Net Neutrality – A Global Debate

The net neutrality debate has run to fever pitch in the United States, with the Federal Communications Commission (the “FCC”) issuing controversial new rules that will treat Internet access like a public utility. President Obama personally weighed in on the issue, leading critics to accuse the FCC of insufficient independence from the White House.

The headlines have made the most of the debate in the United States, but it is clear that regulators across the globe are grappling with the same issues as internet traffic volumes soar and traditional revenue models in telecommunications and content distribution face disruption by new technologies and services.

On March 4, 2015, the European Council of Ministers reached agreement on net neutrality language to be inserted in a future European regulation. The Council’s language stops far short of the strict net neutrality language supported by the European Parliament, which will lead to tense negotiations between the EU institutions in the coming months. Meanwhile, one national regulator in Europe has already started to issue sanctions for net neutrality violations.

In Asia, the debate has yet to emerge in full force, but the flashpoints are coming with increased frequency across the region. Most recently, in December Indian mobile service provider Airtel announced plans to surcharge users of popular voice over internet (VoIP) services such as Skype, Whatsapp and Viber. Airtel faced a firestorm of public criticism over the move, but its hasty retreat from these plans was put down to confirmation of plans by the Telecom Regulatory Authority of India to launch a consultation on net neutrality issues rather than any buckling to consumer pressure.

It is clear that net neutrality is now an issue with global dimensions that will continue to make the headlines through 2015.

Net Neutrality Defined

“Net neutrality” is simple in its conception – the idea that internet service providers should enable internet access to all content and services without discrimination. Proponents and opponents of formal rules enshrining net neutrality into law are often in agreement as to desired outcomes (at least at a superficial level) but at the same time in fundamental disagreement as to the means.

Large internet service providers will point to the practical necessity of managing finite network capacity in order to ensure quality service for all – for example, by “throttling” users of high volume services, such as those who use the internet to stream feature length films. They also point to a need for flexibility in terms of how they deal with content providers and users. Commercial deals giving faster access speeds to high volume content providers and differentiated service packages to high volume users will support higher investment levels in new networks, creating additional capacity for all.

These assertions, argue net neutrality supporters, point up some critical areas for concern. If internet service providers are permitted to create these “internet fast lanes”, network capacity will effectively be sold off to the highest bidder, with smaller content providers and consumers having more limited financial resources unable to enjoy the benefits promised by an open internet. Heavier regulation, directed at constraining or eliminating operators’ discretion to prioritise, is therefore needed.

Net Neutrality – A look at market context

Viewing the net neutrality debate from a global perspective gives insight to the particular problems that inform the debate, and, we would argue, the most appropriate regulatory solutions.

In the U.S., fixed-line broadband competition is generally limited to competition between the local cable network and the local telecom network. This relative lack of competition in the fixed line broadband market has made net neutrality advocates particularly nervous about discriminatory practices, and the case for regulation easier. Competition in mobile broadband in the U.S. seems more robust, which explains why the FCC has until now applied lighter net neutrality rules to mobile operators.

The FCC’s approach to mobile operators changed with its February 26 order, which treats mobile and fixed-line operators the same, while recognizing the capacity constraints that apply to mobile services. The other remarkable aspect of the FCC’s order is that it classifies broadband access as a “telecommunications service,” which gives the FCC clearer statutory footing to regulate the service. Critics worry that the FCC will use this new authority to over-regulate, including imposing...
The FCC so far proposes to use its new authority with restraint, imposing only a few minimal regulatory obligations, including the principle of non-discrimination. The non-discrimination principle is by far the most controversial, because it would prohibit many kinds of commercial agreements between ISPs and content providers. The FCC also said that it would intervene in interconnection and peering disputes, if there were evidence of “unreasonable” practices.

Europe’s regulatory framework has emphasized intra-modal competition, based largely on local loop unbundling. Many European households have a choice among three or more fixed-line broadband providers. Europe’s approach to net neutrality has emphasized transparency and competition: if consumers are unhappy with how a broadband provider deals with content, the consumer can switch providers. However two countries in Europe (The Netherlands and Slovenia) enacted stricter net neutrality rules, leading to a divergence in how EU Member States regulate net neutrality. This prompted the European Commission to propose more detailed net neutrality rules in a proposed regulation. The proposed regulation has brought to the surface differing policy approaches: the European Parliament wants to circumscribe the use of “managed” or “specialized” services by ISPs, whereas the European Council of Ministers wants to give ISPs freedom to innovate, as long as basic Internet access is not impaired. Meanwhile, the Netherlands has used its net neutrality law to sanction telecom operators who provide special retail offers that include content conditions. One practice is “zero rating,” which consists of giving subscribers unlimited access to certain content without that content being counted for purposes of data limits. It is unclear how the new EU legislation, which is likely to be adopted in late 2015, will deal with “zero rating.” The proposed EU text is also silent on paid peering, which remains a sensitive issue for certain content providers.

Asia has a number of markets – Japan, Hong Kong, Singapore and South Korea, in particular – that are often characterised as “broadband paradises” in the sense that internet access has a high quality and a low price. It is noteworthy, however, that the governments in these jurisdictions have all studied net neutrality issues in recent years. While all concluded that continued vigilance is necessary, for the most part regulators determined that existing anti-trust laws and consumer protection laws satisfactorily meet all realistic net neutrality concerns.
Japan is an apt case study for Asia. Liberalisation of internet access markets began there in the 1980s. When NTT, the incumbent domestic carrier, was split and privatised it was required to open up its facilities to competitive DSL services on fairly generous terms. The government helped finance to new market entrants and by 2001, Japan had the highest number of DSL subscribers anywhere in the world.

Effective retail competition for broadband is a common characteristic of these advanced Asian markets. Asia’s high population densities also no doubt help de-risk plans for network investment. These characteristics are critical differentiators to the United States market context.

This is not to say, however, that net neutrality concerns are not emerging in Asia. Incumbent telecoms operators have clashed with regulators in Singapore, South Korea and now India over plans to surcharge users for the use of VoIP, services that use significant bandwidth and, of course, erode operators’ telephony margins. We expect the debate to continue to develop across Asia as bandwidth-hungry services, increased use of mobile and the emergence of next generation networks continue to come to the fore.

**Conclusion**

The need for net neutrality regulation depends on local context, including the level of broadband competition, and how competition and consumer protection law is applied on the ground. In many situations, existing law provides an adequate remedy for potential abuses. In other cases, a regulatory authority needs to be specifically empowered to take action to limit discriminatory practices. The FCC and European approaches are now in alignment insofar as both regimes are technologically neutral, applying to both fixed and mobile communications. Both regimes also rely on the premise that Internet access is a service that can be regulated by telecom regulatory authorities, although the level of regulation should be limited so as not to impede innovation. A number of Asian countries that have published their analyses of net neutrality issues have arrived at broadly the same conclusions, but only recently has there been any real call to put these principles to the test.

With the publication of the FCC’s new rules and the rising debate amongst the EU institutions it is clear that 2015 will see net neutrality in the headlines at a frequency never before seen, with global implications.