I-2.6: Does a legal principle regarding net neutrality exist?

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Debate on Net Neutrality

The debate on Net Neutrality[1] faces a major difficulty, namely that of its legal status: does there exist a "legal principle"—meaning a rule somewhere within the entire body of law—with mandatory force that could be used to counter infrastructure operators' discriminatory practices?

We might as well provide the answer straight away: except for the rare countries that have adopted such a principle—such as the Netherlands in Europe[2], or Chili outside of Europe[3]—, the legal principle of Net Neutrality did not exist at the time these lines were written and is not contained in any national or international legislation or jurisprudence.

In almost all countries, Net Neutrality is made up of a fuzzy and vague legal framework. Here, a 'Policy Statement' published in December 2010[4] by the American Federal Communications Commission (FCC); there, extremely timid 'recommendations' issued by its Canadian counterpart, the Canadian Radio-Television and Telecommunications Commission (CRTC), as part of its *Review of the Internet traffic management practices of Internet service providers*, published in October 2009[5]; elsewhere, evasive 'guidelines' proposed by the Norwegian regulator, the Norwegian Post and Telecommunications Authority (NPT), last February[6].

Whether or not these documents have any sort of legal force (which is doubtful), they all suffer from their imprecision and insufficient content.

Should we therefore resign ourselves to the misleading term of "regulatory principle" that is regularly applied to Net Neutrality[7]? The use of this term proves that those who use it are on shaky ground, and especially the European Commission[8]. It does not mean anything for lawyers unless they interpret it literally. In that case, it would mean *a legal principle with value of a decree*, which would mean that even if it were included in a rule (which is not currently the case), the principle of Net Neutrality could be overridden by any law or other superior norm, either domestic or international.

Neutrality as a legal principle

Perhaps this situation is inherent to the ambiguity of the principle of neutrality itself[9].

The principle of neutrality exists in many legal systems, including European and international law. Unlike Net Neutrality, it is generally a fully operative legal principle in these legal systems.

In France, this principle exists in areas as varied as commercial law (regarding advertisements), tax law (VAT), administrative law (the public service), or constitutional law. The debate over the secularity of public institutions that has once again come to the fore due to immigration in Western Europe and the success of religious parties in the elections held in the newly-democratic countries following the Arab revolutions, is due to the constitutional principle of neutrality.

However, this principle is like a chameleon in that it takes on different meanings depending on the area of law to which it is applied. The principle of neutrality that underlines the mechanism of VAT is not the same as the one governing administrative or civil courts of law. Furthermore, it has nothing to do with the principle of neutrality revindicated in political instutions' institutional design or in the protection of fundamental rights.

The principle of neutrality is most ambiguous in the field of electronic communications and the law that governs them[10]. Neutrality is two-fold when applied to these domains, for it includes *technological* neutrality and *competitive* neutrality. This largely explains why the current debate over iP TV is so confused, especially since there is a frequent confusion between the two meanings of the term.

One of the first times the expression 'technological neutrality' was used was in the 'Licence' Directive of April 10, 1997, and then was mentioned a number of times in the directives that make up the 2002 Telecommunications Package, as recently amended in 2009. For example, the Authorisation Directive recommends "*the establishment of an authorisation system covering all comparable services in a similar way regardless of the technologies used*," (recital 2), and especially in the Framework Directive in the same 2002 Package where it takes on a slightly different meaning: "*the requirement for Member States to ensure that national regulatory authorities take the utmost account of the desirablility of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology"* (recital 18). These provisions are insisted upon in Directive 2009/140/CE of November 25, 2009 (cf. recitals 35, 40, and 68). According to the Framework Directive as modified in 2009, discrimination can also be positive when used to reestablish balance or promote certain specific services.

Competitive neutrality is an economic concept that has begun to be used in competition law. It can especially be found in decisions regarding interconnection litigation over call termination tariffs set by a vertically integrated operator that controls the infrastructure allowing it to provide this service. In such cases, the courts attempt to determine the tariff compatible with the existence of a competitive market, whence the expression "*competitive neutrality*". In France, even though it appears that neither the *Conseil de la Concurrence*, nor its successor, the *Autorité de la Concurrence*, have ever used the expression, the *Autorité de Régulation des Télécommunications* (ART)—before it became the *Autorité de Régulation des Communications Electroniques et des Postes* (ARCEP) in 2005—expressely used it in the press statement that followed three decisions it published on June 5, 2003.

Nonetheless, neutrality has many other potential applications in the telecommunications industry beyond these two principles of technological and competitive neutrality since it is also necessary to include the obligation for electronic communications operators to obey "the principle of neutrality with regards to the contents of the messages they transmit," according to the provisions of Article L32-1-5° of the French *Code des postes et des*

communications électroniques (Code of the Postal Service and of Electronic Communications).

Back to Net Neutrality

Net Neutrality is different from the previously defined notions of legal, technological, or competitive neutrality. If this were the case, we would assuredly be able to identify its legal status. Its different nature prevents us from using one, or all, of these three principles to try to identify its place in the legal system.

The European Commission's previously cited Declaration, and especially the Communication it published on April 19, 2011[11], clearly manifested its legal hesitations. It mentioned a "policy objective," and "a commitment" that it backs up (or tries to back up) with a few regulatory provisions. Moreover, it is significant that the Commission itself admitted that "there is no set definition of 'net neutrality'".

Net Neutrality refers to Internet traffic management policies, which are supposed to remain as "reasonable" as possible, which leads the Commission—more implicitly than explicitly—to try and attach net neutrality to three different legal principles:

- *the principle of the freedom of communication*, which means the right of any end-user to access content using the infrastructure or applications and services of his choice (article 8, paragraph 4, point G of European Directive 2002/21);

- the *principle of transparency*, essential for any free and competitive market, is justified by the existence of minimum standards where universal service is concerned (Article 21 of the Universal Service Directive), or the pursuit of greater market fluidity, especially when consumers decide to change service providers (Article 30, paragraph 6 of the Universal Service Directive);

- the *principle of equality*, which forbids any difference in the way access is granted to electronic communications infrastructures and services, but only when said infrastructures are publicly owned.

It is not certain that Net Neutrality—at least in the minds of its advocates, especially in the United States[12]—can be reduced to traffic management policies. But, if we suppose that this is the case, we can ask ourselves whether the aforementioned principles are capable of providing a legal justification for the recognition of a principle of Net Neutrality, or whether a judge could use them to declare that net neutrality is a general legal principle.

I. Net Neutrality and the Freedom of Expression

The freedom of expression is generally recognized by solemn and almost legendary documents. This is the case of the famous First Amendment of the American Constitution, or Article 11 of the French Declaration of the Rights of Man and the Citizen of August 26, 1789, which states significantly that: *La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme : tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminéspar la loi* (The freedom of ideas and opinions is one of the precious rights of man. Every citizen may accordingly speak, write, and print freely, but shall be held accountable for such abuses of this freedom as shall be defined by law).

'Freedom of expression of ideas and opinions' is obviously not limited to the written press,

which in the 18th Century was the only available method of public dissemination of thoughts. But, its intent was to cover all means of communication, and therefore, three centuries later, it applies to Internet infrastructures.

The *Conseil constitutionnel* (French Constitutional Council) took account of this in its significant ruling of June 10, 2009[13] regarding France's legislation against illegal filesharing, known as the HADOPI Act (whereas n°12): *Considérant qu'aux termes de l'article 11 de la Déclaration des droits de l'Homme et du Citoyen : « La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme : tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminéspar la loi » ; qu'en l'état actuel des moyens de communication et eu égard au développement généralisé des services de communication au public en ligne ainsi qu'à l'importance prise par ces services pour la participation à la vie démocratique et l'expression des idées et des opinions, ce droit implique la liberté d'accèder à ces services*. (Whereas Article 11 of the Declaration of the Rights of Man and of the Citizen states: 'Freedom of expression of thoughts and opinions is one of man's most precious rights: each citizen may accordingly speak, write, and print freely, but shall be held accountable for such abuses of this freedom as shall be defined by law'; and whereas the current state of means of communication and with regards to the generalized development of publicly available online communication services and the importance these services have taken on in allowing participation in democratic life and the expression of one's idead and opinions, this right implies the liberty to be able to access these services).

It is to be reminded that since 2004, French law has defined the expression "publicly available online communication services" as communication services accessible over the Internet.

Is Net Neutrality indistinguishable from the freedom of accessing publicly available online communication services?

Probably not.

Net Neutrality means that online service providers are prohibited from discriminating between various sources, destinations, and content of the information transmitted over their networks[14]. Net Neutrality is thereby a way to neutralize infrastructure and thereby neutralize internet service providers in order to enjoy free use of the physical and logical architecture of the 'network of networks'.

In fact, Net Neutrality is articulated around four principles:

- operators must transmit data without taking its contents into consideration (reminiscent of the principle of neutrality articulated by aforementioned article L32-1-15° of the French code of the Postal Service and Electronic Communications) ;
- data must be transmitted without taking into account their source or destination;
- data must be transmitted without discrimination between communications protocols;
- data must be transmitted without altering its contents.

If Net Neutrality adopts these four principles, it is evidently different than the freedom of expression upon which the Constitutional Council based its June 10, 2009 ruling. It is intrinsically linked to the history of the Internet and its libertarian roots. As wrote Lawrence

Lessig[15], "*Whether or not the creators of Internet were aware of what their creation would engender, they nonetheless built it in function of a certain philosophy: in a word, the idea that the network itself would not be able to regulate its growth. Applications would take care of that. That was the principle of an end-to-end structure.*"

Discriminatory practices with regards to access to infrastructures is obviously prohibited by many laws, more at the national level than the European one[16]: the aforementioned Declaration of the European Commission exhorts States to intervene.

One is often told that Net Neutrality is hindered by practices such as:

- blocking or limiting traffic,
- reducing the speed of peer-to-peer filesharing or streaming video,
- imposing a fee for access to certain services,
- willfully degrading said services,
- filtering between "safe" and "harmful" traffic,
- differentiating between packets,
- IP routing that enables packets to be routed via different ways,

Yet, various legal provisions in many countries impose such practices. In French law, for example:

- *la loi relative à la confiance dans l'économie numérique* (art.6.17 & art.6.18),
- *Code de la propriété intellectuelle* (art.L336-1), or
- *la loi relative aux jeux en ligne* (art.61)

These provisions help prevent or stop various disturbances to the public order (child pornography), copyright, and the accessibility of betting or games of chance online. Their effectiveness is not questionable, and they assuredly help maintain "net neutrality." This common goal is what justifies such measures.

Can one draw the conclusion that the vision of net neutrality conveyed by these principles makes it a fully operative legal norm or principle?

In the previously cited June 10, 2009 ruling, the Constitutional Council invalidates certain provisions of the HADOPI Act because it gave exorbitant powers to the administrative agency in charge of its enforcement. For the Council, these provisions would have gone against Article 11 of the Declaration of the Rights of Man and the Citizen. However, the Constitutional Council, in a later ruling on the LOPPSI 1 act (legislation to improve domestic security) [17], that provisions granting an administrative agency with the power to block Internet connections "*were a reasonable compromise between the Constitutional principle of preservation of the public order and the freedom of expression guaranteed by Article 11 of the Declaration of the Rights of Man and of the Citizen" (*whereas n°8).

Thereby, just a few months later, the Constitutional Council adopted a completely different

and almost divergent position on provisions that might be regarded as unconstitutional. However, in the case relative to the LOPPSI 2 Act, the justification is that the agency's decision is able to be challenged in court.

This allows us to make two observations that are hardly in favor of demonstrating the existence of a principle of Net Neutrality, at least not on the basis of the freedom of expression:

- the principle of freedom of access to publicly available online communication services is assuredly conditional;

- the imperative of preserving public order can take the upper hand, but in such cases, the Constitutional Council is vigilant to ensure that these measures are proportional to the goal being pursued.

There is a long road to travel between freedom of expression and Net Neutrality.

II. Net Neutrality and the Principle of Transparency

Does the principle of transparency allow us to prove that Net Neutrality has a legal basis?

That is doubtful.

Here, reference is not being made of the economic doctrines relating to the market or to competition, but rather, of the legal principle of transparency as contained in statute.

The legal principle of transparency assuredly exists. It has even been enshrined in European Community law by the December 7, 2000 ruling of the European Court of Justice in the Telaustria Verlags GmbH case[18].

But, this legal principle is very circumscript.

- It is only applied to the area of *public procurement*. In its December 7, 2000 ruling, the Court reacted to a service that was contracted out by the government to a private company. It did later extend the field of the principle of transparency, but only to the field of third-party concessions in the area of public service contracts by a ruling of October 13, 2005[19], and then to all procedures for the award of public service contracts in a ruling Commision vs. France on October 20, 2005[20].

- It only applies to government actions, especially actions made by public decision makers that could perturb the normal outcome of a competitive market.

- It is based on the principle of non-discrimination on grounds of nationality enunciated by Article 18 of the Treaty on the Functioning of the European Union.

- As stated by the Court at least twice in 2005 and 2008, the principle only concerns cross-border contracts and therefore does not concern contracts and transactions that concern solely domestic acts or operations.

Once again, this is far removed from the principle of Net Neutrality.

Especially because despite the provisions of the two directives of the 2009 Telecommunications Package or the aforementioned Declaration of the European

Commission on Net Neutrality, national legislation or rules in the European Union's member states are markedly timid towards net neutrality.

Might one not think that if there were a particular meaning and application of the legal principle of transparency regarding Net Neutrality it would be contained within all national legislations and would be present in European directives?

This is not the case. Except for the Netherlands—the only European country to have passed legislation protecting net neutrality on June 24, 2011 in application of the Telecommunications Package of 2009—no other country in the European Union has consecrated net neutrality in its internal legislation.

At the very least, one might identify a few recent initiatives taken by some of the European Union's more important country, even though they currently have no legal consequence:

- In Belgium, the Francophone Socialist Party introduced two pieces of proposed legislation into Parliament, and even a constitutional modification. They remained moot and it seems that the political crisis Belgium has been experiencing for more than a year does not constitute a particularly favorable political environment for their adoption in the near future.

- France's telecommunications regulator, the ARCEP, began work internally on Net Neutrality in September 2009, and then followed up with an international colloquium organized in April 2010. A report by the Government to Parliament was published on July 16, 2010. It enumerates (pages 35 and following) a series of reforms that should be performed on existing legislation, but which are not a serious overhaul of existing rules. The Informational Report submitted to Parliament by Mesdames Corinne Erhel and Laure de la Raudière is more ambitious, although its conclusions regarding modifications to existing legislation remain very moderate: the consecration of Net Neutrality is suggested as a "policy goal," which would allow regulators to make rules to promote it.

- In Italy, a proposed bill relating to Internet regulation was submitted to Parliament in March 2009, but still has not been adopted. Yet, the bill would forbid all types of discrimination.

- In Norway, the relevant regulator adopted "principles" in order to promote Net Neutrality. They seem to have been favorably received, but are "guidelines" without any true legal force.

Given these conditions, it is impossible to seriously conclude that there exists a principle of Net Neutrality based on the European Community's principle of transparency.

III. Net Neutrality and the Principle of Equality

Might one therefore say that Net Neutrality is but one of the many aspects of the principle of equality? Or is it only pertinent to this principle because, by attaching it to this principle, it might glean some of its legal weight as a founding principle for many systems of rules?

The idea is far from ridiculous. Net Neutrality means refusing to discriminate in access to infrastructures, transmission of data, or the choice of their recipient. And the refusal of discrimination is precisely what the principle of equality means—and one of its most

advanced forms can be found in the French legal system.

In France, the principle of equality's legal basis can be found in many provisions of constitutional value or nature, starting with those found in Article 1 of the Constitution of October 4, 1958, and Article 6 of the Declaration of the Rights of Man and the Citizen of August 26, 1789.

Let us reproduce here these extremely explicit words:

> *Article 1 of the Constitution of October 4, 1958:*
>
> *France shall be an indivisible, secular, democratic, and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs. It shall be organized on a decentralized basis.*
>
> *Article 6 of the Declaration of the Rights of Man and of the Citizen:*
>
> *Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.*

The principle of equality has been the main subject of more than a hundred rulings by the Constitutional Council, all of which converge in order to consecrate this principle as a principle of constitutional value allowing the Council to ensure that the legal provisions submitted to its review respect it. But, an analysis of the Constitutional Council's jurisprudence shows that it considers the principle of equality to imply the non-discriminatory application of the law to physical or legal persons in identitical situations, such as those who use infrastructures.

But, it also allows lawmakers or regulatory authorities to authorize operators to treat physical or moral persons differently insofar as they are in different situations, and so long as this difference in treatment is justified by the goals pursued by the law authorizing these discriminations.

Rereading the 13th paragraph of a June 10, 2004 ruling[21] is sufficient: "*Whereas the principle of equality does not prevent different rules from being applied to different situations, insofar as this difference in treatment has some relevance to the goals of the law that established it.*"

The principle of equality in the French Constitutional Council's jurisprudence is all the more interesting because it is much more subtle than it might seem.

This is why the Constitutional Council regularly accepts that different situations—such as the difference between two sources of energy—may justify different treatment. An example of this is found in a July 7, 2005 ruling[22] whose 15th-17th paragraphs are extremely explicit: *"Whereas, according to the plaintiffs, subordinating the obligation to purchase contained in Article 10 of the Act of February 10, 2000 concerning energy-producing wind technology, the criticized provisions break the equality between renewable energy producers by harming those who produce wind energy; Whereas the principle of equality does not prevent lawmakers from applying different rules to different situations, nor does it prevent derogations from this principle for reasons of the general interest, so long as in either case, the difference of treatment is directly related to the goal of the law that*

establishes it; Whereas, with respect to the characteristics and impact on the environment of the installations that they use, wind energy producers are in a different situation from other energy producers; whereas, therefore, the principle of equality is not contraried by Article 37 of the law submitted for review."

At the same time, the Constitutional Council also states that different situations do not oblige lawmakers to treat them differently. In its December 29, 2003 ruling relating to the 2004 budget[23], it develops this argument in the following manner (paragraph 37): *"Whereas, first of all, that according to the terms of Article 6 of the Declaration of the Rights of Man and of the Citizen: 'Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes'; whereas, even though, generally, the principle of equality requires that people in the same situation be trated in the same manner, it does not mean that there is an obligation to treat people in different situations differently."*

Nothing—no serious legal argument or politically objective goal—justifies obliging lawmakers to force infrastructure operators to treat all of their clients in the same way. Similarly, no legal argument or political goal would justify obliging them to treat them differently.

It is hardly necessary to remind the reader that the Constitutional Council is above and beyond this debate and that it only ensures that the difference in treatment is proportional to the difference in situations. In its aforementioned ruling on the *Loi pour la confiance dans l'économie numérique*[24] (paragraphs 13 and 14), it expresses its doctrine somewhat definitvely: "*Whereas, the taking into account of differences of the conditions of accessibility of messages over time—whether it is published in paper or electronic format—is not contrary to the principle of equality; whereas, however, the different regimes implemented for the right to reply and to the statute of limitations by the criticized provisions is grossly in excess of what would be necessary for the taking into account of the particular situation of messages exclusively available in electronic format."*

Under these conditions, it seems very difficult to identify a principle of Net Neutrality within the principle of equality. The only possibility for this would be if lawmakers sovereignly decided to implement this principle and if the Constitutional Council were asked to rule on the conformity of such a law with the constitution and then confirmed that this principle was not grossly in excess of what was necessary to ensure users' access to the Internet.

IV. Net Neutrality and the general principles of law

It is extremely difficult to attach Net Neutrality to any existing legal principle, which is perhaps why in Europe, one ceaselessly hears the term of a "policy goal" [25] that governments should strive for.

There remains, nonetheless, a last possibility that must be explored, which is that of a *general principle of law* that courts of law might make into jurisprudence, even in the absence of an act of parliament. [26] Even though we might not yet be ready for this, it is possible that this might happen in the future, and maybe even a near future.

French law and the law of other European countries contains this possibility and allows judges the right to identify general principles of law. An attentive observer of administrative jurisprudence in France[27] perfectly described this process: "*The Judge attempts to identify principles that are in accordance with the general state and spirit of the law. [He] looks for inspiration in individual, yet convergent, legal provisions…He is also attentive to the demands of the law and of the legal conscience of his contemporaries."*

Can one not imagine that even in the absence of specific and convergent legal provisions,

national judges in Europe, and even the European Court of Justice, end up imposing Net Neutrality as a general principle applicable to all?

To do this, they would have to surmount three major obstacles:

- Even though the demand for Net Neutrality is shared by many individuals, it has no definite contents and remains a protean concept without any true structure. In their aforementioned informational report, Mmes. Erhel and de la Raudière are so conscious of this fact that they propose that a 'proper definition'[28] be established before any policy goals are to be suggested. This is their first proposition, justified by their triple preoccupation of "sending a clear political signal," "remedying the insufficient legal framework in this area," and "relying on a proper definition." [29]

- Consecrating a principle of Net Neutrality would necessarily imply the identification of very subtle differences. Even though the principle might be useful to consumers, it would have to take into account the necessities of infrastructure deployment and operation. This is at the heart of the ruling handed down on April 6 2010 by the US Court of Appeal of the District of Columbia in the Comcast Corp *vs* FCC case[30]. The FCC had adopted new principles to promote the freedom of access to the Internet and its infrastructures[31]. The Court of Appeals clearly stated its reticence in this significant decision "*Yet notwithstanding tbe difficult regulatory problem of rapid technology change posed by the communication industry, the allowance of wide latitude in the exercice of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer*"[32].

- Lastly, one must wonder whether it would be useful to recognize Net Neutrality as a principle[33]. What would this recognition bring except for the sacralization of the regime of infrastructures and application? Wouldn't the cure be worse than the disease? Why should Net Neutrality be recognized as a principle instead of the right for operators investing in infrastructure to obtain fair payment for third parties' (intermediaries or final users) use of those infrastructures? At a time of global interconnection of electronic communications networks, would that not be opening our infrastructures to those of our operators' competitors, who would seize the opportunity, and would still keep their ability to monitor the networks and data that pass through their domestic networks? What would become of Europe and the European countries that would neutralize their infrastructures for political principles, thereby handing their operators and infrastructures over to the aggressive strategies of their foreign competitors? [34]

These are major questions that remain unanswered, but which might stop the courts from recognizing the existence of a general principle of net neutrality, since courts usually only recognize as general prnciples evident principles that do not contain major difficulties. As observed Nathalie Escaut in her pleadings on the Jean Bouin ruling[35], regarding the general principle of transparency applicable to the occupation of the public domain, following a demonstration similar to the one above, "*The question of transparency regarding contracts for the occupation of the public domain seems in reality a question that can only be answered by lawmakers: it requires a political decision and precise legal organization."*

These are the same words with which I would like to conclude the present study. The question of Net Neutrality "*seems in reality a question that can only be answered by lawmakers: it requires a political decision and precise legal organization,"* thereby confirming that since the principle of neutrality does not exist in most States, we must consider the neutrality of a so-called principle.

[1] One of the fathers of this debate is Tim Wu, *Network Neutrality, Broadband Discrimination*, Journal of Telecommunications and High Technology Law 2003, Vol.2, p.141

[2] The Dutch law was adopted on June 24, 2011

[3] The Chilean law was adopted on July 13, 2010

[4] FCC News, Press Release, December 21, 2010

[5] Published on October 21, 2009

[6] Published on February 24, 2009*, Network Neutrality Guidelines for Internet Neutrality*, www.ntp.no

[7] Cf. French parliamentary report entitled *Rapport d'information* by Mrs. Corinne Ehrel et Laure de la Raudière submitted in virtue of Article 145 by the *Commission des affaires économiques* (French National Assembly) on *La neutralité de l'internet et des réseaux* n°3336

[8] Communication from the Commission to the European Parliament, the Council, the Economic and social Committee, and the Committee of the Regions, n°COM/2011/0222, April 19, 2011 on The open Internet and net neutrality in Europe ; addendum, Commission Declaration 2009/C308/02, December 18, 2009.

[9] On the principle of neutrality, cf. especially Vassilios Kondylis, *Le principe de neutralité dans la fonction publique*, LGDJ 1995, Bibliothèque de droit public, Tome 168

[10] Lucien Rapp, *Dialogue de sourds autour du principe de neutralité*, Les Echos 1er mars 2004

[11] Cf. footnote 8.

[12] Especially, Tim Wu, *Network Neutrality, Broadband Discrimination*, *supra*.

[13] Ruling n°2009-580 DC

[14] Regarding the technologies that allow for such discrimination, cf. CISCO *White Paper, Controlling Your Network – A Must for Cable Operators*, 1999

[15] *L'avenir des idées*, 2005

[16] Cormac Callanan, Marco Gercke, Estelle De Marco, Hein Dries-Ziekenheiner, *Internet Blocking Balancing Cybercrime Responses in Democratic Societies*, Milltown Dublin, 2009

[17] Ruling n° 2011-625 DC, 10 March 2011

[18] Aff. C-324/98, AJDA 2001, p.106

[19] Aff. C-458/03

[20] Aff. C-264/03

[21] Décision n°2004-496 DC

[22] Décision n°2005-516 DC

[23] Décision n°2003-489 DC

[24] Décision 2004-496 DC

[25]Aformentioned Communication by the European Commission to the European Parliament and Council, to the European Economic and Social Committee, and to the Committee of Regions, n° COM/2011/0222 of 19 April 2011.

[26] Cf. *Aramu* ruling, CE Ass. 26 Oct. 1945, Rec. p.213

[27] René Chapus, *Droit administratif général*, Tome 1, n°122 et s.

[28] Aformentioned report, p.68

[29] Their definition is the following: « *(i). the ability for internet users, (ii) to send and receive the contents of their choice, use or operate the applications of their choice, connect and use the programs of their choice as long as they do not harm the network, (iii) with a transparent, sufficient, and non-discriminatory quality of service, (iv) and in respect of legal obligations and the necessary measures to manage security and unpredictable situations of congestion* »

[30] United States Court of Appeal, District of Columbia Circuit, 6 April 2010, n°08-1291 *Comcast Corp. versus FCC NNBC Universal et al.*

[31] Press Release, August 5, 2005 : *FCC Adopts Policy Statement. New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet*. Suivi d'une FCC Notice of Proposed Rulemaking en date du 22 octobre 2009

[32] This decision did not hinder the FCC's determination. See especially www.voices.washingtonpost.com, 13 September 2011, "*FCC's Net Neutrality Rules to Trigger Legal Hill Challenge*".

[33] Cf. an interview with Mr Jean-Ludovic Silicani, President of the ARCEP, in Les Cahiers de l'ARCEP, n°3 août-septembre-octobre 2010, dossier : *La neutralité de l'internet*, p.1

[34] Cf. Lucien Rapp, « *Distribution en réseau et réseaux de distribution : l'infrastructure peut-elle être durablement neutre ?* » LDI n°33, décembre 2007, p.70

[35] CE section 3 décembre 2010, *Ville de Paris, Association Paris Jean Bouin*, req. n°338272 et 338527, BJCP, n°74, p.36 et suivantes.