacy of the strategies that policy actors devised to neutralise the power inequality in policymaking and challenge the policymakers' command of policy is limited. The UK/EU-based policy actors' perception of power relationships in policymaking established here concurs with that of Pollack (2010), Young (2010), Freedman (2008), Marsh (2008, 2002) and Marsh et al. (2003), that the policymaking power remains concentrated among the few executives in the UK government, Ofcom and those in the European institutions.

The analysis of policy actors' engagement experience in this chapter indicates varying degrees of power concentration in both the US and UK due to the rules of engagement that prescribe the roles policy actors play in policymaking. These roles, as discussed in 5.2 and demonstrated in Chapter 6, define the argumentative turns in policymaking in a way that privileges the state policy actors to selectively build non-state policy actors' pre-consultation or pre-formal policymaking process input into their consultation objective discourses. The scope and emphasis of the subsequent discourses and policy discussion is set based on these consultation objectives.

The roles policy actors play, according to the rules of policy engagement and practices, form the net neutrality policy networks, which act as power relation structures that privilege certain ideas, interests, values and objectives over others. This privilege highlights the power inequality structured in the political system and the specific case of net neutrality policymaking, contributing to the observed power concentration. However, the analysis also suggests agency resistance, driven by ideas and interests, to this structured inequality through the use of coalitions, research, public opinion shaping, media and lobbying. This struggle between structure and agency and the degree of power concentration in net neutrality policymaking surfacing from this analysis correspond with the policy practices and power relations in the US and UK media policymaking processes described by Freedman (2008: 80 - 104).

The power relations and struggle exhibited in these policy actors' engagement experience resembles power relations in the modern capitalist democratic state sketched by critiques of classical pluralist theorists, such as Domhoff (2010), Freedman (2010, 2008), Marsh (2008, 2002) and Heclo (1978). In contribution to such notions, the analysis here reveals that policy actors perceive that political systems, cultures and procedural requirements for policy engagement make power in policymaking relational, resource dependent and intensive. These circumstances act as a structural constraints that disadvantage resource-poor policy actors and privilege resource-rich

policy actors competing to inscribe their ideas, objectives values and interests in net neutrality policy. This finding supports the thesis that agents' ability to influence policy is resource dependent (Marsh and Smith 2000: 5 - 6).

Contributing to this thesis (Marsh and Smith 2000: 5 - 6), the analysis here identifies the types of resources on which policy actors are dependent in their net neutrality policy engagement. In both cases, finance, public support and relationships with policymakers are the keys to successful policy advocacy. More specific to the US case, the formality of the rulemaking procedure and its requirements show that finance and public support are more important than connections. The combination of these factors contributes to power being concentrated among the resource-rich policy actors, mostly major corporations and relevant state policy actors. Policy practices that favour the informality of meetings in the UK and EU, on the other hand, make strong relationships with decisions-maker more important than finance. These practices result in power in policymaking being concentrated among only a few executives. In addition, negotiation as an inherent practice in the UK and EU policymaking means that narrative is another factor that reinforces the executive dominance in policymaking.

Chapter 8

Convergence, politics and net neutrality policies

The US and UK net neutrality policy development analysed in Chapters 5-7 indicates that communications policies are evolutions of ideas, values, and interests. These evolutions underpin interaction between structure and agency competing to sustain, change or promote certain ideas, values and interests through policymaking. From this analysis emerge three aspects of the dilemma in regulating convergence: function, ideology and politics. The functional aspect features the continuation of competing regulatory goals of the previously distinct policy areas of transmission infrastructure and content discussed in section 2.3.1. The ideological aspect results from market limitations in serving public interest. Concerning the political aspect, competing yet inter-dependent interests of broadband service providers and business as well as individual users fuel the policy debate, making a consensual agreement challenging to achieve. The conversation seen in the analyses in Chapters 5, 6 and 7 confirms the argument made by Marsh and Smith (2000) that the interaction between structure and agency is embedded in every stage of policymaking. Contributing to this argument, the findings from the analysis in chapters 5-7 highlight that the power struggle between structure and agency underpins all aspects of the dilemma in regulating convergence.

8.1. Functional dilemma

As discussed in section 2.2.1, the functional interdependence between distribution infrastructure and content is the technical root of the net neutrality debate and the functional aspect of the dilemma of convergence regulation. This technical level of convergence together with the corporate (e.g., horizontal and vertical mergers of Time Warner and AOL, BskyB and Easynet and Liberty Global with Virgin Media) and market convergence (e.g., that of telecom and broadcasting) contributes to the Internet network capacity problem. The Internet traffic generated from provision of convergent services, particularly the convergence of telecom and broadcasting, is pushing the limits of the existing Internet network infrastructure. Broadband providers' technical and commercial responses to this problem (e.g., congestion management and paid-traffic prioritisation or paid-guarantee service delivery) are prominent in the net neutrality debate across the Atlantic. As evident in the discourse structure of content providers and consumer and public

interest groups (Section 6.2), broadband service users perceive broadband providers' responses as threats to their interest in non-discriminatory access. This apparently irresolvable conflict of interest between broadband providers and users stimulated policymaking processes to establish ground rules for broadband service provision.

The network capacity problem that sparked the debate on traffic management highlights the increasing importance of broadband service and network for today's digital economy. According to Lee and Wu (2009: 74), this significance makes broadband provision an 'infrastructure service essential to the economy' or a service 'affecting the public interest' of the 21st century. The authors contend that broadband access services should be regulated toward public interest and arguably treated as a common carrier.

However, the objective of public interest as a regulatory criterion for the converging telecom and content sectors, according to Iosifidis (2011a), Michalis (2007), Napoli (2001) Garnham (1996), emphasises different values of public interest. The examination of policy and regulatory precedents in the US, UK and EU (see section 5.1) suggests that broadband service is not legally treated as a common carrier in every jurisdiction studied.

Policies and regulatory criteria for infrastructure services, according to Iosifidis (2011a), Michalis (2007), Napoli (2001), Aufderheide (1999) and Garnham (1996), prioritise the economic welfare aspect, while content focuses on the social and political welfare aspects of public interest. The societal and political values of the content transmitted over the Internet infrastructure may challenge the decisions on policy and regulatory principles for this particular infrastructure service provision.

The discourse analysis in Chapter 6 indicates that the common regulatory criteria for the interdependent telecom and content sectors in the case of net neutrality are access and non-discrimination. However, the analysis shows that policy actors place emphasis on different values underpinning these criteria and interpret these criteria dissimilarly. The pro-traffic management advocates emphasise the economic values of broadband access provision and investment, while net neutrality advocates highlight the social and political value of access to audiences and to content (see sections 6.1 and 6.2). As for the principle of non-discrimination, broadband providers, the key drivers for the pro-traffic management discourses, interpret the principle as making both managed and unmanaged broadband access service equitably available to everyone. In pro-net neutrality

discourses non-discrimination is interpreted as direct broadband access to audience for content providers and to content for individual users or audiences without interference from broadband providers.

These different emphases and interpretations imply competing institutionalised values (economic vs social and political) constituting public interest. Such institutionalised values, shaped by ideologies, form part of the structural factors that shape the net neutrality policy discourses and outcome (see Figure 2, page 86). Although the nature of the problem is infrastructure-based, this research argues in support of Garnham (1996: 284) that the implications of Internet infrastructure for the content and services it carries render the traditional sector-specific telecom regulatory criteria and measures inadequate. The net neutrality policies, therefore, serve as examples of policymakers' attempts to reconcile these competing institutionalised values underpinning infrastructure and content regulation.

The interaction between structure and agency in the functional aspect of the dilemma in convergence regulation is evident in policy actors' mobilisation of these institutionalised values to reshape competing discourses and convince decision-makers to consider and promote their objectives and interests. In doing so, policy actors either attempt to change or continue the existing power relations between broadband providers and users and market practices. This action is an exercise of the second face of power (Bachrach and Baratz 1970). This aspect of the dilemma is evident in both the US and UK cases.

8.2. Ideological dilemma

The ideological aspect of the dilemma refers to the concepts or ideas and ideologies underpinning convergence regulation. Such aspect in net neutrality policymaking results mainly from neo-liberalism, an ideology that according to Crouch (2011: 17) favours market over state provision of communications services and completion as a means to regulate the demands and supplies in the market. As discussed in section 2.1, neoliberalism shapes the institutionalised values and the corporate, organisational, policy and regulatory changes that drive convergence and development of communications products and services. The ideology also plays an important role in shaping communications policies, stripping back the role of non-market institutions in communications products and services provision and regulation (Hesmondhalgh 2007: 109 - 10; McChesney 2000:

6). The ideology also results in a shift in the emphasis of public interest to market efficiency (Iosifidis 2011a: 70 - 72).

Aside from neoliberalism, the American version liberalism (Hartz 1991: 5 - 14), feudalism (ibid.) and the social-market concept (Curran and Seaton 2010: 374 - 78) are the key concepts that vary the degree of free market in the US, UK and EU. As discussed in section 2.1, the American version of liberalism and traces of European feudal principles shape the relationship between the state and its people. The former casts the state as a supporter and facilitator of private interests and activities and thus considers private entities' ability to operate without state interference as being good for the public. The latter entrusts the state to provide what it deems good for the public and prioritises collective good over private interests.

Thus, under 'natural liberalism', communications services in the US have always been provided by private entities, whereas the same services in Europe, including the UK, were originally provided by the state. Combined with the neoliberal emphasis on market, competition and reduction of non-market interference, the state in the US case has a much smaller role to play in the provision and regulation of communications services. With traces of feudal principles and the social market concept, non-market institutions in the UK and EU still have a more definitive role to play in communications service provision and oversight than the US non-market institutions under neoliberalism.

The dilemma in regulating convergence at the ideological level is most obvious in the US case (see section 5.1). As explained in section 2.1, the underlying influence of US 'natural liberalism' (Hartz 1991: 5 - 14) combined with neoliberalism resulted in a drastic reduction of regulation and state interference following private demands or deregulation. One consequence of such deregulation on convergence under the mix of 'natural liberalism' (ibid.) and neoliberalism is the challenge the state faces in re-subjecting broadband providers to common carrier obligations. This challenge appears in the Court ruling of the *Comcast Corp. v FCC* (2010) 600 F.3d 642 and the *Verizon. v FCC* (2014) 740 F.3d 623 cases, where the ruling stated that the FCC has no jurisdiction over broadband providers' management of their network. Prior to President Obama's official endorsement of the FCC re-reclassification of Internet service as a telecommunications service under Title II of the Communications Act 1934 (Obama 2014), net neutrality advocates had (unsuccessfully) urged the FCC to do so.

As discussed in section 5.1, the sentiment among net neutrality advocates was that politics and power relations between the FCC, the telecom giants and Congress at the time led the FCC to avoid reclassifying broadband services as telecom services, subjecting them to common carrier rules. The FCC's precarious jurisdiction in regulating broadband service provision with common carriage rules (as a result of its 2002 and 2005 classification of broadband services as information services which exempts them from common carrier rules) plagued the FCC throughout its 2009 open Internet rulemaking and eventually brought down its key behavioural rules: no-blocking and non-discrimination.

As discussed in section 5.1, the FCC faced a number of challenges in re-subjecting broadband services to common carrier obligations under Title II due to the politics of its organisational structure, despite the President's endorsement. These challenges are reflected in the FCC decision to postpone voting on net neutrality rules until 2015 (Davis 2014) and the US House of Representatives Communications and Technology Subcommittee delay in opening hearings on the FCC's new net neutrality rules (Selyukh 2014). Even after the adoption of the 2015 open Internet rules, which involved reclassification of broadband services back to those of a public utility and subject to common carrier regulation under Title II of the 1934 Communications Act (FCC 2015a), such rules remain subject to judicial review (Wood 2015).

The challenges the FCC's 2011 and 2015 open Internet rules have been facing indicate that deregulation further complicates the dilemma of regulating provision of infrastructure services in which convergence at all levels (technology, corporate and market) occurs. The significance of broadband infrastructure to today's economy and society qualifies the Internet network as the 21st century 'infrastructure infected with public interest' (Lee and Wu 2009: 74) and justifies re-subjecting the services to common carrier obligations. The challenges in Title II reclassification to enable the FCC to re-subject broadband providers to common carrier rules serve as evidence of competing structural factors between the non-market and market institutions under neoliberal and natural liberal ideologies. The resulting power struggle between structure and agency here involves policy actors' attempts to reclassify broadband service as a public utility under Title II against the neoliberal and natural liberal ideologies that prioritise market over state in provision and regulation of communications services.

In the UK and EU cases, traces of feudal principles and social market concept counter-balance the neoliberal ideology, resulting in a more modest degree of deregulation and free market. As

discussed in section 5.1, such restraint keeps in place the common carrier obligation for electronic communications service provision across Europe. This regulation results in different competition models between the US and Europe, including the UK. This common carrier obligation, the LUU regulation, creates the impression that the retail broadband access service competition is healthier in Europe than in the US and thus supports a more market-based regulation or competition regulation. This regulation is the fundamental structural factor that distinguishes the US from the UK and EU net neutrality problem definition and discourses (see Chapter 6).

Even with a moderate degree of deregulation and a free market, introduction of additional common carrier regulations to the same service provision has been contested in the UK and EU. Leaning toward greater deregulation, the UK government and regulator have been clear from the outset that they would use self-regulation to oversee broadband providers' access service provision, recognising that net neutrality violations are potential problems. The resistance of net neutrality advocates, whose discourses echo the social market concept, resulted in the development of the UK open Internet voluntary code of practice. This resistance suggests a power struggle between structure and agency whereby agents, the UK/EU-based net neutrality advocates, compete against the institutional ideology that favours self-regulation in an attempt to protect their interests in non-discriminatory Internet access. The UK/EU-based policy actors, who remain dissatisfied by the UK policy decision, shifted the forum to influence national policy at the EU level. Examples of that include Skype and ORG (through its European counterpart).

However, heavier competition and greater fragmentation of interests apply to the EU legislative process due to the explosion of policy actors involved. As such, legislating net neutrality at the EU level remains subject to 'further discussion', according to the press release of the 3350th Council meeting (Giacomelli 2014: 10). 'The presidency concluded that more technical work was needed with a view to define a Council position' on net neutrality (ibid.). Given that the connected continent regulatory proposal carrying net neutrality provision requires approval from both the European Parliament and the Council, the presidency conclusion is likely to further delay the Council's decision.

The delay in the Council's decision indicates that agreement on the measure to implement the principles of open and non-discriminatory broadband access cannot yet be achieved. This disagreement, the on-going negotiation and lobbying that continue throughout the official legislative process (see section 7.3) imply a power struggle among agents with competing interests. It also

indicates an interaction between structure and agency, observable in agents' attempts to keep in place traces of feudal principles and social market concept that justify state intervention through net neutrality regulation and the competing neoliberal ideology.

8.3. Political dilemma

The political aspect of the dilemma in regulating convergence of telecommunication and content in net neutrality policy development is driven mainly by the competing yet interconnected interests of broadband access service providers and users. Consequently, policy actors engage in the policymaking process to defend and promote their actual interests, which are predominantly technical and commercial. The technical aspect involves the supply and demand of Internet network capacity. The commercial aspect involves broadband providers' investment incentives to upgrade their network capacities, content providers' benefits from the low market-entry barrier of the best-effort Internet and individual users' access to online content and services of their choice.

However, the net neutrality discourse structures analysed in Chapter 6 show that the competing commercial interests of broadband providers and users crowd out the technical aspect of the net neutrality policy debate across the Atlantic. These competing interests shape policy actors' claims for action, their policy or discursive practices and reactions to net neutrality policy outcomes, as demonstrated in Chapter 6, sections 7.2 and 7.3.

This aspect of the dilemma is observable in policy actors' exercise of power through discursive practices in both the formal and informal parts of the policymaking process. The analysis of policy actors' discourse structure in Chapter 6 indicates that policy actors represent their actual interests in such a way that supports the institutionalised values underpinning communications regulatory criteria. Interviews with policy actors regarding their policy engagement practices in section 7.3 demonstrate that the same representation technique applies to their informal verbal communication in the context of private meetings or lobbying activities.

The policy actors' discourse construct highlights the exercise of the second face of power (Bachrach and Baratz 1970). In such exercise, policy actors either mobilise the institutionalised values to exclude competing regulatory solutions and actual interests or to justify the inclusion of their actual interests. This action indicates an interaction between structure and agency whereby the agents turn the structure, the institutionalised values, to discredit competing interests and to promote their

actual interests in this discursive process of policymaking. In doing so, agents or policy actors represent their actual interests in a way that appears in compliance with institutionalised values while portraying the competing interests as challenges to the traditional communications regulatory criteria, irrespective of the reality.

This interaction between structure and agency over the political aspect of the dilemma is also reflected in policy actors' exercise of power through problem and value definition as structured in the discursive practice or policy engagement practices. Genre analysis in section 5.2 demonstrates that the communication protocol (discursive and policy practice) in consultation, a formal policymaking process shaped by the broader political system pertinent to each case studied in this research, determines the power relations among the state and non-state policy actors. This genre serves as a structure privileging state-policy actors over non-state policy actors in promoting their objectives, values and actual interests.

The advantage that the state policy actors enjoy in this context takes the form of an authority to set limits to the scope and emphasis of the issues being discussed in the consultation. Such scope and emphasis contribute to the pre-selection of the winning arguments as they privilege the values and interests that better align with interests and views on the policy issues as demonstrated throughout Chapter 6. In this respect, the consultation genre serves as a constraint on agents' ability to promote their actual interests. Such constraints contribute to what Marsh (2008, 2002) and Marsh et al. (2003) calls 'structured inequality' in politics.

In addition to the turn of arguments in the formal discursive process of policymaking (the consultation), policy engagement practice and requirements defined by the broader political system and policy precedents (section 7.3.1) also contribute to power inequality in policymaking. These requirements, as discussed in section 7.3, also serve as structural factors that privilege resource-rich policy actors over those who are resource-poor. To equalise this structured power inequality, policy actors may form a coalition which acts as a free agent in policy advocacy. As explained in sections 7.1 and 7.3, coalitions operate as sub-networks within the network of all the policy actors engaging in the net neutrality policymaking process. Examples include the coalition of content, consumer and public interest groups and trade or industry associations acting on behalf of policy actors in the same industry operating in the US and UK.

These sub-networks are born of common or compatible interests and thus create a sense of commonality, which policy actors use as leverage to negotiate for state policy actors' support. This form of power exercise can be read as a mobilisation of public interest, which is one of the institutionalised values, or bias, that shapes state policy actors' or policymakers' decisions. In this exercise of power, policy actors interact with two sets of structures: the decision-making network, as a structure, and the public interest value. Agents exercise coalition power to appeal to the public interest value of the state policy actors at the centre of the decision-making network so that they are filtered into the decision-making network and effectively advocate for their actual interests.

In cases where agents' or policy actors' actual interest conflict with that of the state policy actors at the centre of the decision-making network, a coalition serves as a strategy to resist the dominance of the state policy actors' discourses. This function of coalition is most observable in the UK case, in which content providers coordinate with consumer and public interest groups to challenge state policy actors' preference for self-regulation. In return, the coalition achieved the open Internet voluntary code of practice to guide such self-regulation. In the US case, a coalition of technology companies, academics and public interest groups is used to challenge the competing interests of the resource-rich broadband providers in traffic management flexibility and self-regulation. The result of this competition for state-policy actors' support was the open Internet rules (FCC 2015a) introduced to compensate for those of 2011, which have been vacated by the D.C. Circuit Court in 2014. The 2015 open Internet rules are more stringent than those of 2011, prohibiting blocking, throttling and paid-prioritisation (FCC 2015b: 19740) and applying equally to both fixed and wireless networks. In an attempt to accommodate broadband providers' interests in network management flexibility, the rules allow for 'reasonable network management', but restrict such practice to technical and engineering purposes and 'not business' purposes (ibid.: 19741).

However, the politics of net neutrality policymaking continue in both the UK and US cases for various reasons. In the UK case, the national politics of net neutrality policymaking are influenced by the EU legislative procedure. Net neutrality is one of the policy objectives and provisions of the connected continent regulatory proposal being considered in this process. The UK-based policy actors, therefore, have to continue engaging in the EU legislative process to promote their objectives, values and interests. To strengthen the pro-self-regulation discourses advocated by broadband providers and the UK government, major mobile broadband providers (EE and Vodafone), who had not signed up to the UK open Internet Code, have recently become signatories (BSG 2014: 7).

The exercise of power through discourse and other strategies surfacing from the analysis in Chapters 6 and 7 supports Marsden's interpretation of these mobile operators' recent commitment to the UK code as 'playing the self-regulatory game' (2014) with no actual evidence that they have abided by the code or would do so. This research interprets these mobile operators' commitment to the UK code and Ofcom's assessment of traffic management practices, based solely on the virtual universality of broadband providers' commitment to the code, as attempts to prove that self-regulation is effective. This can be used as evidence to support the UK government's input of the pro-self-regulation discourse to the EU legislative process as the net neutrality provisions sustain further negotiation during the Council's reading (Giacomelli 2014: 10).

In the US case, *Verizon. v FCC* (2014) 740 F.3d 623 case indicates the successful resistance of broadband providers' pro-traffic management and self-regulation discourse against the FCC pro-net neutrality and regulation discourses. However, driven by its own interest, the actual interest of net neutrality policy advocates and the political interest from the White House, the FCC adopted the new open Internet rules (FCC 2015a) in response to the January 2014 D.C. Court ruling. Nonetheless, the rules remain subject to legal challenges during the judicial review (Wood 2015).

The pending policy decisions in both the UK and US cases demonstrate that policy actor interests shaped by ideas and ideologies are drivers of net neutrality policymaking politics. The competing interests of broadband providers and users have resulted in a policy dilemma that is yet to be resolved.

8.4. Conclusion

Based on the convolution of factors that shape net neutrality policies in the US and UK (discussed in Chapters 5-7), the thesis of this research is that the US and UK net neutrality policies are the results of a discursive process and are driven by inter-connected yet competing commercial and political interests to reshape the convergent telecommunication and content industries in support of certain goals and interests. The critical approach to net neutrality policy analysis employed by this research reveals the actual competing interests and problems underpinning the policy debate. These actual interests and problems constitute policy actors' representation of their calls for action and objectives (Chapter 6). Policy actors' accounts of their engagement in the net neutrality policymaking process (Chapter 7) highlight the significance of the informal policymaking process for the policy decisions made. The interactive analysis of Chapters 5-7 confirms that the net

neutrality policies in the US, UK and EU are actually made outside the formal policymaking process of consultation.

Through a critical lens, this research argues that the actual problem for broadband access service provision and oversight across all the cases results from three aspects of dilemma in regulating convergence: functional, ideological and political. The fundamental cause is the functional aspect, which centres on the interdependence of the distribution network (broadband Internet network) and content. According to Noam (2008: 5), the former sets limits on the latter. At the heart of this interrelationship, businesses, based on the concept of political economy of the Information society (Garnham 2011: 53), are supposed to be the core sources of return on investment for broadband providers and cross-subsidy of domestic use of the Internet access services. However, Garnham (ibid.) observes that businesses generate much less IP traffic and thus spend less on IP broadband access services, while the domestic consumption of the content services generates much more IP traffic yet yields much less return on broadband network investment. This functional dilemma then leads to conflicts of interest between broadband providers and business and domestic users, fuelling the political aspect of the convergence regulatory dilemma.

The actual policy problem and competing interests identified help clarify which aspects of public interests the net neutrality policies being developed in the US, UK and EU intend to prioritise. The analysis in sections 6.3 and 7.2 indicates that the US policy-makers are keen to prioritise the economic, social and political welfare values of public interest attached to content, while the UK policymakers focus almost exclusively on the economic welfare value of public interest. However, in the US case, the open Internet rules (FCC 2015a) contain a loophole that may challenge the achievement of the intended objectives. This is observable in the remaining limitation of the 2015 rules in addressing individual users' difficulties in detecting traffic management discrimination and barriers for individuals to file complaints against broadband providers as the enforcement measure (FCC 2015b: 19742) remains the same.

The net neutrality provision in the connected continent regulatory proposal approved by the European Parliament and awaiting the final approval from the Council creates the impression that it attempts to achieve all aspects of public interest. However, critiques of the EU net neutrality provisions indicate that economic welfare is likely to be prioritised over the social and political welfare aspects of public interest enshrined in the non-discriminatory access to the Internet through the on-going negotiation in the remaining EU legislative process (Genna 2013; Horten 2013).

Irrespective of where the net neutrality policies in these jurisdictions currently stand, the functional, ideological and political aspects of the convergence regulation dilemma continue to drive the policy debate. The US net neutrality policy decision, the 2015 open Internet rules, is facing legal challenges; the EU decision is pending. Given the obligation under the European Community Act 1972, the UK net neutrality policy and regulatory approach may have to change depending on the EU legislative outcome. The final net neutrality policy outcomes across these jurisdictions and their implications for the public interest in access to broadband Internet and the content available on this communication platform are beyond the scope of this research.

Given the complexity of interacting institutional factors and policy actors driven by interconnected yet competing interests that shape the net neutrality policy analysed in Chapters 5 – 7 and the actual policy problem rooted in the dilemma in regulating the Internet as infrastructure for convergence of telecom and content, policy consensus is difficult to achieve and transient. In the net neutrality policymaking process, compromises have been made. However, resistance remains strong. Thus efforts to challenge the 2015 open Internet rules and modify the connected continent regulatory proposal to affect national policies continue.

To secure and sustain consensus in such a polarised notion as net neutrality, additional policies may be required to appease the competing interests. In the US case, an example of such measures includes a separate specific policy to encourage broadband investment to compensate for the compromised interest in traffic management flexibility of broadband providers. Such side-lined interest of broadband providers, pro-traffic management advocates argue, undermines innovation in network infrastructure and return on infrastructure investment. According to Van Cuilenburg and McQuail (2003: 184), innovation and return on investment constitute the economic welfare aspect of public interest, underpinning both the infrastructure and content branches of communications policies. In the UK and EU cases, depending on how the industry develops under the current net neutrality policy and the EU policy outcomes, additional measures may be required to support the side-lined interests of users in non-discriminatory access. An example of such measure may come in the form of a subsidy for online public service media to support the social and political welfare values of public interest attached to broadband access that the current policy and regulation cannot directly and fully support.

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