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List of Abbreviations

BEREC	Body of European Regulators for Electronic Communications
BIAS	Broadband Internet Access Service
DMA	Digital Markets Act
DPI	Deep Packet Inspection
DSA	Digital Services Act
DSL	Digital Subscriber Line
ECJ	European Court of Justice
EU	European Union
FCC	Federal Communications Commission
GB	Gigabyte
ISP	Internet Service Provider
NRA	National Regulatory Authorities
RIF	Restoring Internet Freedom
US	United States
USTA	United States Telecom Association
VoIP	Voice-Over-Internet-Protocol
VPN	Virtual Private Network
WIFI	Wireless Internet

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I. Introduction

In June 2014, comedian John Oliver featured a segment on his talk show discussing a proposal from the Federal Communications Commission (FCC) to allow “fast lanes.”¹ Oliver famously opened with a video clip of a government hearing stating that the FCC sought to “ground its rules in Section 706 of the Telecommunications Act of 1996,” delivering punchlines highlighting how boring the subject of internet regulation.² However, the segment took a more serious tone when describing the danger in allowing such “fast lanes.”

Only two months prior, news reports of a proposal to allow internet service providers (ISPs) to charge content providers (also called edge providers) to prioritize their internet traffic over others began to emerge of.³ Oliver described the dangers of allowing ISPs to dictate what consumers have access to. He also explained the importance of an open internet, without which companies like Google or Facebook would have not emerged.⁴ In fact, so important was the debate at the time that Comcast, a prominent cable and internet service provider in the United States spent more than \$18.8 million in lobbying the government, falling only second to Northrop Grumman, a prominent defense company, in the money spent towards government advocacy.⁵

This segment was credited by other news outlets for raising awareness about the FCC’s potential rule change.⁶ So high was the traffic to the FCC’s website following the segment that the Commission temporarily shut down its website.⁷ At the end of the commentary period, the FCC tallied 3.7 million public comments, the highest the Commission had received to date.⁸ Among the contributors were members of the technology industry.

¹ John Oliver, *Net Neutrality: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 1, 2014), <https://www.youtube.com/watch?v=fpbOEoRrHyU&t=3s>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Anne Flaherty, *FCC to Rule on ‘Paid Prioritization’ Deals by Internet Service Providers*, PBS (Sep. 18, 2014), <https://www.pbs.org/newshour/politics/can-internet-providers-cut-deals-sites-fcc-decide>.

⁷ *Id.*

⁸ *Id.*

In a letter authored by “more than one hundred technology companies,”⁹ including Amazon, Google, Meta (then-Facebook), Netflix, and Microsoft, the coalition urged the Commission to refrain from adopting rules that would allow “internet service providers to discriminate both technically and financially against Internet companies and to impose new tolls on them.”¹⁰ According to these companies, rules preventing blocking, discrimination, and paid fast lanes (also known as paid prioritization) were a better course of action for the FCC.¹¹

Ultimately, the FCC did not adopt rules allowing for paid prioritization. In fact, since this 2014 policy debate, both the United States and the European Union have adopted the same net neutrality protections that the companies advocated for. However, the legal procedures each took to enact these protections impacted their strength.

This paper seeks to analyze the net neutrality protections under each regime, comparing specific provisions and their relative strength. It begins with defining the term “net neutrality” in Part II, describing the policy debates undergirding the concept and explaining its importance for promoting an open internet. Part III discusses the United States net neutrality regime, as regulated by the Federal Communications Commission. It details the history of net neutrality protections in the United States and the several rounds of rulemakings and litigation, ending with the most recent court ruling invalidating federal net neutrality regulations. Part IV turns to the European regime, analyzing the 2015 Regulation for Open Internet Access, the European Court of Justice judgments that elaborated on its protections, and the recent European Commission consultations on potential changes to the Regulation. Part V compares the regimes, concluding that although the regimes provide for similar substantive protections, because of the United States’ historical oscillation between having or lacking enforceable federal net neutrality regulations, the European Union enjoys an advantage in efficacy. Part VI offers concluding remarks about the potential future of net neutrality.

II. What is Net Neutrality?

⁹ Brendan Sasso and National Journal, *FCC’s Internet ‘Fast Lane’ proposal in Danger*, THE ATLANTIC (MAY 7, 2014), <https://www.theatlantic.com/politics/archive/2014/05/fccs-internet-fast-lane-proposal-in-danger/457017/>.

¹⁰ Letter from Technology Companies to the Federal Communications Commission (May 7, 2014), https://cdn1.vox-cdn.com/assets/4422119/letter_to_FCC.pdf.

¹¹ *Id.*

The term “net neutrality” stems from the phrase “network neutrality,” which was coined by Professor Tim Wu of Columbia Law School in an article published in 2003 describing the economic and policy debate surrounding the provision of internet services.¹² He defined “network neutrality” as an “anti-discrimination principle” designed to “give users the right to use non-harmful network attachments or applications, and give innovators the corresponding freedom to supply them.”¹³ The anti-discrimination principle was necessary, he argued, to combat the anti-competitive behavior from cable and internet service providers that threatened these basic rights and freedoms. Elaborating on the anti-competitive behaviors, Professor Wu observed “an unfortunate tendency to want to ban new or emerging applications or network attachments.”¹⁴ At the time, these technologies included Wireless Internet (WiFi) devices and Virtual Private Networks (VPNs).¹⁵ He proposed a network neutrality rule that would distinguish between necessary discrimination and harmful discrimination by operators: “absent evidence of harm to the local network¹⁶ or the interests of other users, broadband¹⁷ carriers should not discriminate in how they treat traffic on their broadband network on the basis of inter-network¹⁸ criteria.”¹⁹ He used the example of online gaming to illustrate the proposition that carrier should police bandwidth usage, rather than blocking individual applications. Rather than force users interested in a better gaming experience to pay for access to a specific application, Professor Wu argued that under the principle of “network neutrality,” users should be able to purchase more bandwidth.²⁰ Thus, net neutrality seeks to balance the private interests of internet service providers, the private interests of users and content providers, and the public interest of promoting competition in the telecommunications industry.²¹

A. Key Terms

¹² Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

¹³ *Id.* at 142.

¹⁴ *Id.* at 143.

¹⁵ *Id.*

¹⁶ Local Networks are defined as networks that owned and individually managed by each broadband carrier. *Id.* at 166.

¹⁷ During the internet’s early days, users connected to the internet through dial-up, which allowed consumers to access the internet over local telephone lines. Eventually, consumers began to access broadband internet, which are high-speed communications technology. *Verizon v. FCC*, 740 F.3d 623, 629 (D.C. Cir 2014).

¹⁸ The inter-network (which eventually became known as the Internet) is collectively managed among service providers. *Id.* at 166.

¹⁹ Wu, *supra* note 12, at 168.

²⁰ *Id.*

²¹ *Id.* at 141.

Since the publication of Professor Wu’s seminal article, the policy debate on net neutrality has grown to encompass more principles beyond anti-discrimination. Crucial to understanding modern net neutrality are the protections that are currently enshrined in the American and European regimes that protect against blocking, throttling, unreasonable discrimination, zero-rating, paid-prioritization.

First, anti-blocking rules ensure that internet service providers cannot prevent user access to specific content by blocking specific applications, websites, or services. Second, anti-throttling (also called anti-degradation) rules bar internet service providers from slowing down the transmission speed for specific applications, websites, or services. Third, protections against unreasonable discrimination keep internet service providers from using throttling or blocking practices on specific types of content in order to disadvantage content providers or interfere with a user’s ability to access the lawful content of their choosing. The qualifier “unreasonable” suggests that there is such a thing as “reasonable discrimination,” which can take the form of network management practices that temporarily discriminate against specific types of traffic during times of congestion. However, in order to be deemed “reasonable,” these network management practices must be based on technical considerations, rather than commercial ones, and they must be tailored to the network issue they aim to resolve. Fourth, rules against zero-rating prevent internet service providers from avoid counting the data used for specific applications towards a user’s data cap. Finally, rules against paid prioritization prohibit internet service providers from offering “fast lanes” to content providers that prioritize or speed up their traffic in exchange for a fee charged to the content provider.

B. The Case for Net Neutrality Regulations

The goal of net neutrality can be surmised as an attempt to prevent the providers of internet service from determining what type of content and service is consumed. In the early days of the internet, the so-called “end-to-end” principle prescribed an internet that functioned only to transport communications across networks.²² Early design features of the internet promoted this principle. For example, early internet networks were application-blind, so internet service providers could not inspect data packets to see what they were transporting

²² Marta Maroni, *An Open Internet: The Court of Justice of the European Union between Network Neutrality and Zero Rating*, 17 *European Const. L.R.* 517, 518 (2021).

across networks.²³ Early internet networks also allowed every application to join and transported their data using a “best-effort basis.”²⁴ Since then, the internet has evolved to allow for deep-packet inspection (DPI), which gives internet service providers the ability to see the type of data they are transmitting, thereby enabling them add barriers to entry and transmission for applications of their choosing.²⁵ As a result, the application-blind and “best-effort” transmission design features have transformed into principles informing net neutrality policies. Net neutrality stands for the proposition that internet service providers should not block, throttle (slow down), or prioritize different types of internet traffic.²⁶ It can also be defined as “a central regulatory tool in the field of internet governance, as it attempts to prevent ISPs from becoming the gatekeepers of what circulates online.”²⁷ Thus, net neutrality aims to promote an open internet that is accessible to users and creators, alike.

Internet service providers argue that net neutrality regulations are unnecessary to prevent these harms, and may even be counterproductive to the goal of promoting an open internet. For example, in comments filed to the FCC in 2023, Comcast argued that the internet thrives under “a light touch framework.”²⁸ According to members of the telecommunications industry, imposing more net neutrality obligations on internet service providers “stifles competition, dampens innovation, and harms consumers.”²⁹ They claim that the internet evolved to become “fast, open, and fair” because of, not in spite of, a light regulatory framework.³⁰ Further, the telecommunications industry insists that there are no historical harms to justify stringent regulatory requirements.³¹

Contrary to industry claims, net neutrality regulations are an important tool for regulators to protect against anti-competitive behaviors. Internet service providers have market incentives to interfere with how consumers access the internet and the type of content they access on the internet. For example, internet service providers have economic incentives to block or throttle specific edge providers or types of edge providers if these practices may

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 519.

²⁷ *Id.* at 528.

²⁸ In the Matter of Safeguarding and Securing the Open Internet, Comments of Comcast Corporation, WC Docket No. 23-320, 2. https://update.comcast.com/wp-content/uploads/dlm_uploads/2023/12/FINAL-Comcast-Comments-on-Open-Internet-NPRM-12.14.23-2.pdf

²⁹ *Id.*

³⁰ In the Matter of Safeguarding and Securing the Open Internet, Comments of CTIA, WC Docket No. 23-320, 1. <https://api.ctia.org/wp-content/uploads/2024/01/CTIA-Open-Internet-Reply-Comments-011724.pdf>

³¹ *Id.*

benefit their own competing content offerings or the offerings of their affiliates.³² A prominent example of this incentive arose with the emergence of Voice-over-Internet-Protocol (VoIP) services. As consumers started to turn to VoIP as a substitute for traditional telephony, internet service providers began blocking and throttling these services.³³ The launch of video streaming services also brought increased competition against traditional cable TV programming.³⁴ One way to combat the increased competition is to make their offerings look more attractive, or make the competing offerings less attractive, by ensuring reduced transmission quality.³⁵

Further, internet service providers may choose to charge edge providers “access fees” in order to have their content transmitted on their specific network.³⁶ Should edge providers refuse, internet service providers can keep content from being transmitted to end users. Edge providers may also offer to pay these fees or enter into agreements to have their content transmitted to the exclusion of their rivals. This interferes directly with consumers’ ability to access content and may negatively impact innovation and service offerings.³⁷ Because internet service providers are “typically an edge provider’s only option for reaching a particular end user, these providers have the ability and incentive to charge exorbitant access fees, positioning them as gatekeepers to specific end users.”³⁸ While internet service providers benefit from increased revenue through access fees, consumers suffer decreased access to content as edge providers may exit or refuse to enter specific markets.³⁹ Additionally, the increased cost for edge providers will reduce profit and decrease their incentive to produce more content or innovate.⁴⁰ The need to negotiate entry into specific

³² A 2010 Preserving the Open Internet Order cited industry comments submitted through a notice-and-comment period as part of the administrative agency rulemaking process. (“Vertically-integrated broadband providers have the incentive and ability to discriminate against competitors.”) (“Broadband providers will have a natural incentive to use prioritization to favor their own services.”) 2010 Preserving the Open Internet, n.46.

³³ FCC 2010 order for Preserving the Open Internet, n.50. “In the span of 6 years, Skype [an over-the-top VoIP provider] has emerged as the largest provider of cross-border communications in the world, by far. . . . Given these immense traffic volumes, it’s difficult not to conclude that at least some of Skype’s growth is coming at the expense of traditional carriers.”

³⁴ FCC 2010 Order for Preserving the Open Internet, 13. The launch of streaming services also brought increased competition against traditional cable TV programming.

³⁵ *Id.* at 14. “By interfering with the transmission of third parties’ Internet-based services or raising the cost of online delivery for particular edge providers, telephone and cable companies can make those services less attractive to subscribers in comparison to their own offerings.”

³⁶ Barbara van Schewick, *The Case for Meaningful Network Neutrality Rules*, Center for Internet and Society, 11 (Feb. 19, 2015), <https://cyberlaw.stanford.edu/publications/case-meaningful-network-neutrality-rules/>.

³⁷ FCC, *supra* 33, at 14. “End users would be harmed by the inability to access desired content, and this conduct could lead to reduced innovation and fewer new services.”

³⁸ *Id.* at 15.

³⁹ *Id.*

⁴⁰ *Id.* at 16.

broadband markets also increases transaction costs (and overall costs) for edge providers.⁴¹ This results in an overall reduction in content diversity, producing an economic harm to end users as a result. Paid prioritization, the practice of speeding up or favoring the traffic of specific content in exchange for payment (or other forms of consideration) given to internet service providers, also results in these same harms.⁴² Thus, net neutrality rules serve to prevent such anti-competitive practices.

Net neutrality rules also promote a healthy startup economy. Generally, the costs of developing an application are low; the biggest cost for developers is often the cost of designing and programming the application, itself.⁴³ As a result, developers famously pursue the creation and launch of an application as a hobby or passion project, with some becoming large and influential technology companies.⁴⁴ Google, Reddit, and Facebook (now called Meta), for example, started their companies with little or no outside funding.⁴⁵ One of the advantages of low startup costs is that developers and creators can make their content available to consumers almost instantly.⁴⁶ However, anti-competitive behaviors such as increasing costs for developers through access fees or paid prioritization and the refusal to make specific applications available to users threatens the startup economy. Even the speed of transmission can impact a company's chance of success, as research suggests that a website loading increase of as little as 100 milliseconds can negatively impact a consumer's time on a website, the money they spend, and their return rate.⁴⁷ Further, increased startup or transaction costs results in fewer free applications and increased costs for paid services for users.⁴⁸

In addition to preserving a healthy and competitive internet marketplace, net neutrality regulations promote the free exchange of ideas on the internet. With the explosion of social media websites, it is well-known that the internet has become a "powerful mechanism available to a private citizen to make his or her voice heard."⁴⁹ Further, the internet is a one-stop-shop for information, allowing users to access news outlets,

⁴¹ *Id.*

⁴² *Id.* at 46.

⁴³ van Schewick, *supra* note 35, at 12.

⁴⁴ *Id.* at 12.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 13.

⁴⁸ Ryan Singel, Expect Fewer Great Startups if the FCC Kills Net Neutrality, WIRED (Dec. 12, 2027), <https://www.wired.com/story/expect-fewer-great-startups-if-the-fcc-kills-net-neutrality/>.

⁴⁹ Corynne McSherry, An Attack on Net Neutrality is an Attack on Free Speech, ELECTRONIC FRONTIER FOUNDATION (June 22, 2017), <https://www EFF.org/deeplinks/2017/06/attack-net-neutrality-attack-free-speech>.

government services, libraries, databases, and other sources of information.⁵⁰ The internet is also a source of community organizing for people across the political spectrum.⁵¹ Similar to debates about how content moderation policies may impact the free expression and exchange of ideas, net neutrality ensures that internet service providers do not impact a user's access to information and ideas through the prioritization or blocking of specific traffic.

Thus, net neutrality rules serve important economic and policy considerations in promoting an open internet that mitigates anti-competitive behavior and allows for the exchange of information and ideas.

III. Net Neutrality in the United States

In the United States, federal net neutrality regulations have historically fallen under the purview of the Federal Communications Commission, the federal agency responsible for regulating the telecommunications industry. The two-decade history of net neutrality regulations in the United States can be analogized to a light-switch, oscillating between having regulations in effect and having almost no regulations in effect. The reason for this oscillation is that the promulgation of net neutrality regulations in the United States depends on three factors: the political composition of the members of the FCC, the legal classification of broadband internet under either Title I or Title II of the Communications Act, and the specific court reviewing legal challenges to the FCC's rules. The following sections provide an overview of the development of federal net neutrality regulations and the common law decisions impacting them. Despite its inability to provide lasting legal net neutrality protections, the United States has acted as a pioneer in net neutrality law by enshrining anti-blocking, anti-discrimination, anti-throttling, and general conduct rules into its net neutrality regime.

A. Background on the FCC's Authority to Regulate

In the United States, the Federal Communications Commission is responsible for the regulation of interstate and international communications by radio, television, wire, satellite, and cable.⁵² The agency is comprised of five commissioners, who are appointed by the

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² FEDERAL COMMUNICATIONS COMMISSION, <https://www.fcc.gov/about/overview> (last accessed Sep. 13, 2024).

United States President and are confirmed by the United States Senate.⁵³ The Communications Act of 1934,⁵⁴ the Congressional Act that created the agency and delegated to it the authority to regulate telecommunications, did not originally contemplate the internet, as its adoption predated the creation of the internet.⁵⁵

Though the Communications Act has been interpreted to cover broadband internet, the Title from which the FCC derives its regulatory powers over broadband internet has been subject to debate.⁵⁶ Title I covers “information services,” which the statute defines as:

“the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”⁵⁷

Title II covers “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁵⁸ Important to note is that Title II designation automatically imposes common carrier requirements. The term “common carrier” arose in the Nineteenth Century when American courts “began imposing certain obligations—conceptually derived from the traditional legal duties of innkeepers, ferrymen, and others who served the public—on companies in the transportation and communications industries.”⁵⁹ The basic principles of common carrier regulations were that the carriers should “carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable.”⁶⁰ These common carrier requirements were later codified in the 1887 Interstate Commerce Act and in the Communications Act of 1934.⁶¹

⁵³ NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, *The Federal Communications Commission*, <https://www.ntia.gov/book-page/federal-communications-commission-fcc#:~:text=The%20FCC%20is%20directed%20by,commissioner%20to%20serve%20as%20chairman> (last accessed Sep. 13, 2024).

⁵⁴ Though this Act was initially adopted in 1934, the Telecommunications Act of 1996 amended and added provisions to the original Communications Act of 1934.

⁵⁵ In re: MCP No. 185, Federal Communications Commission, In the Matter of Safeguarding and Securing the Open Internet, Order, No. 24-700 (6th Cir. 2024), 2.

⁵⁶ *Id.* at 2. The Communications Act of 1934 outlines different regulatory obligations according to how a service is defined under each Title. Title I covers “information services,” while Title II covers “telecommunications services.”

⁵⁷ 47 U.S.C. § 153.

⁵⁸ *Id.*

⁵⁹ *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir 2014).

⁶⁰ *Id.* at 651 (quoting *Interstate Commerce Commission v. Baltimore & Ohio Railroad Co.*, 145 U.S. 263, 275, 12 S.Ct. 844, 36 L.Ed. 699 (1892)).

⁶¹ *Id.*

Title I, on the other hand, subjects covered entities to less stringent requirements. Thus, whether broadband internet is a Title I information service or a Title II telecommunications service determines the authority and scope of FCC's regulatory powers.

In general, courts have held that FCC may only impose substantive net neutrality rules under Title II. However, as the following account of US precedent case law on net neutrality demonstrates, classifying broadband internet as a Title II telecommunications service is not enough; without a court that supports net neutrality, the FCC's interpretation of Title II to include broadband internet will be invalidated.

B. The FCC's First Internet Regulations

The Commission's earliest efforts at regulating the internet can be traced back to 1980, when it adopted the *Computer II* regime.⁶² Under this rule, the Commission distinguished between "basic" services subject to common carrier standards under Title II of the Communications Act and "enhanced services which did not necessitate common carrier regulations."⁶³ Common carrier restrictions automatically triggered under the Communications Act include a prohibition on "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."⁶⁴ Common carriers must also charge "just and reasonable rates" for their services.⁶⁵ Internet services offered over telephone lines were, at first, classified as enhanced services subject to different, non-common carrier standards as defined by the Commission.⁶⁶ However, the Commission imposed common carrier obligations on telephone companies and required them to allow third-party internet service providers to access their wireline transmission facilities.⁶⁷ Congress tracked this distinction between "basic services" and "enhanced services" when it passed the Telecommunications Act of 1996.⁶⁸ The Telecommunications Act of 1996, which amended the Communications Act of 1934, created the distinction between telecommunications services (with common carrier obligations) under Title II and information services under Title I.⁶⁹

⁶² *Id.* at 629, citing *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3037-40 ¶¶ 36-42 (2002).

⁶³ *Id.*

⁶⁴ *Id.* at 630 (citing Section 201(a) of the Communications Act).

⁶⁵ *Id.*

⁶⁶ *Id.* at 629.

⁶⁷ *Id.* at 630 (citing *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3037-40 ¶¶ 36-42 (2002)).

⁶⁸ *Id.* at 630.

⁶⁹ *Id.*

Under the *Computer II* regime, Digital Subscriber Line (DSL) services (broadband internet service transmitted over telephone lines) were classified as a Title II telecommunications service.⁷⁰ However, DSL services could exempt their internet access services from common carrier regulations by operating them under a separate internet service provider (rather than over the telephone line).⁷¹ In 2002, the Commission defined cable broadband providers as providers of a “single, integrated information service.”⁷² Thus, they were exempt from Title II common carrier standards. In 2005, the Commission classified DSL, wireless, mobile, and other types broadband services as information services under Title I, sparing them from common carrier obligations.⁷³

Despite the FCC’s move to avoid imposing common carrier standards, the Commission soon moved to create net neutrality obligations.

C. The FCC’s 2005 Internet Policy Statement

In 2005, the FCC began its first steps in promoting net neutrality principles by publishing an internet policy statement.⁷⁴ The policy statement acknowledges the way internet access has improved the speed and reach of telecommunications.⁷⁵ As federal agencies derive their power from explicit grants of authority via statutes known as enabling acts (also called organic statutes), the policy statement points to Congress’s mandate to the FCC via the Communications Act to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”⁷⁶ Additionally, the FCC cites the Communications Act’s mandate to the agency to “regulat[e] interstate and foreign commerce in communication by wire and radio.”⁷⁷ From this Act, the FCC deduces it has

⁷⁰ *Id.* at 631 (citing *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24012, 24014, 24029–30 ¶¶ 3, 35–36 (1998) (“Advanced Services Order”))

⁷¹ *Id.*

⁷² *Id.* (citing Cable Broadband Order, 17 F.C.C.R. at 4824 ¶ 41).

⁷³ *Id.* (citing *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14853, 14862 ¶ 12 (2005) (“2005 Wireline Broadband Order”); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C.R. 5901, 5901–02 ¶ 1 (2007) (“Wireless Broadband Order”); *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 F.C.C.R. 13281, 13281 ¶ 1 (2006)).

⁷⁴ *Id.*

⁷⁵ FEDERAL COMMUNICATIONS COMMISSION, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement (2005), ¶1.

⁷⁶ *Id.* at ¶2.

⁷⁷ *Id.* at ¶4.

jurisdiction to impose net neutrality restrictions.⁷⁸ It adopted 4 principles in this policy statement:

“To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice; consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; consumers are entitled to connect their choice of legal devices that do not harm the network; consumers are entitled to competition among network providers, application and service providers, and content providers.”⁷⁹

The FCC also introduced in the policy statement an exception for reasonable network management exceptions.⁸⁰

Importantly, the Commission stated in a footnote that it was not adopting binding rules in its policy statement.⁸¹ Rather, the Commission stated that it was adopting the principles based on ancillary authority under Title I of the Communications Act.⁸² This meant that no regulations were automatically applied. Still, the FCC had the jurisdiction to promulgate rules under the “necessary and proper” clause of the Act.⁸³

D. The FCC’s Enforcement of its 2005 Policy Statement

In 2008, the FCC issued its first enforcement action based on the principles articulated in the 2005 policy statement. After finding that Comcast had throttled the transmission of BitTorrent, a peer-to-peer file sharing service, the Commission concluded that this behavior violated the FCC’s policy, as written in its 2005 policy statement, that “consumers are entitled to access the lawful Internet content of their choice [and] to run applications and use services of their choice.”⁸⁴ In response, Comcast countered that its

⁷⁸ “As a result, the Commission has jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner.” *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at n.15.

⁸¹ *Id.*

⁸² “Ancillary authority” is a term used to describe the powers granted by section 4(i) of the Communications Act. Three Supreme Court decisions found ancillary authority where the Communications Act did not grant the Commission power to regulate the cable systems that were at issue: *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1994), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

⁸³ Section 4(i) of the Communications Act allows the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i).

⁸⁴ *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

throttling was necessary for network management.⁸⁵ This argument did not convince the Commission, as they found Comcast had “significantly impeded consumers’ ability to access the content and use the applications of their choice.”⁸⁶ Further, the Commission found that Comcast had tools at its disposal to manage bandwidth without discriminating against different types of internet traffic.⁸⁷ As a result, the FCC issued an order mandating that Comcast take remedial action. Because Comcast had entered into an agreement with the FCC to resort to other non-discriminatory forms of network management, the Commission’s order imposed disclosure requirements providing information on Comcast’s alternative network management practices.⁸⁸ Notwithstanding the FCC’s decision to reduce the order’s severity, the order marked the Commission’s first enforcement action based on the Commission’s net neutrality principles.

E. *Comcast v. FCC* Invalidates the FCC’s Enforcement Order

Though the company complied with the disclosures mandated by the FCC’s enforcement order, Comcast challenged the enforcement action through litigation. The D.C. Court of Appeals reviewed the challenge in 2010. The court struck down the order, holding that the FCC lacked proper jurisdiction under ancillary authority to regulate internet service providers using the 2005 policy statement.⁸⁹ The court found that the Commission failed to demonstrate that its intervention in Comcast’s throttling of peer-to-peer sharing applications was “reasonably ancillary to the... executive performance of its statutorily mandated responsibilities,” in part because, in the court’s opinion, the Commission could not point to a statute mandating such a regulatory responsibility.⁹⁰ The court’s opinion details the explicit grant of authority via the Communications Act for the Commission to regulate common carrier services under Title II, which include landline telephony, radio transmissions, broadcast television, and cellular telephony.⁹¹ However, the Commission classified the internet as neither a Title II telecommunications service or a Title IV cable service in its then still-binding 2002 *Cable Modem Order*.⁹² Instead, the Commission classified the internet as a

⁸⁵ *Id.* at 645.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 644 (citing *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

⁹¹ *Id.* at 645.

⁹² *Id.*

Title I “information service.”⁹³ Thus, because of the lack of authority under Title II or Title IV, the Commission relied on ancillary authority under Title I.⁹⁴

In order to justify its reliance on ancillary authority, the Commission had to show that “(1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁹⁵ Though Comcast conceded that the first prong was satisfied, it disputed the second prong.⁹⁶ Analyzing the second prong, the court held that the Commission had failed to make a showing that it had “statutorily mandated responsibilities.”⁹⁷ The court found that the Commission had gone too far in asserting that the recognition of ancillary authority in precedent cases for one aspect of cable translated into future recognition of ancillary authority of all aspects of cable.⁹⁸ Instead, the court emphasized that according to *Southwestern Cable*, “each and every assertion of jurisdiction . . . must be independently justified as reasonably ancillary to the Commission’s power over broadcasting.”⁹⁹ Though the Commission argued that section 230(b)¹⁰⁰ and section 1¹⁰¹ were “statutorily mandated responsibilities” that trigger ancillary authority, the Court found these to be policy statements¹⁰² that were not sufficient to create statutory obligations.¹⁰³ Instead, the Commission had to demonstrate a relationship between the 2002 Order and the services it seeks to regulate and an express delegation of regulatory authority.¹⁰⁴ Because it failed to do so, the court held that the Commission failed to ground its enforcement order in proper

⁹³ *Id.* at 649.

⁹⁴ *Id.* at 645.

⁹⁵ *Id.* at 646 (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-692 (D.C. Cir. 2005)).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ “Nothing in *Midwest Video I* even hints that *Southwestern Cable*’s recognition of ancillary authority over one aspect of cable television meant that the Commission had plenary authority over all aspects of cable.” *Id.* at 650.

⁹⁹ *Id.* at 650 (quoting *Southwestern Cable*).

¹⁰⁰ *Id.* Section 230 states “[i]t is the policy of the United States to promote the continued development of the Internet and other interactive computer services” and “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.” The Commission argued that Comcast’s throttling had contravened both objectives. See 47 U.S.C. § 230.

¹⁰¹ *Id.* at 652. Section 1 states: For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a . . . rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . at reasonable charges, . . . there is created a commission to be known as the ‘Federal Communications Commission. . .’” See 47 U.S.C. § 151.

¹⁰² *Id.* at 652. The FCC conceded that precedent had held these two statutes to be policy statements, rather than laws creating obligations.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 653.

statutory authority. As a result, it vacated the order.

F. The FCC Issues Formal Net Neutrality Regulations Under Title I

Despite this legal setback, not long after, the FCC issued a rule codifying net neutrality regulations under its Preserving the Open Internet Rule. It formally adopted three net neutrality principles. First, under the transparency rule, the Commission required fixed and mobile broadband providers¹⁰⁵ to “disclose the network management practices, performance characteristics, and terms and conditions of their broadband services.”¹⁰⁶ Second, under a no blocking rule, the FCC formally prohibited fixed broadband providers from blocking “lawful content, applications, services, or non-harmful devices.”¹⁰⁷ The rule also barred mobile broadband providers from blocking “lawful websites . . . or applications that compete with their voice or video telephony.”¹⁰⁸ Third, under a no unreasonable discrimination rule, fixed broadband providers (only) were barred from unreasonably discriminating against lawful network traffic.¹⁰⁹ It acknowledged the importance of reasonable network management, defining this term as practices that “are appropriate and tailored to achieving a legitimate network purpose.”¹¹⁰ Thus, the FCC permitted “reasonable discrimination” by allowing reasonable network management measures.¹¹¹ It declined to make a definitive rule for specialized services.¹¹²

It is important to note that the Commission did not prohibit the offering of tiered or usage-based pricing.¹¹³ It also did not mandate that all subscribers pay the same price for internet access, as this would, in the Commission’s view, force those users that use less bandwidth and data to subsidize those consumers who use more bandwidth and data on the

¹⁰⁵ FCC Preserving the Open Internet, 76 FR 60754 (2011) (“We define ‘fixed broadband Internet access service’ as a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user’s home router, computer, or other Internet access device to the network. This term encompasses fixed wireless broadband services (including services using unlicensed spectrum) and fixed satellite broadband services. We define ‘mobile broadband Internet access service’ as a broadband Internet access service that serves end users primarily using mobile stations. Mobile broadband Internet access includes services that use smartphones as the primary endpoints for connection to the Internet.”).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* The FCC defines specialized services as services offered “over the same last-mile connections used to provide broadband services. These services may include heart monitors, energy consumption sensors, or facilities-based VoIP offerings.

¹¹³ *Id.*

same network.¹¹⁴ It also allowed for use-agnostic or application-agnostic discrimination, where during periods of congestion, internet service providers temporarily could grant lighter users more bandwidth than heavier users.¹¹⁵ The Commission found this type of discrimination does not interfere with user choice nor distort competition among edge providers, therefore, aligning with the goal of promoting the openness of the internet (i.e. net neutrality).¹¹⁶ The Commission also provided an exception for specialized services under the anti-discrimination rule.¹¹⁷

The Commission pointed to Section 706 of the Communications Act as its source of authority for adopting the Open Internet Rules. The Commission's rule noted that Section 706 directs the Commission to "encourage the deployment of advanced telecommunications," which include broadband Internet access.¹¹⁸ The FCC looked to Section 706(a)'s mandate for the Commission to encourage the deployment of advanced telecommunications "utilizing, in a manner consistent with the public interest, convenience, and necessity," including "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."¹¹⁹ Section 706 falls under Title I of the Communications Act, thus preserving broadband's classification as a Title I information service.

G. *Verizon v. FCC* Invalidates the FCC's Title I Rules

In 2014, the D.C. Circuit Court of Appeals reviewed a challenge to the Commission's statutory authority raised by Verizon. Following the *Chevron*¹²⁰ analysis applied to the statutory interpretation made by administrative agencies, the court found that the Commission's "understanding of section 706(a) as a grant of regulatory authority represent[ed] a reasonable interpretation of an ambiguous statute."¹²¹ However, where the Commission fell short was in utilizing the grant of regulatory authority "in a manner that contravenes any specific prohibition contained in the Communications Act."¹²² The court

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that administrative agencies are entitled to deference where they apply a reasonable interpretation to an ambiguous statute).

¹²¹ *Verizon v. FCC*, 740 F.3d 623, 37 (D.C. Cir 2014).

¹²² *Id.* at 649.

found that the Commission ran afoul of the Communications Act by imposing common carrier regulations upon broadband providers. The court held that the anti-discrimination rule treated broadband providers like common carriers, because imposing a no-discrimination requirement “compels those providers to hold themselves out ‘to serve the public indiscriminately.’”¹²³ Though the court would have considered an argument stating that a no unreasonable discrimination rule and no blocking rule are distinguishable from a general nondiscrimination rule applied to all carriers, the Commission failed to raise this argument during the litigation proceedings.¹²⁴ The FCC instead argued that broadband providers are not carriers, because rather than fulfill an obligation to carry data across their networks, they have the ability to negotiate with end users as potential customers.¹²⁵ However, because the anti-discrimination rule forced broadband providers to carry for edge providers upon request, the court found that this amounted to treating broadband providers like common carriers.¹²⁶ For the same reason, the court rejected the Commission’s reliance on allowing reasonable network management as evidence of a more permissive standard than a common carrier standard.¹²⁷ Thus, the FCC’s anti-discrimination and anti-blocking rules were invalidated for deficiently imposing common carrier rules under Title I, rather than Title II.¹²⁸

H. The FCC Re-issues Net Neutrality Rules under Title II

To account for broadband internet’s growth and the *Verizon* court’s mandate to classify broadband as a Title II service in order to impose common carrier regulations, the FCC issued an order in 2015 that anchored its net neutrality regulations in Section 706 of the Telecommunications Act and Title II of the Communications Act. Following the legal framework applied to offerings under *Brand X*¹²⁹, the order redefined offerings by retail broadband internet access providers as two separate offerings.¹³⁰ The Commission classified broadband internet access service as a telecommunications service, bringing internet service providers under a Title II regime.¹³¹ The Commission also recognized “add-on” applications and content as part of broadband internet access services, classifying these offerings as

¹²³ *Id.* at 655-56.

¹²⁴ *Id.* at 656, 658.

¹²⁵ *Id.* at 653

¹²⁶ *Id.*

¹²⁷ *Id.* 656-57.

¹²⁸ *Id.* The court preserved the transparency requirements imposed on internet service providers.

¹²⁹ See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

¹³⁰ FCC Open Internet Order, 80 FR 19737 (2015).

¹³¹ *Id.*

information services under the Title I regime.¹³² Examples of “add-on” services include email and news content services provided by internet service provider, themselves.¹³³ Importantly, the Commission also classified mobile broadband internet access service as a Title II telecommunications service.¹³⁴ Thus, the Commission addressed the authority issues raised in the *Verizon* decision.

The order codified no blocking, no throttling, and no paid prioritization rules for both fixed and mobile broadband.¹³⁵ Under the no blocking rule, “[a] person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”¹³⁶ The no throttling rule prohibited providers of broadband Internet from “impair[ing] or degrad[ing] internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device.”¹³⁷ This rule included an exception for reasonable network management, which the order defined as a practice that “is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.”¹³⁸ According to the no paid prioritization rule, broadband internet service providers could not “directly or indirectly favor some traffic over other traffic ... either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.”¹³⁹

The order also adopted a “no unreasonable interference/disadvantage” standard (also called the general conduct rule) that prohibited broadband internet service providers from “unreasonably interfer[ing] with or unreasonably disadvantag[ing] (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users.”¹⁴⁰ According to the Commission’s order, this standard served to protect free expression.¹⁴¹

Further, the order incorporated the transparency rule from the 2010 Open Internet

¹³² *Id.*

¹³³ *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 698 (D.C. Cir. 2016).

¹³⁴ *FCC Open Internet Order*, 80 FR 19737 (2015).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

rules. Under the transparency rule, internet service providers were required to disclose accurate information on their “network management practices, performance, and commercial terms of its broadband Internet access.”¹⁴² Importantly, these disclosures mandated sufficient information to allow “consumers to make informed choices.”¹⁴³ The 2015 order enhanced the transparency requirement by imposing additional obligations upon internet service providers to disclose information on “promotional rates, all fees and/or surcharges, and all data caps or data allowances.”¹⁴⁴ Further, the Commission added packet loss as a network performance measure to be disclosed when undertaken.¹⁴⁵ However, the Commission provided a temporary exemption from the transparency rule for internet service providers with 100,000 or fewer customers.¹⁴⁶

It is important to note that the order also carried over from 2010 an exception for specialized services, which are defined as non-broadband internet access services.¹⁴⁷ These services may include heart monitors, energy consumption sensors, or facilities-based VoIP offerings.¹⁴⁸ However, the Commission was clear that the provision of non-broadband Internet access data services could not “undermine the purpose of the open Internet rules.”¹⁴⁹ Thus, the transparency rule required providers to disclose their use provision of non-broadband internet access data services.¹⁵⁰

Though the order contained a provision on enforcement, it does not address fines. Still, the Commission’s enforcement powers included investigations and complaint adjudication.¹⁵¹

Thus, under the FCC’s 2015 Open Internet Order, the Commission issued net neutrality regulations under Title II for the first time.

I. *USTA v. FCC* Upholds the FCC’s Net Neutrality Regulations

The D.C. Court of Appeals revisited the Commission’s source of authority and reviewed the classification of broadband internet access as a Title II telecommunications service in 2016. The US Telecom Association (USTA), a trade association comprised of

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

internet service providers, challenged the 2015 order on the basis of its authority and substantive provisions. Of the Commission’s recognition of two separate offerings (one broadband internet access telecommunications service and other “add-ons” information service), the court found that the meaning of the term “offering” was ambiguous in the organic statute, thus, meriting *Chevron* deference to the agency.¹⁵² Applying the *Chevron* framework, the court found that the Commission’s interpretation of an ambiguous statute in a way that results in classifying all of broadband internet as a Title II telecommunications service was a reasonable interpretation.¹⁵³ The court also considered procedural challenges raised by the US Telecom Association under the Administrative Procedure Act, holding that these challenges were without merit.¹⁵⁴ Further, the court addressed an “arbitrary and capricious”¹⁵⁵ challenge to the agency’s reclassification of broadband as a telecommunications service, finding that the Commission articulated reasonable rationale for its decision and acted within the scope of its expertise.¹⁵⁶ Finally, the court upheld the Commission’s substantive anti-blocking, anti-discrimination, anti-paid prioritization, and General Conduct provisions.¹⁵⁷ Thus, the FCC’s Title II net neutrality was upheld in its entirety.

J. The FCC Reduces Net Neutrality Protections under a Title I Regime

Though the *USTA* court upheld net neutrality regulations under Title II, during the Trump Administration, the FCC underwent a leadership change. Then-President Trump appointed FCC Commissioner Ajit Pai to Chair of the FCC.¹⁵⁸ With a Republican majority, the

¹⁵² *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 702 (D.C. Cir. 2016).

¹⁵³ *Id.* at 704.

¹⁵⁴ *Id.* at 701. US Telecom alleged that the Commission’s notice-and-comment process was not compliant with Section 553 of the APAP, which requires the Notice of Proposed Rulemaking “include in either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3). US Telecomm argued that the Commission’s reliance on Section 706 instead of Title II was misleading, as the Commission relied on consumer perception and the telecommunications management exception as justification for reclassifying broadband internet access service (BIAS) as a Title II service. The Court found that the Commission had provided sufficient information in its request seeking comment on whether the Commission should reclassify BIAS and provided sufficient notice that it would also rely on consumer perception in its reclassification by inviting comment on this possibility. The telecommunications management exception is. Lastly, US Telecom raised a challenge under the Regulatory Flexibility Act, for which the court stated it lacked jurisdiction to evaluate.

¹⁵⁵ The Administrative Procedure Act requires reviewing courts to invalidate agency actions when the actions at issue are deemed “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” See 5 U.S.C. § 706(2)(A).

¹⁵⁶ *Id.* at 706-707.

¹⁵⁷ *Id.* at 733-34, 736.

¹⁵⁸ Samuel F. Callari, *Ajit Pai Appointed Chairman of the FCC – Expect Change*, REED SMITH (Jan. 23, 2017), <https://www.technologylawdispatch.com/2017/01/regulatory/ajit-pai-appointed-chairman-of-the-fcc-expect-change/>.

FCC moved to propose a rule to overturn the net neutrality protections that went into effect in 2015. On January 4, 2018, the FCC issued an order reclassifying broadband internet access as a Title I information service.¹⁵⁹

The Restoring Internet Freedom (RIF) Order eliminated the conduct rules adopted in 2015. Thus, the FCC struck the rules prohibiting paid prioritization, blocking, and throttling.¹⁶⁰ Further, the order removed the General Conduct rule.¹⁶¹ The Commission instead chose to update the transparency rule to include blocking, throttling, and paid prioritization provisions that, in their view, would be less burdensome on internet service providers, as the previous iteration had costs that outweighed the benefits.¹⁶² Further, the Commission stated that antitrust law was an effective tool to combat “any potential or actual anticompetitive harms that may arise from paid prioritization arrangements.”¹⁶³

The order preserved a transparency rule, requiring that internet service providers “publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices.”¹⁶⁴ The updated transparency rule also required that the disclosures be made “via a publicly available, easily accessible website or through transmittal to the Commission.”¹⁶⁵ Thus, if the internet service provider did not provide disclosures on their websites, they could send this information to the FCC to disclose on a publicly available website on their behalf.¹⁶⁶ The FCC also required internet service providers to disclose the following practices: blocking, throttling, affiliated prioritization, paid prioritization, congestion management, application-specific behavior, device attachment rules, and security.¹⁶⁷ Additionally, internet service providers had to provide a service description detailing the service technology, speed, latency, and suitability of the service for real-time applications.¹⁶⁸ Internet service providers were also required to provide information on the service terms, including price, privacy policies and redress options.¹⁶⁹ This order eliminated the disclosure requirements tied to performance metrics, including disclosure of

¹⁵⁹ FCC Restoring Internet Freedom Order, 83 FR 7852 (2018).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

packet loss and traffic performance during peak hours.¹⁷⁰

As for authority, the Commission's rule concluded that Section 706 was not a grant of regulatory of authority.¹⁷¹ Instead, the Commission cited Section 230 of the Communications Act as its source of statutory authority.¹⁷²

K. *Mozilla v. FCC* Upholds the FCC's Title I Regime

In 2019, the D.C. Court of Appeals reviewed a challenge to the Restoring Internet Freedom order.¹⁷³ The court upheld the order with two exceptions. First, it rejected the Commission's authority to preempt states from creating net neutrality rules that the Commission repealed or refrained from imposing and from imposing rules that are stricter than the Commission's.¹⁷⁴ Second, the court remanded the Order, so that the FCC could "examine the implications of its decisions for public safety," "sufficiently explain what reclassification will mean for reflation of pole attachments," and "adequately address [] concerns about the effects of broadband reclassification on the Lifeline Program."¹⁷⁵ Still, the court held that the classifying broadband Internet access as a Title I information service was a reasonable interpretation of the Communications Act.¹⁷⁶ Further, it upheld the Commission's interpretation of Section 706 as "'exhorting the Commission to exercise market-based or deregulatory authority granted under other statutory provisions, particularly the Communications Act' not as 'an independent grant of regulatory authority to give those provisions meaning.'"¹⁷⁷ Additionally, the Court upheld Section 257¹⁷⁸ of the Communications Act as a proper source of authority for the Commission's transparency rule as promulgated by the 2018 RIF Order.¹⁷⁹ Because the statute does not prescribe a specific method for compliance, the Court agreed that the Commission's interpretation of the statute as a mandate to collect evidence on the market barriers to entry into the telecommunications

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

¹⁷⁴ *Id.* at 14.

¹⁷⁵ *Id.* at 14.

¹⁷⁶ *Id.* at 15.

¹⁷⁷ *Id.* at 90-91 (quoting the 2018 RIF Order ¶ 270).

¹⁷⁸ Section 257(a) charges the Commission with "identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." Section 257(c) requires that the Commission "report to Congress on such marketplace barriers and how they have been addressed by regulation or could be addressed by recommended statutory changes." 47 U.S.C. § 257.

¹⁷⁹ *Mozilla Corp. v. FCC*, 940 F.3d 1, 94 (D.C. Cir. 2019).

services and information services was a reasonable interpretation.¹⁸⁰ In response to “arbitrary and capricious” challenges to the removal of provisions of the transparency rule, the court found the Commission’s justification for their removal—that additional transparency obligations do not benefit consumers, operators, or the Commission—t be a reasonable.¹⁸¹ Thus, the court upheld the Commission’s “light-touch” Title I framework for net neutrality regulations.

L. The Current Net Neutrality Regime in the United States

Following another change in the composition of the FCC¹⁸², where the Commission now had a Democratic majority, in April 2024 the FCC promulgated a rule undoing the Title I classification and reliance on the transparency rule for promoting an open internet. In its order, the Commission reclassified broadband internet as a Title II telecommunications service.¹⁸³ Relying on Sections 201 and 202 of the Communications Act and Section 706 of the Telecommunications Act, the Commission reinstated anti-blocking and anti-throttling rules, as well the general conduct standard.¹⁸⁴ Further, the FCC reintroduced stronger transparency requirements.¹⁸⁵

Under the no-blocking rule, internet service providers are barred from blocking “lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”¹⁸⁶ Mirroring the language of the 2015 Open Internet order, the no throttling rule prohibits the impairing or degrading of “Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.”¹⁸⁷ The Commission defines reasonable network management as a practice that (1) “has a primarily technical network management justification, but does not include other business practices” and (2) is primarily used for and tailored to achieving a legitimate network management purpose.”¹⁸⁸ Important to note is that the Commission recognizes the practice of allowing an end user to speed up or slow down their own traffic through tiered

¹⁸⁰ *Id.* at 94-95.

¹⁸¹ *Id.* at 98.

¹⁸² Elizabeth Williamson, *Biden Nominates Rosenworcel as F.C.C.’s First Female Leader*, N.Y. Times (Oct. 26, 2021), <https://www.nytimes.com/2021/10/26/us/politics/jessica-rosenworcel-fcc.html>.

¹⁸³ FCC Safeguarding and Securing the Open Internet, 89 FR 45404 (2024).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

package offerings.¹⁸⁹ Further, the order bans paid prioritization.¹⁹⁰ However, it provides an exception where the Commission “may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.”¹⁹¹ In order to prove that the practice would further the public interest, internet service providers must provide evidence that the practice would “further competition, innovation, consumer demand, or investment.”¹⁹² Accordingly, petitioners must also prove that the practice does not harm “the open nature of the Internet.”¹⁹³ Finally, under the general conduct rule, the Commission prohibits internet service provider from “unreasonably interfer[ing] with or unreasonably disadvantage[ing]” an end user’s ability to access the lawful internet content of their choosing and an edge provider’s ability to provide the lawful content of their choosing.¹⁹⁴ Importantly, the practice of zero-rating is to be evaluated under the general conduct rule, allowing for beneficial types of zero-rating to stand and harmful types to be found in violation of the rule.¹⁹⁵

Under the revised transparency rule, internet service providers must “publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices.”¹⁹⁶ Mandatory disclosures include information on network practices, such as congestion management, paid prioritization, zero-rating, and application-specific behavior.¹⁹⁷ Internet service providers must also provide descriptions of service technology, speed, pricing, privacy policies, and consumer redress options.¹⁹⁸

As for enforcement, the order allows for internet service providers to request advisory opinions that will provide compliance guidelines.¹⁹⁹ Further, the order provides procedures for informal and formal complaints by end users.²⁰⁰ Though the order states that the Commission will “pursue remedies and penalties” when a violation has occurred, the order does not specify the kinds of remedies and penalties it plans to impose for violations of the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

net neutrality rules.²⁰¹

The Sixth Circuit Court of Appeals reviewed petitions by internet service providers to stay the FCC rule change classifying internet service providers as Title II common carriers.²⁰² It granted the stay, preventing the FCC from enforcing its net neutrality regulations.²⁰³ Among other factors, the court agreed with petitioners that the FCC had overstepped its authority by issuing this rule change, because the rule implicated a major question, which under administrative law doctrine, may only be legislated by Congress.²⁰⁴ Though this court order is not considered a final judgment on the merits of the challenge to FCC's most recent net neutrality regulations, the court's order granting a stay signals that the court is likely to invalidate the FCC's rules. Thus, the United States currently lacks enforceable net neutrality regulations at the federal level.

Recognizing that they may subject to potentially stricter and conflicting net neutrality regulations at the state level in the absence of harmonized federal regulations, telecommunications associations comprised of internet service providers have filed a petition for a writ of certiorari with the aim of striking down net neutrality regulations at the federal Supreme Court level. It is important to note that the internet service providers' fears are not unfounded, as, historically, where federal net neutrality regulations have been blocked by litigation, states have promulgated their own net neutrality laws to fill in the void left by the FCC. While the petition challenges a New York rate-fixing law called the Affordable Broadband Act, it additionally argues that allowing states to classify broadband internet services as a common carrier would be "detriment[al] [to] providers, consumers, and the nation."²⁰⁵ It emphasizes the importance of "uniform, national regulation," in its request for

²⁰¹ *Id.* The order cites 47 CFR §§ 1.80, 1.89, both of which provide a list of remedies available to the Commission. Under 47 CFR 180, which applies to common carriers, the Commission may impose fines of "\$244,958 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$2,449,575 for any single act."

²⁰² In re: MCP No. 185; Federal Communications Commission, In The Matter Of Safeguarding And Securing The Open Internet, Declaratory Ruling, Order, Report And Order, And Order On Reconsideration, Fcc 24-52, 89 Fed. Reg. 45404, Published May 22, 2024, Case No. 24-7000/24-3449/24-3450/24-3497/24-3508/24-3510/24-3511/24-3519/ 24-3538, In re: MCP No. 185 Open Internet Rule (FCC 24-52) Originating Case No. 24- 52 (6th Cir. 2014).

²⁰³ In order to grant a stay, the court must find that the petitioner will likely succeed on the merits, that the petitioner is likely to suffer an injury without a stay; others will suffer injury without stay, and granting a stay would serve the public interest. *Id.*

²⁰⁴ *Id.* "When Congress delegates its legislative authority to an agency, it presumably resolves 'major questions' of policy itself while authorizing the agency to decide only those 'interstitial matters' that arise in day-to-day practice. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986))."

²⁰⁵ Petition for Writ of Certiorari, *New York State Telecommunications Association, Inc., et al. v. Letitia James*, in her official capacity as Attorney General of New York (2024), 3.

the Court to reverse a Second Circuit decision allowing the state of New York to subject broadband providers to common carrier regulations.²⁰⁶

With challenges to both state and federal net neutrality regulations, the telecommunications industry has demonstrated that what it seeks is a uniform bar against net neutrality regulations. Whether the Supreme Court will hear the case is unclear. However, what remains clear is that the United States currently does not have enforceable federal net neutrality regulations.

IV. Net Neutrality in the European Union

The European Union's net neutrality regime benefits from procedural advantages over the United States. However, the protections enshrined in the EU Regulation for Open Internet Access provide the same substantive protections promulgated in the United States. It is the lack of countervailing factors such as rapid changes in leadership or invalidating decisions by a reviewing court that have allowed the Regulation to provide stable net neutrality protections to its citizens. Further, the European Court of Justice (ECJ), rather than void the regulations, have strengthened them by imposing no-zero-rating obligations on internet service providers. Thus, the development of net neutrality regulations in the European Union can be characterized as a linear progression towards stronger protections for an open internet. Like the United States, European Union law provides for anti-blocking, anti-discrimination, anti-throttling, and transparency obligations. Despite the European Union's comparative procedural advantage, recent consultations conducted by the European Union's Commission signal a move towards rolling back certain net neutrality provisions—specifically, the protection against network access fees. This section provides an overview of net neutrality regulations in the European Union, describing their development into the protections currently in force.

A. History of Net Neutrality in Europe

In 2009, the European Commission agreed on a package of telecommunications reforms (EU Telecoms Reform 2009) that codified net neutrality protections.²⁰⁷ This agreement included an “Internet Freedom Provision” that, based on the European Convention

²⁰⁶ *Id.*

²⁰⁷ Christopher T. Marsden, *Network Neutrality: From Policy to Law to Regulation*, MACHES-TER UNIVERSITY PRESS (Feb. 23, 2017), 35, <https://www.manchesterhive.com/display/9781526105479/9781526105479.xml>.

for the protection of Human Rights and Fundamental Freedoms and the general principles of Community law, allowed European Union Member states to take measures related to user access to electronic communications networks.²⁰⁸ However, the agreement only allowed for measures that were “appropriate, proportionate and necessary within a democratic society” if they restricted end user access to electronic communications networks. Still, in a memorandum describing the details of the reform package, the European Commission touted that the Internet Freedom Provision would be accompanied “by new measures to reinforce the neutral character of the internet in Europe.”²⁰⁹ The memorandum also stated that under the new EU rules, “national telecoms authorities [would] have the powers to set minimum quality levels for network transmission services so as to promote ‘net neutrality’ and ‘net freedoms’ for European citizens.”²¹⁰ The rules additionally provided for transparency requirements, whereby telecommunications providers would be required to inform consumers, prior to their signing a contract, “about the nature of the service to which they are subscribing, including traffic management techniques and their impact on service quality, as well as any other limitations (such as bandwidth caps or available connection speed).”²¹¹

Similar to the United States, the growing movement during the time of the “Telecoms Reforms” was partially motivated by internet service providers blocking VoIP applications.²¹² Another point of commonality was the fragmented response to implementing net neutrality rules. Because the Telecoms Reforms providing for transparency and network openness obligations for internet service providers were codified in two directives²¹³, member states were to implement these rules into their own national laws.²¹⁴ These rules included obligations for internet service providers to not block or degrade traffic beyond what is necessary for network management.²¹⁵

In 2011, the Netherlands became the first country within the European Union to adopt a net neutrality law.²¹⁶ Its legislation prohibited mobile telephone operators from blocking

²⁰⁸ European Commission, Agreement on EU Telecoms Reform Paves Way for Stronger Consumer Rights, an Open Internet, a Single European Telecoms Market and High-Speed Internet Connections for all Citizens (2009), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_09_491.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Marsden, *supra* note 207, at 37.

²¹³ Directive 2009/136/EC (Citizens’ Rights Directive) and Directive 2009/140/EC (Better Regulation Directive).

²¹⁴ Marsden, *supra* note 207, at 35.

²¹⁵ *Id.* at 36.

²¹⁶ Kevin J. O’Brien, *Dutch Lawmakers Adopt Net Neutrality Law*, NEW YORK TIMES (June 22, 2011), <https://www.nytimes.com/2011/06/23/technology/23neutral.html>.

internet telephony services like Skype or WhatsApp, or from charging consumers fees in order to access these services. Though operators could still offer plans with different levels of service quality (in the form of different download speeds), operators could not impose fees directly to the use of specific free Internet services.²¹⁷ The law allowed the national telecommunications regulator, OPTA, to impose fines up to 10 percent of a company's annual sales.²¹⁸ Further, it adopted the framework under the "Telecoms Reforms" in 2012.²¹⁹ Other member states also adopted the mandated net neutrality regulations, including Slovenia and France.²²⁰

Despite these strides in promoting net neutrality among European Union member states, following the implementation period, 20 National Regulatory Authorities "had not implemented any part of the 2009 directives" by the implementation deadline.²²¹ Further, the Body of European Regulators for Electronic Communications (BEREC), which is a European Union agency responsible for ensuring the implementation of electronic communications laws²²², found breaches of these rules. Namely, BEREC reported VoIP blocking in several member states.²²³

In 2013, the European Commission began the process for codifying a net neutrality regulation at the EU level by formally adopted a proposed regulation.²²⁴ On October 27, 2015, the European Union approved a regulation providing harmonized requirements for net neutrality.²²⁵

B. Regulation 2015/2010 for Open Internet Access

The Regulation opens with recitals discussing its aim to set "common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights."²²⁶ Further, it states that the Regulation serves to

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Marsden, *supra* note 207, at 42.

²²⁰ *Id.* at 45.

²²¹ *Id.* at 38.

²²² BEREC, <https://www.berec.europa.eu/en/mission> (last accessed Sep. 13, 2024).

²²³ Marsden, *supra* note 207, at 38.

²²⁴ *Id.* at 627.

²²⁵ *Id.* at 102.

²²⁶ EU Regulation 2015/2010, Laying Down measures Concerning Open Internet Access and Amending Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services and Regulation (EU) No 531/2012 on Roaming on Public Mobile Communications Networks within the Union (2015), <https://eur-lex.europa.eu/eli/reg/2015/2120/oj>.

“guarantee the continued functioning of the internet ecosystem as an engine of innovation.”²²⁷

Article 1 establishes the principle of non-discrimination so that internet traffic is treated equally by internet service providers.²²⁸ Article 2 provides the definitions for internet service providers (called “provider of electronic communications to the public” in the text of the Regulation) and “internet access service.”²²⁹ The substantive protections are outlined in Article 3.

Article 3 opens with a declaration that “[e]nd-users shall have the right to access and distribute information and content, use and provide applications and services... via their internet access service.”²³⁰ Accordingly, under the regulation’s non-discrimination rule, internet service providers must “treat all traffic equally, when providing internet access services, without discrimination, restriction or interference.”²³¹ Still, internet service providers are not precluded from utilizing “reasonable traffic management measures,” which must be “transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic.”²³² Internet service providers may only deviate from reasonable traffic management measures in three circumstances: to comply with court orders, orders from public authorities, or legislative acts from the European Union or member states; to preserve a network’s cybersecurity; or to counter network congestion, provided that the internet service providers treat the same kinds of traffic (all-in-a-class) equally.²³³

Article 4 provides transparency requirements for internet service providers. Under this Regulation, internet service providers must provide information in their service contracts information on how traffic management measures may impact the quality of the internet service and a user’s privacy. Additionally, internet service providers must explain how quality of service terms such as data volume and traffic speed constraints may impact internet service. The transparency requirement also stipulates that this information be “clear and comprehensible explanation[s], ensuring that consumers understand the provisions they are signing on to via binding service contracts.”²³⁴ Though the regulation harmonizes

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

requirements for internet service providers, Article 6 allows individual member states to set their own penalties.²³⁵

It is important to note that Regulation 2015/2120 does not explicitly prohibit the practice of zero-rating.²³⁶ The BEREC guidelines for implementing in the Regulation, first published in 2016 (after the Regulation went into effect), provide a set of binding principles for internet service providers.²³⁷ They, too, did not mention the practice of zero-rating.

However, in 2020 and 2021, zero-rating was explicitly evaluated in a series of cases before the European Court of Justice. These judgments strengthened net neutrality cases in the European Union by adding a new prohibition on harmful zero-rating practices.

C. The ECJ Adds Anti-Zero-Rating Protections

In 2020, the European Court of Justice reviewed, for the first time, the practice of zero-rating. In definitional cases, the European Court of Justice explains “meanings, concepts and the correct interpretation of the legal instrument at stake.”²³⁸ In evaluating the practice of zero-rating, the Court needed to determine whether zero-rating fell under the scope of Article 3(2), which governs agreements between users and internet service providers, or Article 3(3), which requires internet service providers to treat all internet traffic equally (i.e. to follow the non-discrimination principle).²³⁹ At stake was the validity of the practice as a whole. Applying Article 3(2) would allow the practice to stand as a valid agreement between users and internet service providers. Meanwhile, applying Article 3(3) would invalidate the practice for the failure to treat all internet traffic equally.

The case arose from challenges to the zero-rating practices from a Hungarian internet service provider called Telenor. At the time, Telenor offered two service packages that zero-rated specific applications.²⁴⁰ In its “MyChat” package, Telenor offered a 1 GB data package, which consumers could use freely for any available application or service.²⁴¹ The data used for six specific applications (Facebook, Facebook Messenger, Instagram, Twitter, Viber, and

²³⁵ *Id.*

²³⁶ Maroni, *supra* note 22, at 520. The author references Lindroos-Hovinheimo’s distinction between definitional and balancing cases, where the Court balances fundamental rights.

²³⁷ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules (2016), https://www.berec.europa.eu/sites/default/files/files/document_register_store/2016/8/BoR_%2816%29_127_BEREC_Net_Neutrality_Guidelines_30082016_final.pdf.

²³⁸ *Id.* at 520.

²³⁹ *Id.* at 521.

²⁴⁰ *Id.* at 522.

²⁴¹ Case C-807/18 and C-39/19, Telenor Magyarország Zrt. v. Nemzeti Média- és Hírközlési Hatóság Elnöke (Sep. 15, 2020) ¶10, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018CJ0807>.

WhatsApp) would not count towards the 1GB data limit.²⁴² Further, after users had met their data cap, consumers could continue to use those applications without restriction, while other applications would be throttled.²⁴³ Telenor offered a similar data package for its “MyMusic” deal. “MyMusic” allowed users to stream music via Apple Music, Deezer, Spotify, and Tidal and specific radio services without this data counting towards their data cap.²⁴⁴ As with the “MyChat” package, once the data cap had been met, customers could continue using the listed applications, while other applications would be throttled or blocked.²⁴⁵

In its judgment, the Court found that Article 3(2) of Regulation 2015/2120 “requires that such an [internet access service] does not entail any limitation” of user rights, as safeguarded by Article 3(1).²⁴⁶ The Court also considered the meaning of “agreements” between internet service providers and their end users, emphasizing its distinction from the meaning of “commercial practices.”²⁴⁷ Under the Regulation, the term “agreements” allows for end users and internet service providers to agree on the terms of service involved in the provision of internet access, such as “the price and corresponding data volume and speed.”²⁴⁸ “Commercial practices,” on the other hand, are not agreements between the end user and internet service providers; they instead focus on an internet service provider’s different offerings.²⁴⁹ For example, “commercial practices” include “specific variants or combinations of [internet access] services to its potential customers.”²⁵⁰ Still, according to the Regulation, neither “commercial practices” nor “agreements” may limit the rights guaranteed to end users.²⁵¹

The Court took issue with the blocking and slowing down of applications outside of the specific applications included in the MyChat or MyMusic packages, because these measures “appear[ed] to be based not on objectively different technical quality of service requirements for specific categories of traffic but on commercial considerations.”²⁵² Further, these measures did not fall within one of the regulation’s exceptions for differential treatment.²⁵³ As a result, the Court held that offerings that allow end users to utilize specific

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at ¶11.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at ¶30.

²⁴⁷ *Id.* at ¶¶32-35.

²⁴⁸ *Id.* at ¶32.

²⁴⁹ *Id.* at ¶¶34-35.

²⁵⁰ *Id.*

²⁵¹ *Id.* at ¶35.

²⁵² *Id.* at ¶52.

²⁵³ *Id.* at ¶53.

applications without deductions to their data and that throttle or block applications outside of the zero-rated applications once the data limit has been met violate Article 3(2) and 3(1) when they curtail user rights.²⁵⁴ These measures also violate Article 3(3) when the blocking or throttling are based on commercial considerations rather than technical ones.²⁵⁵ With this judgment, the ECJ added to the substantive protections in the EU's Regulation for Open Internet Access by formally banning the practice of zero-rating. With this ruling, internet service providers from incentivizing the use of applications and services of their choice.²⁵⁶

However, despite the ruling's significance, the Court left failed to address some gaps in understanding the Regulation. First, the Court did not distinguish between different types of zero-rating. Though the Court described the two zero-rating components of the MyMusic and MyChat and the holding applies to both components, the reasoning seems to center on triggering throttling or blocking of applications that occurs once a data cap has been met.²⁵⁷ The Court does not describe how not counting the data used for specific applications while counting the data used for all other applications limits consumer choice in similar ways as the first zero-rating component.²⁵⁸ Additionally, the Court opinion did not explain which user rights invoke fundamental rights, likely because the preliminary questions from the referring court did not reference the EU Charter of Fundamental Rights.²⁵⁹ Thus, this ruling presents a missed opportunity for explaining how net neutrality is related to the fundamental rights guaranteed under EU law.

In 2021, the European Court of Justice again confronted the issue of zero-rating in the *Vodafone v. Bundesrepublik Deutschland* case. In this instance, the court was asked to

²⁵⁴ *Id.* at ¶54.

²⁵⁵ *Id.* at ¶54.

²⁵⁶ Maroni, *supra* note 22, at 528 (“Specifically, the provisions on zero-rating prohibit corporate schemes which would steer consumers’ choices towards which apps or services to use, thus distorting the level playing field, and effectively reducing innovation, diversity and pluralism.”).

²⁵⁷ *Id.* at 530. See Case C-807/18 and C-39/19, Telenor Magyarország Zrt. v. Nemzeti Média- és Hírközlési Hatóság Elnöke (Sep. 15, 2020) ¶43-44 (“[A]n agreement by which a given customer subscribes to a package whereby once the data volume included in the tariff purchased has been used up, that customer has unrestricted access only to certain applications and services covered by a ‘zero tariff’, is liable to entail a limitation of the exercise of the rights set out in Article 3(1) of Regulation 2015/2120.) (...in the light of the cumulative effect of the agreements to which they may lead, liable to increase the use of certain specific applications and services, namely those which may be used without restriction on a ‘zero tariff’ once the data volume included in the tariff purchased by customers has been used up, and are, accordingly, liable to reduce the use of the other applications and services available.”), ¶51-52 (“Those measures blocking or slowing down traffic are applied in addition to the ‘zero tariff’ enjoyed by the end users concerned, and make it technically more difficult, if not impossible, for end users to use applications and services not covered by that tariff.”)(“Consequently, those measures appear to be based not on objectively different technical quality of service requirements for specific categories of traffic but on commercial considerations.”).

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 534.

evaluate “Vodafone Pass” packages that would zero rate specific applications, according to the user’s subscription type (i.e., video, music, chat, or social media).²⁶⁰ Like in the *Telenor* case, Vodafone, a German internet service provider, would not count the data used when accessing specific applications from Vodafone partners towards the subscriber’s data cap.²⁶¹ However, unlike Telenor’s MyChat and MyMusic packages, once the data limit was reached, Vodafone throttled all applications, including those included in the Vodafone Pass packages.²⁶² Because these packages were only offered within national territory, the referring court sought clarification on whether this condition violated the EU’s Roaming Regulation.²⁶³ However, the Court also analyzed the packages’ validity under Regulation 2015/2120. Citing *Telenor*, the Court highlights Article 1 of the Regulation, which makes clear that the purpose of the Regulation is to “safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users’ rights.”²⁶⁴ Thus, under Article 3(3), internet service providers have the obligation of equal treatment of traffic, except for instances of reasonable traffic management, which do not include instances of differential treatment based on commercial considerations.²⁶⁵ Further, the judgment cites *Telenor* for the proposition that “a failure to fulfill the obligation of equal treatment of all traffic cannot be justified under the principle of freedom of contract, recognised in Article 3(2) of that regulation.”²⁶⁶ Accordingly, the Court held that zero-rating, a practice that limits the end user’s experience when roaming, violates Article 3(3)’s obligation to treat traffic equally.²⁶⁷

The European Court of Justice also analyzed the same Vodafone Pass zero-rating packages in *Verbraucherzentrale Bundesverband v. Vodafone*, focusing this time on tethering (the use of hotspots to provide internet access across devices). At the time, the Vodafone Pass counted the data used during a hotspot session towards the subscriber’s data cap.²⁶⁸ As in the *Vodafone Roaming* case, the Court cites *Telenor* for the proposition that Article 3(3) prohibits

²⁶⁰ Case C-854/19, *Vodafone GmbH v. Bundesrepublik Deutschland* (Sep. 2 2023) ¶7, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=245531&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10022727>.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at ¶9. See EU Regulation No 531/2012 of the European Parliament and of the Council of 13 June 2012 on Roaming on Public Mobile Communications Networks within the Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0531>.

²⁶⁴ *Id.* at ¶22.

²⁶⁵ *Id.* at ¶26.

²⁶⁶ *Id.* at ¶24.

²⁶⁷ *Id.* at ¶34.

²⁶⁸ Case C-5/20, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Vodafone GmbH* (Sep. 2, 2021) ¶8, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=245535&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10023644>.

internet service providers from engaging in traffic discrimination.²⁶⁹ Further, agreements between end users and internet service providers under Article 3(2) cannot abrogate from user rights based on the principle of freedom of contract.²⁷⁰ Lastly, reasonable network management measures do not include throttling based on commercial considerations. Because the referring court asked for the clarification on whether tethering affects the analysis, the Court explicitly stated that the Vodafone Pass’s different data counting mechanism during tethering sessions was incompatible with Article 3(3), which requires internet service providers to “treat all traffic equally, when providing internet access services, without discrimination...”²⁷¹

In the last of the zero-rating cases, the European Court of Justice evaluated Telekom’s “Stream On” package, which allowed subscribers to the plan to stream audio and video from partner companies without that data counting towards their data limits.²⁷² As in the other cases, once the data limit had been met, Telekom, a German internet service provider, would throttle content.²⁷³ However, where this plan differed from the previous cases was that the StreamOn zero-rating plan also reduced a user’s bandwidth to 1.7 megabits per second for video streaming, regardless of the application or website used to stream.²⁷⁴ Subscribers could activate and deactivate StreamOn at any time.²⁷⁵ It is important to note that Telekom did not charge fees from content partners for the applications that were zero-rated.²⁷⁶

Responding to the referring court’s inquiry about whether the StreamOn zero-rating and bandwidth reduction according to customer activation violated Article 3 of Regulation 2015/2010, the European Court of Justice held that the “zero tariff” option was incompatible with Article 3(3)’s non-discrimination mandate.²⁷⁷ The judgment stated that the ability to freely access content from Telekom’s partners does not counteract a failure to fulfill the obligation to treat internet traffic equally.²⁷⁸ Further, the Court held that the violation of Article 3(3) is not voided if a zero tariff option is part of an agreement under the meaning of

²⁶⁹ *Id.* at ¶25

²⁷⁰ *Id.* at ¶39.

²⁷¹ *Id.* at ¶¶5, 32.

²⁷² Case C-34/20, *Telekom Deutschland GmbH v. Bundesrepublik Deutschland*, ¶6 (Sep. 2, 2021), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=245537&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10024102>.

²⁷³ *Id.*

²⁷⁴ *Id.* at ¶7.

²⁷⁵ *Id.* at ¶8.

²⁷⁶ *Id.* at ¶9.

²⁷⁷ *Id.* at ¶30.

²⁷⁸ *Id.* at ¶31.

Article 3(2) of the Regulation.²⁷⁹ The Court also stated that the fact that the plan is intended to meet customer or content provider demand does not affect the analysis.²⁸⁰ As in the other zero-rating cases, because the zero tariff option throttles content based on commercial considerations instead of technical ones, StreamOn’s zero-rating option could not be considered a network management practice.²⁸¹ Thus, StreamOn violated the Article 3(3) of the Regulation.²⁸²

The significance of these decisions is that the European Court of Justice explicitly prohibited the practice of zero-rating where the Regulation failed to speak on the practice. Further, what becomes clear from analyzing the 2021 decisions is that the 2020 decision developed the legal framework to be applied in instances of zero-rating.²⁸³ Additionally, the lack of limiting language in the 2020 decision makes clear that Article 3(3) applies to both technical and nontechnical discrimination.²⁸⁴

However, not all forms of zero-rating were banned. The Court was clear that zero-rating would violate Article 3(3) if the data used for certain applications or services did not count towards the data cap. However, this condition leaves open the possibility for zero-rating plans that do not violate the Regulation, including those that differentiate traffic based on commercial considerations.²⁸⁵ One zero-rating practice that would be compatible with Articles 3(3), 3(2), and 3(1) is application-agnostic zero-rating.²⁸⁶

Application agnostic zero-rating programs are defined as “zero-rating programs that do not make distinctions among applications or classes of applications,” instead zero-rating “all traffic equally.”²⁸⁷ Under such a program, an internet service provider could zero-rate according to time of day.²⁸⁸ For example, an internet service provider may zero-rate all internet traffic activity during hours with lower activity, such as between 10 PM and 6 AM.²⁸⁹ Because such a program would treat all traffic equally, making no distinctions among applications or services, it would comply with Article 3(3).²⁹⁰ Additionally, because this

²⁷⁹ *Id.* at ¶32.

²⁸⁰ *Id.*

²⁸¹ *Id.* at ¶33.

²⁸² *Id.* at ¶36.

²⁸³ Barbara van Schewick, The Impact of the ECJ’s 2020 and 2021 Zero-rating Judgments on Zero-rating and Differentiated Pricing in the European Union, White Paper submitted to the Public Consultation on the Draft BEREC Guidelines on the Implementation of the Open Internet Regulation (Apr. 14, 2022), 29.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 12.

²⁸⁶ *Id.* at 23.

²⁸⁷ *Id.* at 24.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

program would also allow consumers and internet service providers to create agreements among themselves, it would also comply with Article 3(2).²⁹¹

Similarly, a program with download speed and data limits may also be compatible with Regulation 2015/2010. For example, a consumer may subscribe to a plan that includes 12 GB of data with specific download and upload speeds.²⁹² Once a subscriber has met their data limit, the speed of all data they consume is reduced, regardless of the application or service being used.²⁹³ This plan would be consistent with Article 3(3) because the reduction in internet speed would not depend on the application type, instead depending on whether the data was being used before or after the data limit has been met.²⁹⁴ Further, the contractual agreement between the end user and the internet service provider would be in accordance with Article 3(2) of the Regulation.²⁹⁵

In addition to adding a new substantive protection to the EU's existing net neutrality Regulation, the 2020 and 2021 ECJ decisions are significant, because they demonstrate the different functions reviewing courts in the EU have compared with reviewing courts in the United States. Notably absent from these ECJ decisions was a challenge to the authority of EU Regulation. Rather, the ECJ focused on interpreting the text of the Regulation without analyzing whether the EU could promulgate such regulations. This difference in the legal issues analyzed by the reviewing courts is due to the different procedures for requesting the review. In the EU, national courts request that the ECJ provide guidance for interpreting specific regulatory provisions, whereas in the United States, reviewing courts analyze litigation brought by private right of action, addressing any challenge to substantive provisions, legal procedure, or statutory authority. Another difference in the role of reviewing courts is that none of the 2021 decisions raised any new questions of law, instead applying the legal framework provided in the 2020 decision.²⁹⁶ In fact, the reasoning of all 2020 and 2021 decisions reinforce each other, rather than contradicting each other.²⁹⁷

Thus, the European Court of Justice strengthened net neutrality protections in the EU by adding a harmful zero-prohibition and providing a useful legal framework for NRAs to use when evaluating an internet service provider's practices.

²⁹¹ *Id.*

²⁹² *Id.* at 25 (“Deutsche Telekom’s MagentaMobile M mobile internet access plan includes 12 GB of data at LTE Max/5G download speeds and upload speeds of up to 50 MBit/s.”).

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 30.

²⁹⁷ *Id.* at 32.

D. BEREC Issues Updated Guidelines

Under Article 5(3) of the Open Internet Regulation, BEREC guidelines are drafted to provide guidance to national regulatory authorities of member states on the implementation of Regulation 2015/2010.²⁹⁸ The Guidelines provide elaborations for each provision within the Regulation. For example, BEREC explains that though Article 3 does not require “ex ante authorization,” internet service providers and NRAs are free to engage in discussions related to the obligations under Article 3 or the NRAs’ authority to intervene under Article 5.²⁹⁹ Regarding the scope of the Regulation, BEREC states that Article 3(1)’s grant of a right upon end users to “access and distribute information and content” applies to “any form of data that can be sent or received” over broadband internet access service (BIAS).³⁰⁰ In line with the 2021 *Vodafone Tethering* ECJ case, BEREC further clarifies that the right to “use terminal equipment of [] choice” includes tethering.³⁰¹ To this point, BEREC also highlights Recital 5, which prohibits internet service providers from “impos[ing] restrictions on the use of terminal equipment connection to the network.”³⁰²

The BEREC Guidelines provides clarification for the interpretation of Article 3(2), which governs agreements between internet service providers and end users. BEREC acknowledges that internet service providers offer “additional services in the same way as [edge providers].”³⁰³ This guidance aligns the FCC’s understanding in 2015, where the Commission classified broadband internet as a Title II telecommunications service and “add on” services as a Title I service. In line with the 2020 and 2021 decisions on zero-rating, BEREC provides guidance on how NRA’s may evaluate whether restrictions for these additional services comply with Article 3(1). To this point, BEREC states that NRAs may consider in their evaluations whether end users remain in full control of their services, whether they may activate or deactivate blocking, whether the default setting complies with Articles 3(1) and 3(3), whether the practice is application-agnostic, and whether the practice is based non-technical or commercial considerations.³⁰⁴

²⁹⁸ BEREC Guidelines on the Implementation of the Open Internet Regulation (2022) (1), https://www.berec.europa.eu/sites/default/files/files/document_register_store/2022/6/BoR_%2822%29_81_Update_to_the_BEREC_Guidelines_on_the_Implementation_of_the_Open_Internet_Regulation.pdf.

²⁹⁹ *Id.* (21).

³⁰⁰ *Id.* (23).

³⁰¹ *Id.* (27).

³⁰² *Id.* (27).

³⁰³ *Id.* (32(a)).

³⁰⁴ *Id.* (32(b)).

The Guidelines further elaborate that under Article 3(2), terms of service agreements specifying tariffs for data limits and speed do not limit an end-user's rights.³⁰⁵ Commercial practices that would be consistent with the Regulation could include application-agnostic packages that allow zero-rating during a specific time period, application-agnostic plans for specific groups such as seniors, students, or low-income families, and packages that throttle all traffic once a data cap has been met.³⁰⁶ Further, the Guidelines state that the Regulation allows for bundle packages with third-party content providers, granting users a free subscription to a platform for a limited time, for example.³⁰⁷ Such offers do not violate the Regulation, because they do not impact the treatment of internet traffic. In line with the 2020 and 2021 decisions, the Guidelines explicitly names zero-rating as an inadmissible practice.³⁰⁸

The Guidelines also provide clarification on how network management measures should be evaluated. Under Article 3(3), internet service providers must provide information about their network management practices.³⁰⁹ The measures, themselves, must be “transparent, non-discriminatory, and proportionate.”³¹⁰ To evaluate non-discrimination, NRAs should consider that the Regulation allows for the differentiation between “objectively different categories of traffic,” which can include the differentiation between application layer protocol or generic application types (such as VoIP, instant messaging, or file sharing).³¹¹ Importantly, encrypted traffic does not excuse differential treatment of traffic by internet service providers.³¹² When evaluating the proportionality of network management measures, NRAs are advised to evaluate whether the measure has a legitimate aim, such as “contributing to the efficient use of network resources and to an optimisation of overall transmission quality.”³¹³ Further, the measures should not be employed longer than necessary.³¹⁴ In addition to a requirement that the aim be suitable and necessary to achieve the legitimate aim, there must also not be a less intrusive or equally effective alternative measure.³¹⁵ Finally, the management must appropriately balance competing interests and

³⁰⁵ *Id.* (35).

³⁰⁶ *Id.*

³⁰⁷ *Id.* (36).

³⁰⁸ *Id.* (40(a)).

³⁰⁹ *Id.* (59).

³¹⁰ *Id.* (58).

³¹¹ *Id.* (60).

³¹² *Id.*

³¹³ *Id.* (61).

³¹⁴ *Id.* (71).

³¹⁵ *Id.* (61).

competing traffic categories.³¹⁶ Any network management practice must avoid the following: blocking, slowing down, alteration, restriction, interference, degradation, and discrimination of specific content or specific classes of content.³¹⁷

Under the Regulation’s transparency requirement, BEREC clarifies that disclosures must be:

“easily accessible and identifiable for what it is; ... accurate and up to date; ... meaningful to end-users, i.e. relevant, unambiguous and presented in a useful manner; ... should not create an incorrect perception of the service provided to the end-user; ... should be at least between different offers, but preferably also between different ISPs, so that end-users are able to compare the offers (including the contractual terms used by different ISPs) and ISPs in such a way that the comparison can show differences and similarities.”³¹⁸

Disclosures must also include “clear and comprehensive” information on network management measures.³¹⁹

With these points, BEREC builds on the text of the Regulation by providing NRAs with interpretation of the substantive provisions and with broadened protections according to the ECJ’s 2020 and 2021 rulings.

E. The European Commission Explores Access Fees

While federal net neutrality regulations in the United States are suffering from an uncertain future due to changes in the administrative law and an indefinite court stay on the FCC’s 2024 order, the European Union may also suffer from self-imposed setbacks. In February 2023, the European Commission launched a consultation, inviting commentary on “future of the electronic communications sector and its infrastructure.”³²⁰ One topic the Commission sought feedback on was a proposed “fair share” rule that would force edge providers to pay fees to internet service providers for the transmission of their traffic to end users.³²¹ The Commission described a “paradox between increasing volumes of data” transmitted across networks and “alleged decreasing returns and appetite to invest in network

³¹⁶ *Id.* (61).

³¹⁷ *Id.* (77).

³¹⁸ *Id.* (130).

³¹⁹ *Id.* (135).

³²⁰ EUR. COMM., The Future of The Electronic Communications Sector and its Infrastructure, (Feb. 23, 2023), <https://digital-strategy.ec.europa.eu/en/consultations/future-electronic-communications-sector-and-its-infrastructure>.

³²¹ *Id.* at Section 4.

infrastructure.”³²² For this reason, internet service providers advocated for access fees to ensure that those edge providers “who generate enormous volumes of traffic to contribute to the electronic communications network deployment costs.”³²³ However, such an outcome would hinder, not help, the European Union’s promotion of an open internet.

The proposed fair share rule would formally allow internet service providers to charge access fees for the use of their networks. Such fees would violate Articles 3(3) and 3(1) of the EU’s Regulation for Open Internet Access.³²⁴ First, the proposed rule would apply only to specific content providers, constituting economic discrimination that is expressly prohibited by Article 3(3).³²⁵ Second, access fees violate Article 3(1), because they interfere with users’ right to access the content of their choosing, as those edge providers that do not pay the fees would not be transmitted across an internet service provider’s network.

Though the proposal eventually failed,³²⁶ the European Union must be wary of renewed debate on the matter and understand that adopting access fees would undermine its obligation to promote and enforce net neutrality.

V. Comparing the Regimes

Because the European Union closely monitored the promulgation of net neutrality regulations during the first decade of the century, it should come as no surprise that the substantive net neutrality protections are the same in the United States as in the European Union. Both regimes codified the major tenets of net neutrality: no discrimination, no throttling, and no paid prioritization. Importantly, while both regimes disfavor the practice of zero-rating, they distinguish between harmful and non harmful zero-rating. Further, both regimes impose transparency requirements on their internet service providers so that users can make informed choices. Lastly, both regimes provide for reasonable network management exceptions that allow internet service providers to take necessary and tailored measures to manage network congestion.

³²² *Id.*

³²³ *Id.*

³²⁴ Barbara van Schewick, *Here’s How the European Commission Proposal to Force Websites to Pay ISPs Violates Net Neutrality*, Center for Internet and Society (May 29, 2023), <https://cyberlaw.stanford.edu/blog/2023/05/heres-how-european-commission-proposal-force-websites-pay-isps-violates-net-neutrality/>.

³²⁵ *Id.*

³²⁶ Clara Hernanz Lizarraga and Jillian Deutsch, *EU Proposed Broader Telco Reform as ‘Fair Share’ Falls Flat*, BLOOMBERG (Oct. 24, 2023), <https://www.bloomberg.com/news/articles/2023-10-24/eu-proposes-broader-telecom-reform-as-fair-share-falls-flat>.

Though the substantive procedures are consistent across the pond, the enforcement mechanisms vary due to the different regulating authorities involved. The European Union relies on the National Regulatory Authorities in each member state to enforce the Regulation, providing them guidelines on the meaning of each relevant provision and the legal frameworks they can apply when analyzing potential rule violations. In contrast, in the United States, the regulating body—namely, the FCC—is charged with enforcing the rules that it promulgates; it does not rely on individual states within the country, for example, to enforce its net neutrality regulations. It is unclear which regime provides a stronger deterrent for anti-competitive behavior by internet service providers. The United States may benefit from predictability and uniformity in having a single regulatory body evaluating and enforcing. However, because of the historical pattern of striking or staying net neutrality regulations in the United States, it can be argued that the FCC’s enforcement provides no deterrence, because it, generally, has no net neutrality regulations to enforce. As a result, the United States is left with a state-by-state approach to net neutrality, applying to different standards according to where the violation occurred. Thus, the United States may suffer from a more pronounced enforcement inconsistency in enforcement, because although the European Union allows national regulatory authorities in each member state to individually assess and penalize violations, they apply the same regulation.

In addition to the differing enforcement mechanisms, the two regimes diverge in the roles played by the reviewing courts. Further, the nature of the case law in each regime varies because of the questions presented to the reviewing court. In the United States, the reviewing court entertains challenges to the validity of the substantive provisions and whether the regulating agency has the authority to promulgate net neutrality rules and to what extent. In the European Union, the case law centers on the clarification of specific provisions of the net neutrality regulation. As such, the cases define the scope of net neutrality protections, rather than evaluating their validity. This distinction in the role of the reviewing courts helps explain why the European Union benefits from having a more stable net neutrality regime—it does not suffer from orders invalidating its substantive provisions. Rather, it benefits from judgments clarifying and expanding on its regulations.

As a result of the Sixth Circuit’s recent review, the United States currently lacks enforceable net neutrality regulations. Consequently, and most importantly, the European Union distinguishes itself for having any enforceable harmonized net neutrality rules at this time.

VI. Conclusion

Although both the European Union and the United States have histories of promulgating strong net neutrality regulations, end users and edge providers in both regimes face threats to their enjoyment of the Open Internet.

In the United States, in addition to a pending Sixth Circuit Court of Appeals opinion invalidating the FCC's 2024 net neutrality regulations, the Supreme Court recently held that federal administrative agencies are no longer entitled to deference under the *Chevron* framework.³²⁷ Instead, each reviewing court must now determine whether the agency acted within the scope of its statutory authority.³²⁸ Thus, it is possible that a future reviewing court may find that the FCC does not have the statutory authority to promulgate any meaningful net neutrality regulations at the federal level. While some states have adopted neutrality regulations for their respective jurisdictions, the petition on behalf of a group of telecommunications associations for a Supreme Court review of a New York state net neutrality law may prompt the Supreme Court to ban state net neutrality regulations or severely curtail state authority to promulgate telecommunications regulations such as these. A potential solution for preserving the Open Internet in the United States would be a Congressional bill. However, given that this year is an election year and net neutrality has not been discussed prominently during campaign events, it is unlikely that Congress (or the next President) will have the impetus to push net neutrality regulations forward soon.

In the European Union, a shift in policy among members of the European Commission and increased lobbying efforts by European telecommunications companies threatens the nature of the Open Internet. Ironically, these threats follow two major regulations that seek to increase end-users' digital rights and maintain an safe and open internet environment—the Digital Services Act (DSA) and the Digital Markets Act (DMA). While neither target telecommunications companies, their obligations imposed upon online platforms (i.e. content providers) contribute to an open an internet. For example, the Digital Services Act requires online platforms, search engines, and internet service providers to prevent and remove harmful content, to disclose more information on their advertising algorithms, and to refrain from targeted advertising based on a person's religion, ethnicity,

³²⁷ See *Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce, et al.*, 144 S. Ct. 2244 (2024).

³²⁸ *Id.*

sexual orientation, or political beliefs.^{329,330} The Digital Markets Act, on the other hand, reduces anticompetitive behavior by introducing interoperability requirements and banning self-referencing.³³¹ Despite these important steps in creating a safe and fair digital environment, recent debate on the “fair share” proposal (i.e. the imposition of access fees for edge providers) would take the regulation of content providers too far, unfairly disadvantaging them to the benefit of telecommunications companies.

Currently, the world enjoys the most connectivity at the highest data transmission rates it has thus far experienced. With government plans to continue investing in expanding broadband internet in both the United States³³² and the European Union³³³, this will only become more true as time passes. Still, increased access to the internet does not necessarily equate to access to a fair and open internet environment. Net neutrality protections are necessary for ensuring end users can access the content of their choosing and edge providers can distribute the content of their choosing without interference from internet service providers. Both the United States and the European Union should be wary of threats to these fundamental and widely recognized rights.

³²⁹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), <https://eur-lex.europa.eu/eli/reg/2022/2065/oj>.

³³⁰ Emma Roth, The EU’s Digital Services Act Goes Into Effect Today: Here’s What That Means, THE VERGE (Aug. 25, 2023), <https://www.theverge.com/23845672/eu-digital-services-act-explained>.

³³¹ Christian Ahlborn et al., EMEA Tech Regulation: Key Takeaways, Digital Markets Act (DMA), COVINGTON (Nov. 2022), <https://marketing.cov.com/m/4687df840468f958/original/DMA-EMEA-Tech-Video-Series-One-pager-November-2022.pdf>.

³³² Internet For All, <https://www.internetforall.gov/> (last visited Sep. 13, 2024).

³³³ EU Gigabit Infrastructure Act (2024), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/749783/EPRS_BRI\(2023\)749783_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/749783/EPRS_BRI(2023)749783_EN.pdf).

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Abstract (English)

This paper seeks to analyze the net neutrality protections under the United States' and European Union's regimes, comparing specific provisions and their relative strength. Following an introduction in Part I, the analysis begins with defining the term "net neutrality" in Part II, describing the policy debates undergirding the concept and explaining its importance for promoting an open internet. Part III discusses the United States net neutrality regime, as regulated by the Federal Communications Commission. It details the history of net neutrality protections in the United States and the several rounds of rulemakings and litigation, ending with the most recent court ruling invalidating federal net neutrality regulations. Part IV turns to the European regime, analyzing the 2015 Regulation for Open Internet Access, the European Court of Justice judgments that elaborated on its protections, and the recent European Commission consultations on potential changes to the Regulation. Part V compares the regimes, concluding that although the regimes provide for similar substantive protections, because of the United States' historical oscillation between having and lacking enforceable federal net neutrality regulations, the European Union enjoys an advantage in efficacy. Part VI offers concluding remarks about the potential future of net neutrality.

Abstract (Deutsch)

In dieser Arbeit werden die Netzneutralitätsschutzmaßnahmen der Vereinigten Staaten von Amerika und der Europäischen Union analysiert, wobei spezifische Bestimmungen und deren relative Stärken verglichen werden. Nach einer Einleitung in Teil I, wird in Teil II zunächst der Begriff „Netzneutralität“ definiert, die politischen Debatten beschrieben, welche dem Konzept zugrunde liegen und die Bedeutsamkeit der Netzneutralität für die Förderung eines offenen Internets erläutert. Teil III befasst sich mit dem US-amerikanischen Netzneutralitätsregime, welches von der Federal Communications Commission reguliert wird. Der Abschnitt beschreibt ausführlich die Geschichte des Netzneutralitätsschutzes in den Vereinigten Staaten und die verschiedenen Phasen der Gesetzgebung sowie etwaige Rechtsstreitigkeiten und endet mit dem aktuellsten Gerichtsurteil, das die bundesstaatlichen Netzneutralitätsvorschriften für ungültig erklärt. Teil IV widmet sich dem europäischen Regime und analysiert die Verordnung für offenen Internetzugang von 2015, die Urteile des Europäischen Gerichtshofs, in denen die Schutzmaßnahmen näher erläutert wurden sowie die aktuellsten Konsultationen der Europäischen Kommission zu möglichen Änderungen der Verordnung. Teil V vergleicht die Regime und kommt zu dem Fazit, dass die Regime zwar ähnliche materielle Schutzmaßnahmen vorsehen, die Europäische Union jedoch aufgrund der historischen Schwankungen der Vereinigten Staaten zwischen durchsetzbaren bundesstaatlichen Netzneutralitätsvorschriften und deren Fehlen einen Vorteil in Bezug auf die Wirksamkeit innehat. Teil VI enthält abschließende Bemerkungen zur möglichen Zukunft der Netzneutralität.