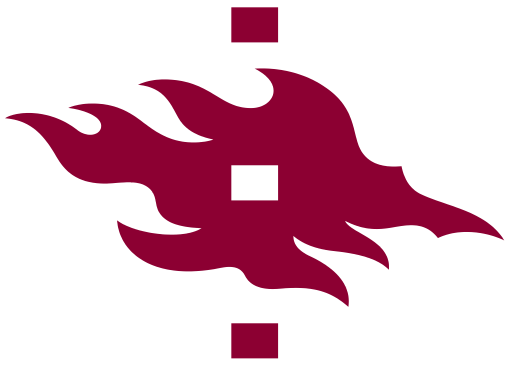


# Openness of the Internet - Regulatory Responses to Gatekeepers

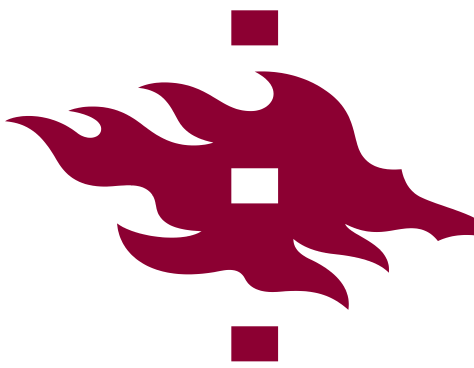
Olli Honkkila  
PhD Candidate  
Jan 31, 2019

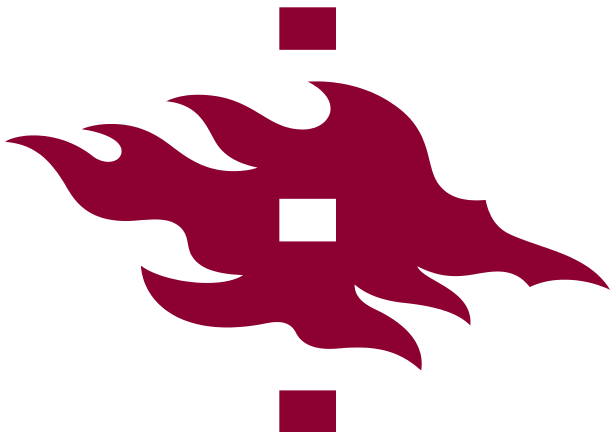


# The contents

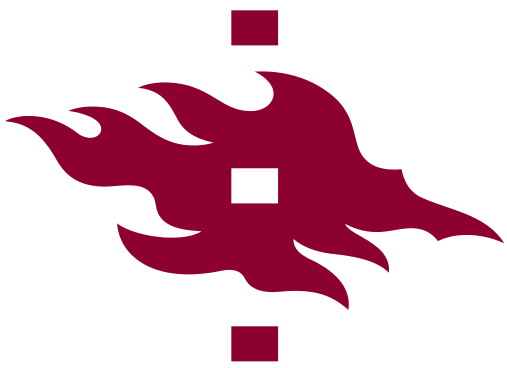
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1. Net neutrality
  2. Google search case & (Proposed) EU Regulation on promoting fairness and transparency for business users of online intermediation services
- My research explores how the openness of the Internet is regulated in the EU and in the US. The aim of this study is to examine how much control different players in the Internet value chain can legitimately exert over the use of the Internet. A key question of the study is, what is the role of *freedom of choice*. To what extent should the Internet users' freedom to choose the services they use be protected? By which means?

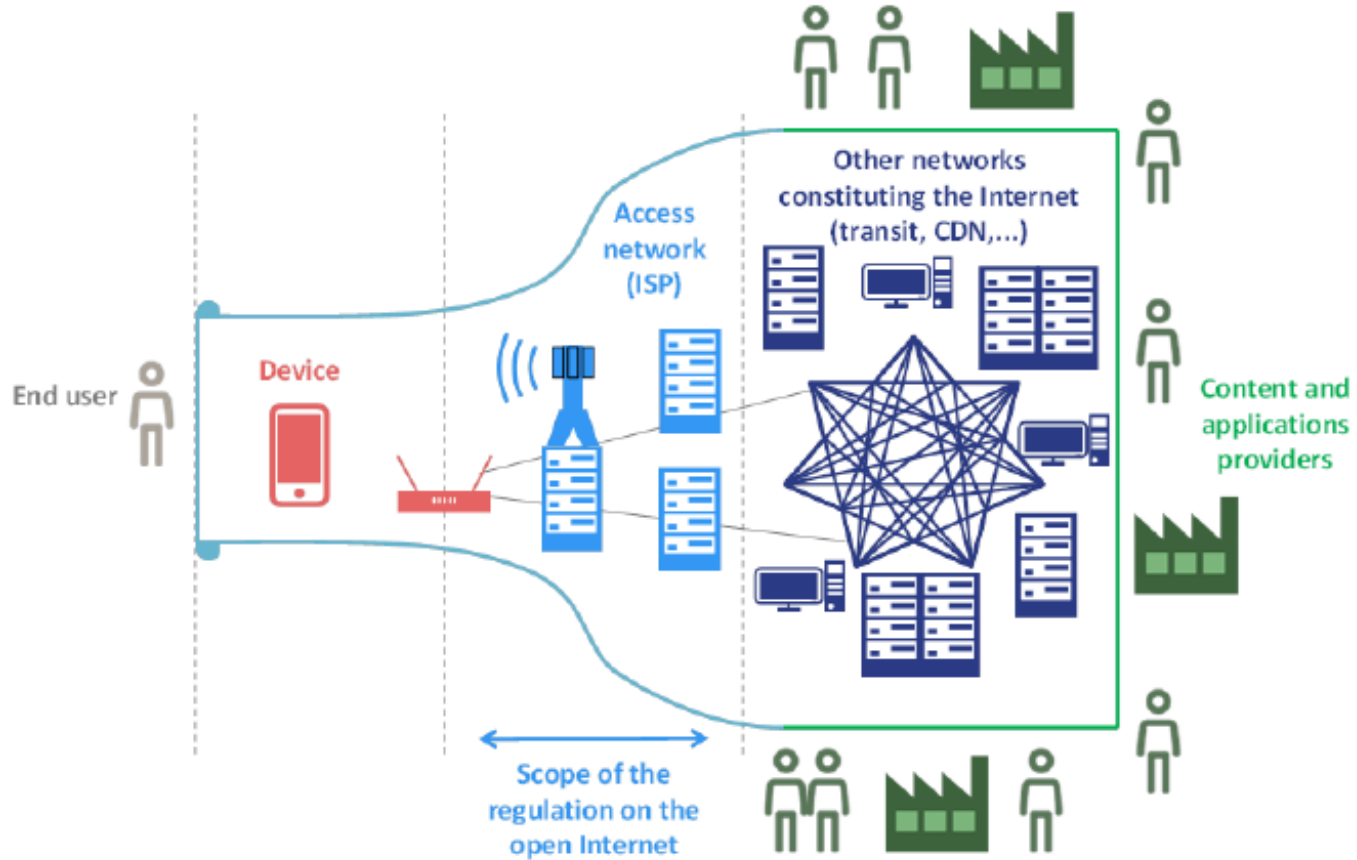




# Net neutrality

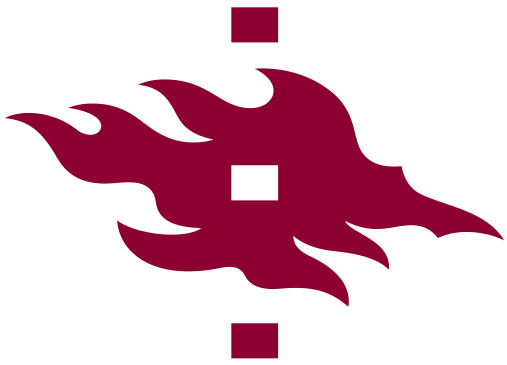


# Net Neutrality



Physical links between the end user and the internet

Source Arcep

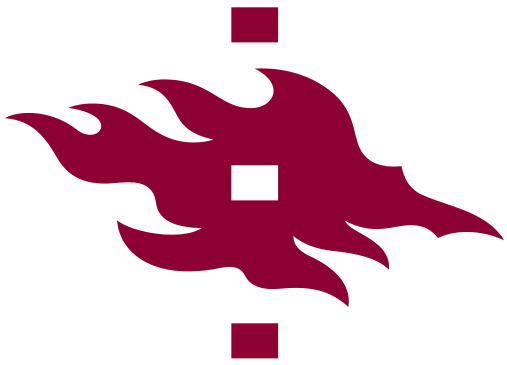


# Net neutrality / Open Internet access

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- EU Framework
  - Regulation(EU) 2015/2120 (“Open Internet Access Regulation”\*)
  - BEREC Guidelines (BoR (16) 127)
- Goals
  - Protecting end users – freedom to choose applications and services
  - Guaranteeing innovation in the internet ecosystem
  - Avoiding fragmentation (caused by Member State level legislation)

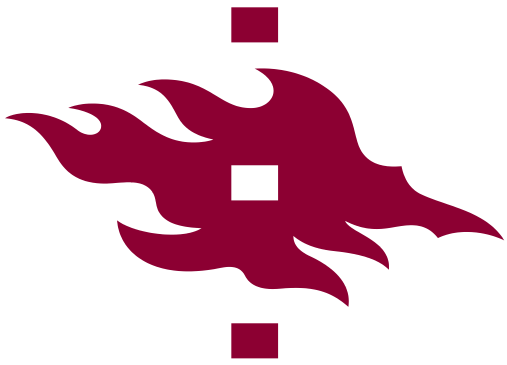
\* Thanks to the legislative process there isn't a generally used name for this regulation (originally referred as Telecoms Single Market Regulation)



# THE KEY net neutrality provisions in the “Open Internet Access”\* Regulation

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- A right for all end-users to access and distribute (legal) content, applications and services **of their choice**, Art 3(1)
- Traffic management, Art 3(3) (main points)
  - Providers of the internet access services are required to **treat all traffic equally**
  - **Reasonable traffic management** allowed
    - E.g., can't be based on commercial considerations, but on objectively different technical quality of service requirements of specific categories of traffic.
- “Specialised services”, Art 3(5)
  - Services other than internet access service optimised for specific content (e.g. IPTV?)
  - Allowed only if the network capacity is sufficient to provide them in addition to any internet access services provided
- Commercial practices, Art 3(2)
  - **Agreements (and any other commercial practice)** between end-users and the providers of internet access services) **on commercial and technical conditions** and the characteristics **shall not limit the exercise of the rights of end-users**



# BEREC Guidelines on commercial practices

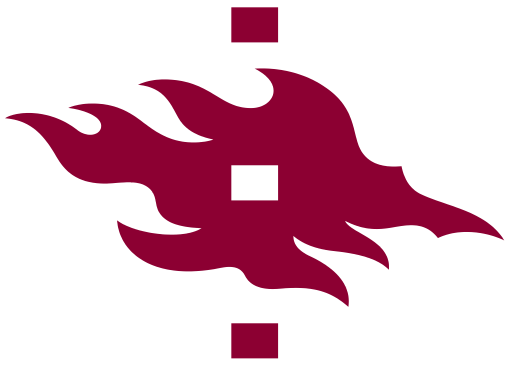
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- BEREC provides examples of factors to take into account, such as:
  - The **market positions** (ISPs and CAPs\*)
  - The **effects on end user rights** (including CAP end users)
    - The effect on **the range and diversity** of content
    - Whether the end user is incentivised to use certain applications
    - Whether there are characteristics that **materially reduce end-user choice**
    - Whether **the functioning of the internet ecosystem as an engine of innovation is impacted**
  - The **Scale** of practice and the **presence of alternatives** (internet access offers)
- A distinction between **INFLUENCING** vs **LIMITING**
  - **HOWEVER, IN PRACTICE THE DIFFERENCE REMAINS BLURRY**
    - For example, the zero-rating in the Netherlands (when open to category of applications) vs Belgium (just a single application from a preselected group)





# **Google search & (Proposed) EU Regulation on promoting fairness and transparency for business users of online intermediation services**

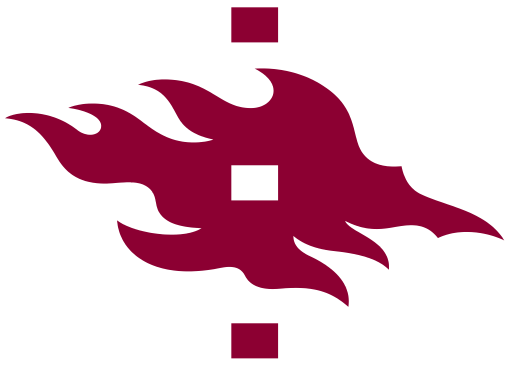


## Google search case

### **The EU Commission:** an abuse of a dominant position:

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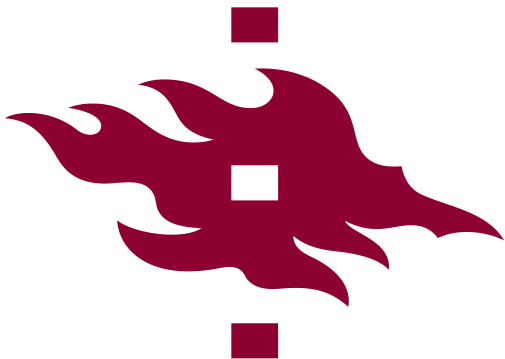
- The markets for general search and comparison shopping **two separate product markets**
  - Google has a dominant position in providing general online search services throughout the EEA
- Google's **more favourable positioning and display** of its own comparison shopping product in its general search results pages
  - More prominent display of own comparison shopping service while demoting competing services
  - Not competition on the merits
  - Potential to foreclose competing comparison shopping services
  - users do not necessarily see the most relevant results in response to queries
- The proposed remedy:
  - Google should **treat equally its own comparison shopping service and those of rivals**



# (Proposed) EU Regulation on promoting fairness and transparency for business users of online intermediation services

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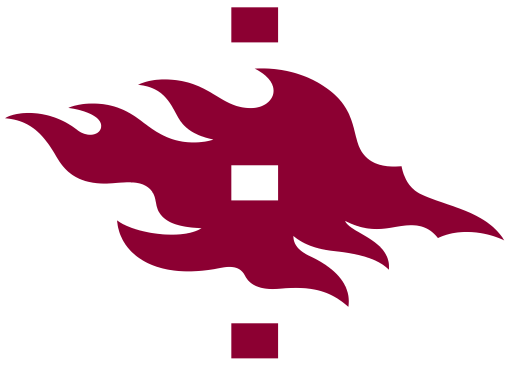
- Impact assessment
  - “A **relatively small number** of online platforms **increasingly provide the main connection between business users and consumers** in each sector, which results in an **increased dependency** of businesses on these online platforms”
  - “Practices identified and detailed in this IA are: sudden, unexplained changes in terms and conditions without prior notice; the delisting of products and services and the suspension of accounts without clear statement of reasons; **issues related to ranking** (including paid-for ranking) of businesses and products; unclear conditions for access to, and use of data collected by platforms; **the discrimination of businesses and favouring of platforms' own competing services**, and most-favoured nation clauses.”
- The draft includes transparency measures, such as requirements to:
  - make publicly available the main parameters (and their relative importance) of online search engines
  - Include in the terms a description of any differential treatment between own and business user’s services



# The questions

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- Legal fragmentation
  - Member State level regulation
  - Political pressure for “fairness”, especially in member state level
- Is “competition just one click away”?
- Is it rational to require rational behavior from consumers?
  - The role of behavioral economics debated
  - What is rational? (asymmetric information, resources...)
  - *“In the algorithm-driven world, we will often be unaware of camouflaged abuses. We will unlikely know when the digitized hand displaces the invisible hand of competition.” (A. Ezrachi)*
- And ultimately, how do we believe innovation occurs?
  - European Commission
    - “App developers provide a constantly improving richness of content that no single platform could have imagined or engineered”
  - Maureen K. Ohlhausen, (previously) Acting Chairman, FTC:
    - *“The idea that today’s leading technology firms will inevitably sustain and even increase their advantages in the future, however, is uncertain based on a review of not so distant events.”*
    - [...] *“Nor do we spend a lot of time talking about the Microsoft/Intel dominance in desktop computing that was such a focus for antitrust at the end of the last century. The wheel turns, and technology moves forward in ways that no one expect”.*

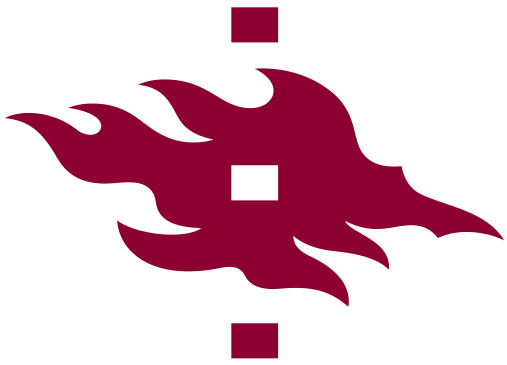


## Microsoft vs Google (United States v. Microsoft Corp, 2002)\*

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- In 1998 Microsoft integrated search engine into it's browser
- The US Government argued that Microsoft's behavior **hampered innovation**, by preventing Google's new search engine **from evolving into a platform that could rival** Microsoft Windows.
- In 2002 the Court required Microsoft to provide unbundled versions of Windows
- Google had been acquired by AOL in 1999

\*This case is entirely fictional – it didn't happen.



# Could we be netscaping now?

- <https://www.businessinsider.com/the-5-most-valuable-internet-companies-in-1995-vs-today-2015-6#2-in-2015-google-8>

## #1 in 1995: Netscape

**Market cap in 1995:** \$5.4 billion

**Market cap in 2015:** Doesn't exist

## #2 in 1995: Apple

**Market cap in 1995:** \$3.9 billion

**Market cap in 2015:** \$763 billion

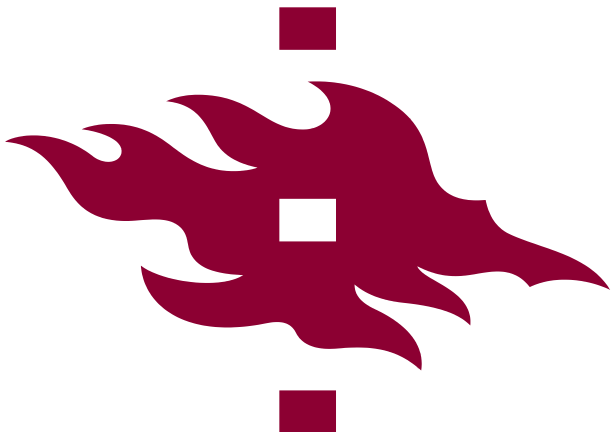
## #2 in 2015: Google

**Market cap in 1995:** Didn't exist

**Market cap in 2015:** \$373 billion

It is hard to predict the future. But it is often hard to assess the past choices and the potential outcomes that never happened as well.

We should not too easily dismiss the Microsoft browser and media player cases.



**Thank you**