Ladies and gentlemen,

First, I have to thank the FGV Law School of Rio for having invited me in this high level international conference to share with you my views on the European approach on net neutrality.

This is indeed a complex issue I dealt with in my quality of former national and European telecoms regulator, namely as President of EETT, the Greek Regulator, and as Chair of BEREC, the Body of European Regulators for Electronic Communications. Net neutrality remains an issue I am currently teaching at the University of Pireaus in Greece and working on as an author and under a practical perspective as communications attorney.

It is my pleasure to be again in Brazil, which is a beautiful country with friendly people, after my participation as a speaker, back in March 2010, at the REGULATEL Latin America Regulators’ Conference hosted by ANATEL in Manaus on “universal access to electronic communications services and pro-competitive regulation”.

The Brazilian Internet Bill of Rights
I understand Brazil is now in the midst of rolling out the secondary legislation for the implementation of the Internet Bill of Rights’ “Marco Civil da Internet” - namely Federal Law 12.965 of 23 April 2014, together with a comprehensive data protection law.

Brazil's innovative civil rights' framework will be fleshed out in the forthcoming presidential decree, upon conclusion of the ongoing consultation with the Internet Steering Committee and ANATEL, the national telecommunications agency, and I am glad to see all parties being represented here. In this regard, many critical questions of political, technical, security and commercial nature on internet governance emerged this morning for all sector stakeholders, namely:

- On top of the very important provisions of the “Marco Civil”, as exposed earlier by Mr Mollon, which is the right mix of regulations in order to achieve a “connected Brazil”? Which are the competent bodies to oversee the coordinated implementation of the regulations, ANATEL, the ordinary courts or self-regulatory instruments initiated by telecommunications providers' associations?
• How can citizens' equal broadband internet access as a democratic right be ensured under fair terms and conditions without any discrimination or censorship applied against users, in accordance with the Federal Constitution?

• What is the market impact net neutrality could have on operators’ business models? For instance, are “net neutrality-compatible” the “zero rating” schemes applied by operators in Brazil, such as the “TIM Whatsapp” service or the Claro users' facility for free use of specific social networking platforms when their data franchise expires?

• What are the broader implications on the net neutrality debate on cost management, information security, internet traffic encryption, bundling of services, consumer protection and on the overall competitive landscape of electronic communications' service providers in Brazil?

• How can the implementation of net neutrality and data protection legislation can safeguard freedom of expression, privacy and fair competition between traditional network operators, desirous to monetize the huge data traffic generated by content providers and Over the Top Players, such as Google, Apple, Skype, Facebook or Whatsapp?

• To what extent do strict data privacy and consumer protection rules, including extensive net neutrality provisions, block technological innovation and therefore harm consumer welfare?

Net neutrality remains a globally controversial issue
Balancing all vested interests remains a controversial matter not only in Brazil but both in the rest of the developed and the developing world. For instance, in the US many operators, such as mobile trade group CTIA, cable trade groups, large broadband providers such as AT&T or Verizon and other companies have already started filing lawsuits against the FCC net neutrality rules, adopted in February 2015. Those rules reclassify broadband under the Utility Regulations of Title II of the Communications Act 1996.

Violation of net neutrality principles by prioritized mobile data traffic through “sponsored data” deals in wireless digital services allowing users access certain websites, apps or advertising without using their data caps is also under regulatory scrutiny in many jurisdictions in Europe. Equally, in the developing world, Facebooks’ “Internet.org” initiative has been accused of violating net neutrality principles in India.

“Zero rating” schemes and “positive price discrimination”
The use of “toll free” data provides specific service providers an advantage
over their competitors by encouraging consumers to access certain content free of charge to the detriment of other. In this context, does the so-called “positive price discrimination” constitute an accepted commercial practice under consumer and competition law?

For instance, in certain African and Asian countries the number of Facebook users is larger than the number of open internet users. The application of zero rating schemes may lead to the social network’s ever-growing data monopoly. In the absence of adequate regulatory safeguards, such practices may create side effects for the mobile market at large. In fact, the bigger mobile operators may increase data caps to encourage a carefree usage of their online content. By using such multi-play strategies, based on higher volume caps, large operators that are able to offer these kinds of bundles may easily push the smaller competitors aside.

Furthermore, exclusivity deals between specific SMP operators and big content providers may gradually lead to the fragmentation of the internet and influence consumer preference. In the absence of specific net neutrality rules, telecom and competition regulators need to evaluate the operators' and content providers' significant market power so as to detect violations of competition rules and relevant abusive practices. We will hopefully have the chance to further exchange views on this matter during our discussion today.

Net neutrality in Europe's Digital Single Market
The European Digital Single Market (DSM) Strategy was announced by the President of the EU Commission Mr Jean Claude Juncker on 6 May 2015. Such strategy comprises a set of 16 initiatives organized around three pillars aiming at ensuring growth for the European digital economy via the provision of trans-border digital services. Such measures are designed to create new jobs while ensuring the free movement of persons, services and capital under conditions of fair competition, consumer confidence and increased privacy protection.

To support the implementation of the DSM initiative, the EU “Connected Continent” Telecoms Reform legislative package, released in 2013, contains proposals on net neutrality. However, this issue is far from been resolved and continues until today to stir emotions in Europe. In fact, back in March 2014, the EU Parliament had opted for a harder stance on making sure all on line traffic is handled equally. Human rights and internet freedom activists were expecting what they called “a clear victory of the free and open internet”.

The Latvian EU Presidency initiates “principles-based” approach
Today, the initial picture on the open internet has changed. Recently, Latvia, which currently holds the 6month EU rotating presidency, initiated a "principles-based" approach on net neutrality. This rather vague concept seems to describe a "two-tier" system, namely a faster internet lane and a slower and
less efficient one. Such differentiation should allow a competitive market with variable services, depending on what consumers are able and willing to pay. With regards to the definition of specialized services, the Latvian proposal states that operators should be allowed to deliver other services than Internet access, provided that those have what the proposal calls no material effect on the quality of Internet connectivity.

Moreover, under the proposal, nobody would be left with internet poverty through extremely slow internet speeds. Internet service providers should treat traffic in a non-discriminatory manner but they would be allowed to offer consumers differentiated speeds and services. National telecoms regulators would have the right to order operators to guarantee a minimum level of Internet service quality, certain technical standards and provide network management information.

Under the applicable complex “trialogue” rule making process, the European Parliament, the European Commission and the Council of the EU have demonstrated their willingness to swiftly negotiate and agree on a common text by June 2015. Once the trialogue is concluded, the joint proposal will be sent to the European Parliament for final adoption of open internet access rules, in the spirit described above.

**The role of the BEREC in the net neutrality debate**

In this debate, BEREC, the Body of European Regulators for Electronic Communications, plays a central role. BEREC's main purpose is to promote cooperation between the 28 National EU Regulatory Authorities by advising the European Commission, the Parliament and the Council, in order to ensure a consistent application of the regulatory framework for electronic communications across Europe. BEREC comprises an executive body, the Board of Regulators, which is composed of the Heads of the NRAs, that elects a inner five-member Board, and an administrative office, official Community organ headed in Riga, Latvia.

Since 2010 BEREC has published a number of very important documents on key topics related to net neutrality, including a report on best practices to facilitate switching, a framework for quality of service in the scope of net neutrality, guidelines on transparency by identifying best practices and recommended approaches, as well as the results of a traffic management investigation, which covered more than 400 fixed and mobile ISPs and gives a very good overview of traffic management practices in Europe. Moreover, BEREC published guidelines on quality of service as well as reports on differentiation practices and related competition issues and an assessment of IP interconnection. Very recently, in June 2015, BEREC published a very interesting Report on How Consumers Value Net Neutrality in an Evolving Internet Marketplace.
BEREC's findings showed that there is an undeniable problem regarding open Internet in Europe and it was necessary to take immediate action. In this direction, clear provisions will hopefully be adopted by the Parliament later this month by striking a right compromise between different interests at stake among market actors. Under my BEREC Chairmanship, I have experienced the complexity of this exercise. Any solution adopted will be criticized by numerous incumbent and alternative telecom providers, using various access platforms such as fiber, cable, or wireless, media companies, over the top players, application providers, interest groups and lobbyists who are fighting with EU lawmakers and with national governments over the legislative agenda.

**Proponents and opponents of net neutrality**

On the one hand, the proponents of net neutrality include digital rights’ activists, free speech advocates, consumer organizations, internet startups, website owners, application developers, content distributors and some OTTs desirous to protect their global commercial interests through a unified regime on internet traffic. For various reasons each, those parties allege the enactment of net neutrality legislation in Europe will guarantee that the internet remains open, transparent and democratic. The adoption of harmonized pan-European rules on content delivery will avoid fragmentation of the web. The implementation of equal access rules will prevent undue discrimination between small and big users, based on their ability to pay more than others to access innovative services of the Information Society.

On the other hand, the opponents of net neutrality comprise the traditional telecommunication operators, fixed and mobile, such as Deutsche Telekom, Telefonica, Orange, Telecom Italia, but also cable companies and other large service providers such as Vodafone. Providers of the underlying network infrastructure in Europe allege they are unable to monetize the huge data traffic generated by US-based OTTs such as Google, Apple, Skype, or Facebook. Using IP protocols, the latter are bypassing the traditional networks allowing consumers to make free or low cost phone calls (as for instance apps like Skype, Viber or Facetime) thereby depriving operators from valuable communications' revenues. Moreover, high video traffic generated from services like YouTube or Netflix creates high network congestion which in turn deteriorates quality of service and requires constant capacity upgrades by ISPs.

For all those reasons, fixed and mobile network operators wish to have the power to offer premium services at higher costs, an option that strict net neutrality rules would prevent. They generally argue that less ex-ante regulation and more commercial flexibility would allow traditional network operators to better face competition with non-telco Over the Top Players.

**National broadband access rules in EU Member States**
Let me now briefly present a panorama of the European landscape on broadband access before addressing specific net neutrality provisions enacted by Member States. At a European level, the **Universal Service Directive 2002/22/EC**, as subsequently amended by Directive 2009/136/EC (Citizen Rights' Directive) obliges member States to ensure that requests for connection at a fixed location to the public telephone network are fulfilled. The implementation of the directive is subject to judicial review.

The European Court of Justice has fined in 2010 Portugal (case C-154/09) for failing to designate telecoms providers as universal service providers in accordance with the Directive. On 24 January 2013, the European Commission requested the Court of Justice (case C-76/13) to impose further fines on the country, which had still not fulfilled all of its obligations.

Other EU Member States, as for instance, Greece, my home country, recognize citizen access to on line services as a constitutional right. By virtue of **Article 5A of the Hellenic Constitution**, the state has an obligation to facilitate the production, exchange, diffusion and access to electronically transmitted information. The Greek regulatory Authority, which I had the honor to Chair for more than four years, has designated OTE, the former incumbent, as universal service provider across the entire country, with the cost being shared among all market players.

Equally in Spain, since 2011, Telefonica, the former state monopoly operator, which is designated as the country's "universal service provider" has to guarantee to offer "reasonably" priced broadband of at least one megabit per second throughout the country.

**Broadband connectivity as a human right**

However, although several stakeholders, nationally and internationally, have agreed that access to Internet is to be considered as a human right, it is still unclear how this access is defined and what concrete obligations it involves.

In most jurisdictions, the promotion of broadband remains more a political goal than part of the universal service, as the case is with the State’s obligation to supply citizens with utilities such as electricity or water. The non inclusion of broadband connectivity to the universal service concept is due to obvious network financing constraints, terrain difficulties and coverage restrictions of the entire territory.

I am sure that especially colleagues and operators in Brazil, which is more a continent than a country, understand the rationale of the above argumentation. Until now, Finland is the only European country that expressly recognizes by law the basic broadband access of 1 Mbps as a fundamental human right for all citizens irrespective from their geographic location.
Court precedents on the right of internet access

Non discrimination regarding internet access is imposed and monitored by national regulatory authorities or even be recognized by court precedents. For instance, in France, internet access has been declared as a human right by high courts, namely by the French Constitutional Council which in June 2009 struck down as disproportionate the punitive penalties of automatic service interruption imposed by law on subscribers caught to illegally download copyrighted material. Service interruption occurred following two email warnings by “HADOPI”, an administrative body constituted for on line copyright protection.

In this direction, in January 2013 the Federal Court of Justice in Germany recognized that internet connectivity is vital in modern life (case 14/2013). As a result the court granted compensation to a plaintiff who was disconnected from accessing Internet due to the service provider’s provisional failure to provide connectivity.

The European Court of Human Rights (ECHR) has also issued several rulings related to the broader notion of freedom to receive information and thereby towards the recognition of a right to information.

Specific national net neutrality rules

Except for generic broadband access provisions, specific net neutrality legislation was adopted by governments in the Netherlands (2012) and in Slovenia (2013). Said national statutes forbid traffic blocking of internet services and deep packet inspection to track customer behavior by operators. France has also soft law provisions and Italy proposes net neutrality provisions, with draft law 2520 containing “open internet” principles similar to the ones of the Brazilian Marco Civil.

The application of the above legislation by the Regulatory Authorities has already produced some case law in Europe. In early 2015, the Slovenian regulator nailed carriers Telekom Slovenije and Si.mobil for violating net neutrality principles via zero rating music applications. Equally, the Dutch Consumer Protection Agency ACM fined former incumbent KPN with €250,000 for blocking some VoIP services on its free Wi-Fi hotspots, and Vodafone with €200,000 for providing free traffic for the “Go -HBO app”, allowing customers to watch pay TV Channel HBO. According to the Dutch regulator, such practices were reported as illegal since they influenced the customers' on line bahaviour.

In the opposite direction, France’s Court of Cassation has upheld by mid-May 2015 a controversial ruling by the country’s competition authority that Orange and other network operators can charge for additional peer network capacity, by rejecting a US operator's (Cogent) appeal.
The Way Forward
In this context, what is the way forward on net neutrality in Europe? Unless any unexpected delays occur, the net neutrality provisions of the “Connected Continent” DSM package towards are expected to be voted soon by the European Parliament. As a result, consumers shall have the right to be informed by operators, before signing a contract, about the nature of the service to which they are subscribing. Pre-contractual information shall include the providers’ obligation to publish data about applicable traffic management techniques and their impact on service quality, as well as any other limitations including bandwidth caps or available connection speeds. Common rules on traffic management will ensure that the internet can continue to function, grow and innovate without becoming congested. Blocking, throttling or slowing down specific content or applications will be prohibited, with only a limited number of exceptions to prevent spamming or cyber-attacks through rapidly spreading malware.

In conclusion, any solution finally adopted in Europe through a multi-stakeholder dialogue should in my view take into account the international developments and the global internet governance principles. To be effective, the legal rules adopted should be able to strike a right balance between the conflicting interests at stake, so as to ensure a free and open internet while encouraging investment, entrepreneurship and innovation.

Thank you for your attention