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Does net neutrality have a future?

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The Federal Communications Commission's (FCC) draft order on the open internet[1] would roll back the FCC's 2015 Open Internet Order, and order that internet access services no longer be considered as telecommunications services regulated under Title II of the U.S. Communications Act. This comes as no surprise because the FCC is now chaired by an appointee of the Republican party, Ajit Pai, who publicly opposed the FCC's Open Internet Order when it was adopted in 2015.

The issues concerning internet neutrality are highly politicized in the United States. Generally speaking, the Republican party defends a light-touch approach to regulation and the Democratic party supports a more proactive approach. Much of the U.S. debate revolves around the FCC's statutory powers to regulate internet service providers. The U.S. Communications Act, last updated in 1996, does not say a word about net neutrality. The FCC therefore had to search for a statutory basis to regulate. In 2005, under the Bush administration, the FCC restricted itself to a non-binding statement of open internet principles. Under the Obama administration, the FCC attempted to adopt binding regulations based on Title I of the Communications Act, but its first attempt was struck down by the federal courts.

On its second attempt in 2015, the FCC changed its legal approach by declaring that the internet access services were common carrier services subject to regulation under Title II of the Communications Act. By declaring internet access services to be telecommunications services regulated under Title II, the FCC could easily impose non-discrimination obligations on internet service providers. However, the FCC had previously said that internet service providers should not be considered as regulated telecommunications operators but instead as providers of information services subject to lighter-touch regulation under Title I of the Act. The FCC's 2015 decision to reclassify internet access services as regulated telecommunications services constituted a break with the position historically taken by the FCC. For Ajit Pai and most members of the Republican party, this change in position constitutes a threat to internet innovation, opening the door to over-regulation. In addition, most members of the Republican party believe that binding net neutrality regulation should have a clear statutory basis, via a law adopted by Congress. The FCC should not create regulatory powers that were not expressly given to it by the legislator.

These domestic law issues play an important role in the net neutrality debate in the U.S. Outside the United States, the more interesting question arising from the FCC's rulemaking proceeding is whether binding net neutrality regulations are necessary and useful. The utility of a regulation is generally assessed by comparing the direct and indirect social costs of the regulation with the regulation's direct and indirect benefits. The FCC's new chairman believes that the 2015 Open Internet Order does not bring a net positive benefit to society, and for this reason, should be repealed. To support his argument, Chairman Pai conducted a cost-benefit analysis.

To support its theory that the 2015 order does not create net benefits, the draft order points out that there have been few disputes concerning internet neutrality. According to the FCC, this is a sign that market forces are functioning properly, and that there is no market failure requiring regulatory intervention. ISP behavior would have been the same with or without a binding regulation. Consequently, according to the FCC, the regulation created no social benefit compared to a situation with no binding regulation. In addition to not creating benefits, the FCC believes that the regulation creates costs for society, notably a decrease in investments made by the operators. The FCC cites an annual decrease of approximately 5.6 percent, but produces no evidence to show a causal link between this

[1] http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1122/DOC-347927A1.pdf

decrease in investment and the FCC's 2015 regulation. In any event, it is probably too soon to draw reliable conclusions on investment levels resulting from the 2015 regulation. The FCC also states that the 2015 regulation limits the development of innovative commercial offers, including those based on commercial partnerships between content distributors and internet service providers. According to the FCC, the public could benefit from innovative internet offers based on the characteristics of two-sided markets. Even though some commercial partnerships could lead to anti-competitive practices, the FCC considers that competition and consumer protection law would be sufficient to address these abuses. To conclude, the FCC considers that the 2015 Open Internet Order creates no benefit to society and generates significant costs.

One might legitimately ask why there have not been more disputes related to internet neutrality, both in the United States and in Europe. Is it because the 2015 European Regulation and the FCC's 2015 Open Internet Order have dissuaded operators from discriminating, or is it because market forces, combined with competition law, would have achieved the same result? In other words, have the FCC's and Europe's net neutrality regulations changed anything?

If we look at net neutrality from a purely economic standpoint, one can reasonably conclude that many kinds of discrimination targeted by the European and U.S. net neutrality rules would be covered by existing competition law. A commercial arrangement pursuant to which an internet service provider favors its own content would in some cases constitute an illegal vertical restriction on competition. Competition law analysis may depend on the level of competition on the retail market, as well as how the relevant markets are defined. A report dated February 2017 prepared for the European Commission[2] confirms that many kinds of abuses relating to "zero rating" would be covered by existing competition law.

But net neutrality is not just about competition law. In a speech dated July 17, 2017[3], BEREC and ARCEP Chairman Sébastien Soriano presented the internet's open architecture as an "infrastructure of freedom." Soriano framed net neutrality as a guarantor of fundamental rights, including protection of personal data, freedom of expression and information, and freedom to engage in business and innovate. In Europe at least, net neutrality has taken on a symbolic value, tied to fundamental rights. Soriano quoted Lawrence Lessig, who said that net neutrality "codes a First Amendment into the architecture of cyberspace, because it makes it relatively hard for governments, or powerful institutions, to control who says what when." Connecting net neutrality with fundamental rights raises other thorny issues that European regulators have not yet considered: When an ISP takes voluntary action to block content it considers harmful, does that constitute a net neutrality violation, a potential violation of the user's fundamental rights, or both? Violations of fundamental rights generally require a form of action by the state, which would be absent in the case of voluntary ISP filtering. And who is to judge questions that lie at the interface of net neutrality and fundamental rights? Telecom regulators are not generally empowered to judge fundamental rights.

The draft order removes some of the more prescriptive aspects of the Open Internet Order, while keeping transparency obligations so that ISPs are required to disclose their traffic management practices to the public. Transparency facilitates choice and the proper functioning of the market, and does not carry the same costs as more prescriptive regulatory measures.

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2 https://www.dotecon.com/news/european-commission-publishes-report-on-zero-rating/

3 http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/7180-berec-chair-speech-at-the-speech-at-the-_0.pdf

Cost-benefit analysis is an essential tool for a good regulation. In the United States and in Europe, several texts require a cost-benefit analysis before any new regulation is adopted, in order to predict as far as possible the positive and negative effects of the regulation, and give preference to regulatory options that maximize social welfare. A cost-benefit analysis will give policymakers a clearer vision of the hidden costs of regulation, in particular potential negative effects on innovation and on the open character of the internet. Winston Maxwell recently published a roadmap to help policymakers identify and measure the positive and negative impacts of regulations affecting the internet intermediaries. *Smart(er) Internet Regulation Through Cost-Benefit Analysis – Measuring harms to privacy, freedom of expression, and the internet ecosystem*, (Presses des Mines, 2017).