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Net Neutrality: Trump's Deregulation Sets Digital Giants Free

by Giovanna de Minico on 5 February 2018

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The current *querelle* on net neutrality offers a telling example of how self-regulation could be the "evil" of the Internet rather than its "panacea" if it alone sets the rules.

In this context, net neutrality is the duty imposed on Internet service providers (ISPs) to allow Internet content providers (ICPs) a non-discriminatory use of the net, regardless of their economic prowess, in order to permit net citizens to select their digital services regardless of bandwidth. Should the determination of such a conflict of interests (producers vs. producers, producers vs. consumers) be entrusted solely to the ISPs, neutrality would soon disappear, since they would find it more convenient to diversify the bandwidth offer, according to the price which the buyer is willing to pay. Therefore, a small blog, much less competitive than a big online publisher, would inevitably have to settle for a second-rate Internet, because the fast superhighway would have been occupied by the economically stronger and bandwidth-consuming operators.

Thus, it is not by chance that, under Obama (2015), the U.S. Federal Communication Commission (FCC) claimed jurisdiction in regulating net neutrality, against the request to allow rules permitting discriminatory types of access. The public regulator's *démarche*revealed a concern that net neutrality could be at risk were its protection to be entrusted to market operators, only interested in the perspective of higher profits.

This regulatory system operated on two tiers, with the top one enshrining the binding rules imposed by the FCC. Basically, these norms prohibited ISPs from creating different degrees of access to broadband depending on the economic capabilities of the ICPs. To sum up: no degradation, no prioritization and no blocking were allowed in order to let both the incumbents and the new entrants operate on a level playing field.

The second tier, determined by negotiations between ISPs and ICPs, presents significant derogations to these primary rules provided that these are necessary, proportional and justified by a prevalent public interest – zero rating is one example – and always if this agreement gets the green light from the FCC. Therefore, the first season of net neutrality was characterized by a mixed combination of rules, whether binding or not, and by the *ex post* intervention of the authority, meant as a last resort to assure the defense of fundamental rights against the greed of the "Giants" of the Internet.

Self-Regulation Rules

I have used the past tense because with President Trump, and consequently with the new body of the FCC, net neutrality has been rolling back, but its repeal is just one small part of a massive, larger plan to eliminate nearly all meaningful federal and state oversight over some of the least-liked and least-competitive companies in America. To be clear: net neutrality repeal in itself is an awful policy because it ignores both competition regulation and consumer needs. Indeed, it eliminates a wide variety of consumer protections that prevent incumbent ISPs from abusing a lack of competition in the broadband market. Without these rules, ISPs will be able to engage in all forms of bad behavior, from paid prioritization deals that disadvantage smaller competitors to imposing unnecessary usage caps that stronger competitors are allowed to bypass.

Ironically, the FCC order is named "acts to restore Internet Freedom" even if will do everything except allow the Internet to grow. This negative evaluation is justified in the light of two strongly connected situations: the fact that consumer protection will depend on the economic interests of ISPs and the lack of preventive remedies in the hands of the FCC. Indeed, the latter can only move to protect consumers *after* a violation has happened and this intervention can only occur if it's painfully clear that an ISP is engaged in "unfair and deceptive" behavior, something that's easy for an ISP to dodge in the net neutrality era, where anti-competitive behavior is often

buried under faux-technical jargon and claims that it was done only for the health and safety of the network.

This illiberal order seems to be based on a wrong assumption: "[…] that the regulatory uncertainty created by utility-style Title II regulation has reduced Internet service provider (ISP) investment in networks, as well as hampered innovation, particularly among small ISPs serving rural consumers. What's more, FCC chairman Ajit Pai said the current rules had addressed non-existent concerns. "We are restoring the light-touch framework that has governed the internet for much of its existence."

This premise has simply been affirmed, not proven by the chairman. Therefore, the order is more the offspring of a dogma that "deregulation is the panacea for all evil" than the outcome of any economic theory. No evidence of the fact that net neutrality would have stifled investments has been given. Because of this faith in the unlimited salvific capacity of deregulation, the FCC has left the Internet in the unfettered hands of the Giants, free to behave as they wish regardless of the well-being of consumers or the competitive balance of the market, as stated in a recent letter signed by 21 writers.

Is Europe Any Different?

The main point of reference of the European system in operation is given by the EU Regulation on the Digital Single Market. It must be clarified that in this regulation the right to net neutrality hasn't been endowed with the dignity of a fundamental right. By contrast, in the Declaration of Internet Rights drawn up by the Italian Boldrini Committee, net neutrality is presented as "a necessary condition for the effectiveness of the fundamental rights of the person" (art. 4).

But the nature of neutrality, i.e. whether or not a fundamental right, is not on the European agenda, with the EU legislator focused on the regulatory tiers. These are not identified in the self-regulation of the access providers and the online service providers. Indeed, entrusting regulation to a contract would downgrade the web from a common good to a commodity, tradeable in exchange of for the highest market price. If so, those who already dominate the online broadband market would be able to attract the largest flow of bytes and impede access to newcomers, who cannot afford to pay the same price.

The EU Regulation has established that the principle of net neutrality is legally binding, leaving only a small room for self-regulation by agreement between private parties, ISPs and ISCs. Indeed, the latter are entitled exclusively to pose accessory rules complementing the basic principle, thus in line with the solution that I am suggesting here from the very beginning. The history of net neutrality reveals its nature: it is a "political issue". As such it is liable to be an example of both a self-regulation model encompassed within a legal framework – like the net discipline

enacted by the FCC in the age of Obama – and/or an example of dangerous deregulation as steered by the new Trump administration.

To Conclude

To reduce the risk of the Internet's degradation under selfish interests, self-regulation cannot be taken as an exclusive source of rules acting independently of the law. Rather, it should be built as ancillary to political decisions and laws. Such a subordinate relationship is fit to ensure the creation of public policies, with self-regulation placing itself at their service, not the other way around.

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