Open floor to

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CONTRARY TO POPULAR PERCEPTION, NET NEUTRALITY IS NOT DEAD IN THE UNITED STATES

Most EU regulators know that the Federal Communications Commission (FCC) repealed Net neutrality in 2017 during the Trump administration. However, state laws and President Biden's election prevented ISPs from adopting many of the discriminatory practices that are no longer prohibited federally.

The US always had some form of Net neutrality. As soon as ISPs began using deep packet inspection to block and discriminate, the FCC stepped in, case-by-case, to clarify these practices were illegal.

In 2010, the FCC adopted generally applicable Net neutrality protections, including banning termination fees, the practice of requiring content providers to pay ISPs. In 2015, the FCC strengthened the protections and reclassified ISPs as common carriers.

After the 2017 repeal, many states adopted Net neutrality measures. Most notably, California comprehensively restored all the Net neutrality protections in place before the repeal. It did so by incorporating both the 2015 rules and the text of the 2015 order implementing the rules. This is similar to adopting an EU law by incorporating the Open Internet Regulation AND the BEREC guidelines that explain it.

This means California has the gold standard Net neutrality law in the US. Because of its large economy – roughly the size of Germany – California's actions resonate beyond its borders. ISPs challenged the law in court, but it survived. California is now free to enforce its law, and other states can copy it.

The Biden administration has committed to restoring Net neutrality at the federal level. But Biden's FCC nominee needs Senate approval to do so, and ISPs have prevented confirmation thus far.

What can the EU still learn from the US?

As the largest telecom companies again propose forcing online services to pay them, Europe can learn from the US experience.

Prohibiting ISPs from charging websites for delivering the traffic the ISPs' customers requested is a key Net neutrality protection. Europe's largest telecoms claim that termination fees won't violate Net neutrality, but that's not possible.

The idea first surfaced in 2005 when AT&T's CEO told the press he wasn't going to let Google and Yahoo use his pipes for free. This set off a media firestorm and a move in Congress to create the first Net neutrality law. And it's why the FCC's 2010 Net neutrality order explicitly outlawed such practices as a kind of blocking.

Termination fees re-emerged in 2012 when the five largest ISPs in the US found a loophole in the 2010 rules and began forcing online companies to pay them by refusing to alleviate congestion at interconnection points where data enters the ISPs' networks.

Any website that refused to pay was rendered nearly unusable. ISPs would simply stop upgrading the connections into their network. Tens of millions who were paying for fast internet could not use the internet reliably during peak hours for years. Remote work was seriously disrupted. Videos wouldn't play. Online games stuttered.

The congestion only ended when companies paid the requested tolls, which were far beyond the cost of widening the connection. This didn't harm the biggest online platforms because they quickly paid, realizing it cemented their dominance. Small and medium-size companies that wouldn't pay or couldn't afford to were throttled at the door.

Termination fees also distorted competition among ISPs. Only the largest ISPs could force content providers to pay for termination, and the more customers they had, the larger the fee per customer they could demand. This gave larger ISPs an even stronger advantage over their smaller competitors.

The payment demands and congestion only stopped in 2015 when the FCC prohibited circumventing Net neutrality at the point of interconnection while continuing to ban termination fees. California adopted the same prohibitions to prevent the return of the disruptions.

The European Commission would be well served to understand what happened in the US before mandating termination fees.