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Competition & Antitrust and Trade

Repeal of U.S. Net Neutrality and What it Could Mean for South-East Asia

Introduction

On 14 December 2017, the United States Federal Communications Commission (“**FCC**”) voted to repeal the net neutrality regulations set in place during the Obama administration in 2015 (“**2015 Regulations**”).

Net neutrality generally refers to network providers treating all sources of Internet content equally as well as consumers’ rights to access content and services on the Internet on a non-discriminatory basis. Generally, this means that Internet Service Providers (“**ISPs**”) should not be allowed to block legal content of a consumer’s choice, throttle legal internet traffic to slower speeds or sell “fast lane” services to content providers who can pay more than others. Effectively, net neutrality seemingly creates a more level playing field for businesses.

This Update provides a summary of the changes to the United States’ position on net neutrality, followed by our comments on the potential impact of the FCC decision to the net neutrality policies in certain parts of South-East Asia.

Changes to US Position on Net Neutrality

Prior to the FCC decision, the 2015 Regulations provided that ISPs operating in the United States (“**US**”) had to adhere to the following restrictions:

- (a) No blocking: Consumers who subscribe to a retail broadband Internet access service must be able to access all lawful destinations on the Internet. ISPs were out rightly banned from blocking lawful content, applications, services, or non-harmful devices, subject to reasonable network management.
- (b) No throttling: ISPs cannot impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management. This rule was in place mainly to prevent ISPs from circumventing the “No Blocking” rule, by rendering an application effectively, but not technically, unusable.
- (c) No paid prioritisation: ISPs cannot directly or indirectly favour some traffic over other traffic, including through use of techniques such as traffic shaping, prioritisation, resource reservation, or other forms of preferential traffic management, either (i) in exchange for consideration (monetary or otherwise) from a third party, or (ii) to benefit an affiliated entity.

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- (d) No unreasonable interference: ISPs are prohibited from unreasonably interfering with consumers' ability to use broadband Internet access services, or with their edge providers' ability to make lawful Internet content, applications, services and devices available to end users. Edge providers refer to online content and application providers such as Google, Amazon and Netflix.
- (e) Enhanced transparency: ISPs must publicly disclose accurate information regarding their network management practices, performance and commercial terms of their broadband Internet access services to allow end users to make informed choices and for content application and service providers to develop, maintain and market Internet offerings.

Following the FCC's recent decision to repeal the 2015 Regulations, how ISPs in the US treat web traffic will essentially be deregulated. The repeal of the 2015 Regulations means that there is little preventing ISPs from favouring certain websites over others, blocking lawful sites completely and controlling how pieces of software interact with the Internet. US ISPs will be able to control how quickly consumers can access certain web pages or download and upload content, depending on how much the consumer pays. In addition, ISPs can exert similar power over corporations by essentially forcing companies to pay more for faster access for consumers, in order to appeal to consumers. While larger companies may not be significantly affected financially, such behaviour by ISPs is likely to hurt smaller companies by making their products/services less accessible to consumers.

Other than the obvious changes to what US ISPs will and will not be able to do, the recent FCC decision included reversing a 2015 FCC decision to reclassify broadband Internet access service as a Title II common carrier service which had removed the Federal Trade Commission ("FTC")'s authority to protect consumers and promote competition with respect to ISPs because the FTC does not have jurisdiction over common carrier activities. With the reclassification of broadband Internet access services as a Title I information service, the FTC can now regulate this space. The FCC and the FTC have since 14 December 2017 entered into a Memorandum of Understanding to coordinate online consumer protection efforts. Amongst others, it was agreed between the two agencies that the FCC will be responsible for monitoring the broadband market and taking enforcement action against failures by ISPs to comply with the new transparency rule. On the other hand, the FTC will be responsible for investigating and taking enforcement action against ISPs for deceptive or unfair acts or practices involving their broadband services.

However, FCC Commissioner Clyburn in her recently released statement together with the "Restoring Internet Freedom" Order sets out her disagreement with the FCC's decision to repeal the 2015 Regulations. The FCC Commissioner's statement centred on criticising the proposition that net neutrality has hindered innovation and investments in the market. More importantly, the FCC Commissioner rebutted the notion that regulation by the FTC would be sufficient since the FTC acts on an ex-post basis and thus adjudication of any dispute to provide meaningful remedies is ineffective. The FCC Commissioner also highlighted the possibility of the Courts denying the FTC's efforts to impose any remedies on the basis that the market is already ostensibly regulated by the FCC.

Interestingly, these changes come less than one and a half years after a landmark ruling of the US Court of Appeals for the DC Circuit on 14 June 2016 in favour of net neutrality, including the D.C. Court of Appeals' view that the FCC's decision to reclassify broadband as a telecommunications service was reasonable and adequately reasoned – please refer to our earlier Client Update on this decision [here](#). Dissatisfied with the D.C. Court of Appeals' ruling,

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the interested parties (mostly ISP industry groups) had been in the process of appealing to the Supreme Court. Although the repeal of the 2015 Regulations may render the subject of the appeal moot, the ISP industry groups could nevertheless decide to continue with their appeal to the Supreme Court to, amongst others, invalidate the D.C. Court of Appeals' ruling that the FCC has the authority to broadly decide Internet regulation.

What the U.S. Changes Could Mean for South-East Asia

SINGAPORE

In Singapore, the Infocomm Media Development Authority of Singapore ("**IMDA**") (formerly known as the Infocomm Development Authority) has adopted a light-touch approach towards regulating net neutrality. Under the Singapore framework, ISPs in Singapore are required to comply with Telecom Competition Code ("**TCC**"), disclose to consumers their network management practices and typical Internet broadband download speeds, as well as meet the IMDA's minimum Quality of Service standards for broadband services. In addition, ISPs are prohibited from blocking any legitimate Internet content or to engage in practices that would have the effect of rendering any legitimate Internet content inaccessible or unusable. As long as they adhere to the four requirements set out above, ISPs in Singapore are allowed to offer niche or differentiated Internet services. Therefore, the position in Singapore is less restrictive than the earlier US position which expressly prohibited paid prioritisation.

The IMDA released a statement on 15 December 2017 stating that there are no plans to review or revise the current regime in relation to net neutrality in Singapore. This is hardly surprising, as the FCC decision has brought the current US position on net neutrality more in line with the position Singapore has adopted since 2011.

We do not expect the FCC decision to have a significant impact on the practice of ISPs in Singapore, given that ISPs have generally always been permitted to offer differentiated Internet content or services and perform reasonable network management practices. Whilst some ISPs could be emboldened by the US developments to review their go-to market approach and consider charging consumers more for access or faster access to certain applications or websites, or push back against the "no blocking" requirement, they would need to carefully consider the possible reactions from consumers. This is especially so in the face of the current intense competition in the media sector and the impending heightened competition in the telecommunications sector with the anticipated commencement of services by another major telecommunications player in Singapore in 2018.

MALAYSIA

There are currently no laws which specifically promote or guarantee the principles of net neutrality in Malaysia. The regulator, the Malaysian Communications and Multimedia Commission ("**MCMC**"), has also not issued any directives, determinations or guidelines specifically on net neutrality.

In Malaysia, ISPs would generally be persons licensed under the Communications and Multimedia Act 1998 ("**CMA**"). The MCMC requires all licensees that provide wireless or wired broadband services to adhere to the Mandatory Standards for Quality of Service ("**MS QoS**"). The MS QoS sets out standards such as the minimum network latency, speeds and service level availabilities that must be met by all service providers. Additionally, the

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CMA requires access providers (which may include ISPs) to provide access to other access seekers (which may also include other ISPs) of at least the same or more favourable technical standards and quality as those provided on the access provider's network, and on an equitable and a non-discriminatory basis.

The CMA expressly provides that it shall not be construed as permitting the censorship of the Internet. However, the CMA prohibits content which is indecent, obscene, false, menacing or offensive in nature with the intent to annoy, abuse, threaten or abuse anyone. This prohibition is also captured in the Malaysian Communications and Multimedia Content Code ("**Code**"). The Code is a voluntary set of industry guidelines on the usage and/or dissemination of content for public consumption.

As long as the ISPs are able to meet the content and standard requirements as described above, they are free to offer differentiated Internet services to the public. Unlike the US, therefore, Malaysia has always permitted product differentiation, provided that the ISPs are in compliance with the law. For example, mobile network operators have been competing to provide mobile plans with "zero-rated" traffic for select applications, such as Twitter, Waze, and Whatsapp. This is not prohibited by the MCMC, which differs from the net neutrality laws previously adopted by the US. The position in Malaysia, like Singapore, is less restrictive than the earlier US position, and it is thus unlikely that that Malaysia will be significantly impacted by the FCC decision, if at all.

Having said this, it is unclear what the position in Malaysia will be in the future. While the MCMC has not made any recent statements regarding its stance on net neutrality following the FCC's decision, it is public knowledge that the CMA is presently undergoing a review. However, little information has been made available on the proposed changes and it remains unclear whether these would entail changes to Malaysia's present stance on net neutrality.

INDONESIA

The 1999 telecommunication law states that "*telecommunication service providers are required to provide services based on the principle of equal treatment and best service for all users*". While this general principle clearly requires equal treatment, it does not necessarily translate to 'neutrality' – at least not in the mind of the telecommunication service providers, and certainly not in the context of the current fast paced data and content driven ecosystem. Hence, net neutrality is not a concept that has been contextualised and reflected in the prevailing regulation. Although as a discourse, certain civil society organisations have been voicing net neutrality in the context of fundamental human rights to access information, and industry associations have been arguing for more neutrality in the guise of better service delivery to its consumers.

The telecommunication regulator in Indonesia has not equated equal treatment with neutrality, and has allowed Internet service providers to discriminate against certain Internet content. Many prominent ISPs have been openly against net neutrality being implemented in Indonesia, asserting that ISPs should have the unhindered right to allow or limit any Internet content that flows through their networks. Some ISPs have also implemented blocking of Internet content. A well-known example is when a state-owned ISP in early 2016 proceeded to block their users from accessing Netflix, on the basis of protecting their users from negative content and the Indonesian Government calling it their "corporate privilege".

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Similar to other jurisdictions, the Indonesian Government has the authority to instruct ISPs to block any Internet content that they consider to be pornographic in nature or violate any other legislation. Although the current Government does not appear to be abusing this right, the threat exists and civil society elements advocating for free access of information are wary of this slippery slope.

Considering the unfinished process, the FCC decision could for now shelve the issue of net neutrality in Indonesia, and potentially leave the actions of the telecommunication service providers unchecked. Will the telecommunication service providers abuse this loop hole? Would the telecommunication service providers only favour the giants, and put the smaller content provider/player at a disadvantage? Will the restricted access curb innovation? All the above are valid questions that might have been discussed further in Indonesia had the FCC had not taken such an adverse position against net neutrality. Nevertheless, we do not expect the FCC decision will have a significant impact as both the telecommunication service providers and the Government did not adopt the earlier net neutrality principle of the FCC and the 2015 Regulation.

Concluding Words

It remains to be seen how the recent FCC decision will affect the conduct of ISPs and how quickly the ISPs will react to the change in regulatory framework.

Net neutrality will remain a hotly contested issue given these developments, especially in the coming year. For further enquiries or discussion, especially on the net neutrality policies of the respective jurisdictions in South-East Asia, please feel free to contact our team below.

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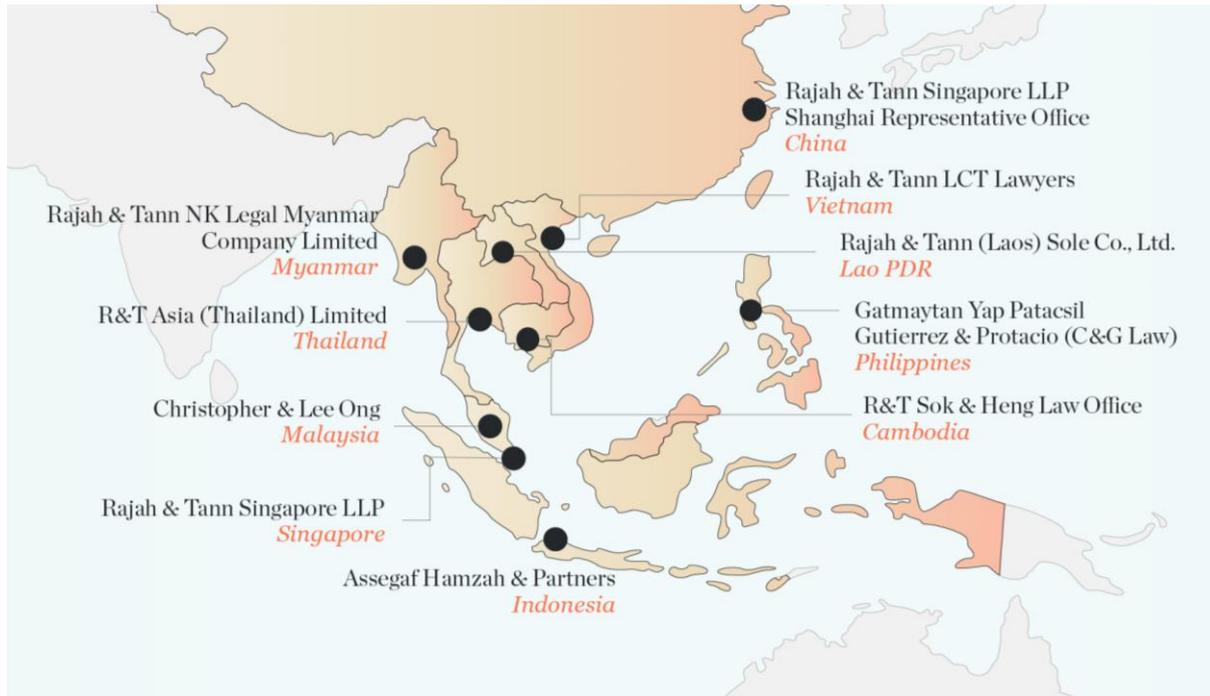
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