Can state regulations go where federal ones do not?

Bronwyn Howell, 9 November 2017

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With the Federal Communications Commission (FCC) revisiting the 2015 Open Internet Order, which wrangled changes to include broadband services under Title II of the Telecommunications Act, questions have swirled around what is next for internet regulation. One big question that remains is whether states may try to leverage their public utilities commissions to impose net neutrality obligations in lieu of light-touch regulation on the national scale.

What if, for example, the California regulator chose to make it illegal for internet service providers to charge content distribution networks a fee for delivering their content, but Nevada did not? Or what if mobile operators in Georgia were prevented from zero-rating popular content, but the Alabama regulator was not concerned about this particular practice? What if none of the state regulators found the practices themselves a problem but decided to place different limits on the prices that could be charged or the number of gigabytes that could be downloaded before a zero-rating exemption expired?

While these are hypothetical scenarios, they highlight the huge advantage the United States has had in the development of and innovation in the telecommunications industry relative to the European Union because of the historically clear division of responsibilities between federal and state (local) regulators in the US. From the get-go, the FCC has wrangled with both the technical and commercial issues of interstate — and international — communications. The foundations were laid in the days of the copper plain old telephone service, where clear distinctions were made between matters best decided at a national level, such as interconnection, and those that could be delegated to local decision-makers, such as local line rental rates and, more recently, location of wireless towers. These distinctions have given way to a great deal of access, expansion, and innovation.

This division of responsibilities has carried over to newer technologies, with the results most obvious in the rapid and nationwide deployment of mobile telecommunications platforms, where for the most part, multiple operators make the same plans and services available (with an exception being the availability of some services at the fringes) to consumers nationwide at the same prices. Mobile telecommunications and broadband services are interstate services and therefore remain in the hands of the FCC when it comes to regulation.

The comparison with the EU is stark. Since its inception, the EU has striven to create a single market for telecommunications services in the manner observed in the US. While the EU makes directives about the general regulatory principles to be followed in its 28 member states, the exact form the regulations take and the intensity with which they are monitored and enforced vary considerably from state to state. There are real differences in the local interpretations of even what appear to be clear central guidelines.

Despite the best of intentions and concerted efforts of coordinating bodies such as the Body of European Regulators for Electronic Communications and its predecessor, the European Regulators' Group, there is no sign yet of a single European market for telecommunications services developing. Instead, one observes a hodge-podge of national regulations — and (at least) 28 separate national mobile markets — emerging. Despite great hopes, the development of Pan-European mobile operators serving a single market is as elusive now as it was 25 years ago. While all 225 million mobile consumers in the US can choose from a portfolio of national operators and plans, with similar prices, terms, and conditions, these simple pleasures remain a dream for Europe's 508 million inhabitants. Only from June 15 of this year have European citizens been able to roam in adjacent states and pay the same rates as in their home countries — something that Americans have taken for granted for decades when traveling interstate. However, the costs of this single Pan-European agreement have been high. This initiative negotiated over many years has sucked up much regulatory energy, meaning there is still little agreement on common views of regulating zero-rating and other net neutrality matters.

According to research undertaken at Delft University of Technology, the very high costs of coordinating regulators is a major impediment to developing "regulatory harmony" and a single market. But the opportunity cost of not having succeeded — the foregone benefits from lagging behind the US exemplar in mobile uptake and use, which they term "the costs of non-Europe" — dwarfs the out-of-pocket coordination costs. Just think of all the roaming bills that could have been avoided had a US-style market prevailed from the start.

It behooves US advocates to bear the European outcomes in mind when suggesting that state public utilities commissions might step into any void left by the FCC backing away from the 2015 Title II provisions. Fragmenting regulatory oversight will inevitably mean a fragmenting of the single market that has served the US so well in the mobile age. Differential regulations across state lines could invoke real costs and ultimately harm the end users of services.

The benefits of genuine regulatory harmonization in the United States should not be taken for granted.