The end of net neutrality is not the end of the open internet

Say what you will about the merits of net neutrality; we are unlikely to reach consensus, much like academics and policy-makers have not reached consensus over the past 15 years ever since the term was put on the policy table. I have explored elsewhere the reasons why I think consensus has been elusive and what to do about it, but suffice it to say here that there are good arguments on both sides, and therefore any policy that categorically sides with one camp or the other is doomed to be wrong on the merits.

But the main problem in the news today is not that the current rules, which are demonstrably pro neutrality, are wrong or unbalanced; rather, the more fundamental question is whether we need rules in the first place at all. If not, then the repeal of the current rules should not spell the disaster that open internet activists fear. In fact, repealing superfluous rules would be good regulatory policy; the most basic premise of regulation is that rules of general applicability, like the ones on net neutrality, should be reserved only for *generalised*harm significant enough to justify the unavoidable cost that comes with regulation.

Far from it, not only has the case for net neutrality been weak from the beginning, but a look at all recent legislation reveals that net neutrality is largely a solution to a problem that does not exist. Very few documented cases exist on the docket of regulatory authorities as real-world examples of ISP practices violating the principles behind net neutrality. It is illustrative that FCC's 2015 Report and Order which enacted the latest rules (the ones under consideration for repeal) did not cite *any* new evidence in that direction (para 75), but instead relied on evidence included in two previous attempts to enact relevant rules, the 2014 Notice for Proposed Rulemaking (paras 39-41) and the 2010 Report and Order (paras 35-36).

And even in those documents the evidence is scarce and unconvincing: the FCC cites the example of AT&T temporarily blocking Apple's FaceTime app, which however, following an investigation, the FCC itself found that AT&T had legitimate reasons to block, the example of Verizon blocking certain tethering apps, which the FCC settled, relying not on net neutrality rules but on spectrum licensing rules, and a small number of incidents that date back to 2005-2008 (mainly the 2005 Madison River case and the 2008 Comcast BitTorrent case), which served as the main impetus behind net neutrality legislation in 2010. All in all, the entire record on the need for net neutrality rules contains fewer than five confirmed cases over the course of a decade.

All the while the EU delayed adopting net neutrality rules thanks to the perceived more intense competition among ISPs, which was seen to act as a safeguard against harmful practices. In a change of heart, relevant rules were adopted by virtue of the Open Internet Regulation in 2015, largely as a response to the findings of a report by the Body of European Regulators for Electronic Communications (BEREC) (recital 3), which showed that European ISPs engage in numerous and various traffic shaping practices (the report was also cited by the FCC in support of its own rules). A closer look, however, reveals that the report does not argue that these practices would amount to a violation of net neutrality principles (and therefore presumably relevant rules should be enacted); it merely documented traffic shaping policies without opining on their legitimacy or threat. Indeed, in its 2017 report on monitoring compliance with the Open Internet Regulation, Ofcom *did not identify a single case of net neutrality violation* in the UK, despite the continuation of the very practices that BEREC listed.

One could counter that the reason there are only a few incidents is precisely because of the deterrent value of existing net neutrality rules. But this is a feeble argument. Even bypassing the obvious chicken and egg problem, the timing and frequency of net neutrality violations proves nothing about the value of the relevant rules. The documented violations above are spread over a period of time that was only partially covered by net neutrality rules, which leaves little room for correlation between the rules and the violations (or lack thereof).

More importantly, though, even if one was somehow convinced that there is a generalised problem to be addressed, there is a wide spectrum of less onerous measures to be adopted compared to the rules currently in force. Self and co-regulation, regulatory threat, antitrust, and—my personal favourite—antitrust-like regulation, like the proposal put forth (but later rejected) by the FCC in its 2014 NPRM (paras 116-128), are all milder alternatives that are more proportionate to the level of harm currently posed by net neutrality violations.

I do not suggest that the broadband industry works flawlessly and that no oversight is needed. But the current rules, when juxtaposed with the documented threats, feel like an overkill. Regulatory agencies have spent far too much time quibbling about net neutrality, instead of turning their attention to more contemporary and more pressing issues, like harmonising spectrum, interconnection disputes, and connecting the unconnected. But this is the topic of another post.

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Notes:

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