

FTC & TRUSTe settle over recertification

The Federal Trade Commission (FTC) settled, on 17 November, with privacy certifiers True Ultimate Standards Everywhere Inc. (TRUSTe) for \$200,000, after alleging that TRUSTe had deceptively represented that it recertified all participating businesses when, in over 1,000 cases between 2006-2013, it had not, and that it had deceptively represented that it was a non-profit organisation.

TRUSTe had claimed that recertification of companies holding its privacy certification occurred annually. "The settlement might create some initial skepticism of certification programs, but could strengthen them in the long run," said Bret Cohen, Associate at Hogan Lovells. "The programs are now on notice that the FTC is paying attention to even the most seemingly minute of their representations, so you may see them adjust their internal compliance and participant standards accordingly." Emily Tabatabai, Attorney at Orrick, suspects that "businesses will still seek certification - it provides a visual stamp of approval on which the consumer can rely without having to wade through the entire privacy policy."

Obama calls for ISPs to be regulated as public utilities

US President Barack Obama issued a video statement on 10 November urging the Federal Communications Commission (FCC) to keep the internet open and free, by calling for internet service providers (ISPs) to be regulated as public utilities, which would see ISPs classified as common carriers under Title II of the Telecommunications Act 1996.

The FCC, the independent government agency responsible for regulating interstate communications, is currently reviewing net neutrality rules: the principle that all data on the internet should be treated equally. In expressing the Administration's views on the subject, Obama said that the FCC should regulate ISPs like public utilities using Title II powers to prevent ISPs from selectively blocking or throttling internet traffic and to prevent paid prioritisation plans that

would create fast lanes.

"There is no chance that the internet will be regulated like traditional public utilities," said George Foote, Partner at Dorsey & Whitney. "Power companies, for example, are subject to the full scope of rate control, guaranteed return, franchised service areas, and complex accounting rules. For years, the FCC has been moving away from that degree of regulation. The theory is that even though the telecom industry is an essential facility, there is enough competition to ensure fair pricing and service, thus eliminating the need for government involvement."

ISPs and telecommunication operators are opposed to being reclassified as common carriers, which would give the FCC significant regulatory power that opponents argue could stifle innovation and prevent investment. Under Title II, the

FCC has the authority to stop any practices it deems unjust or unreasonable, which includes controlling pricing.

"The ISPs who are opposing Title II regulation are not engaged in blocking, throttling, or creating fast lanes, but they object to having their service subject to the possibility of regulation as a utility," adds Foote. "They have a valid point about the administrative burdens and the stifling of innovation. Even with forbearance, the ISPs know that they would be subject to more intrusive scrutiny and would live with the risk that the FCC might forbear less and regulate more at some future date."

"FCC Chairman Wheeler recently stated that he expects the rules to be challenged, irrespective of the final rules, or how ISP service is classified," concludes Michelle Cohen, Member of Ifrah Law.

EU Parliament passes motion on unbundling search engines

The European Parliament passed on 27 November a motion calling on the European Commission (EC) to consider proposals with the aim of unbundling search engines from other commercial services as a potential long-term solution to antitrust concerns, which many commentators have taken as referring to a 'break-up' of Google.

"Given that the vote is not binding for the EC and against the background that leading EC officials have announced that they strongly object to

unbundling and/or regulating Google, we consider the motion's impact to be very limited," said Dr. Andreas Boos, Special Counsel at Milbank.

The EC's competition investigation into Google's search and advertising business re-opened in September despite Google's further proposals to settle. "The motion could further increase the pressure to conclude the investigation," said Boos. "In theory, if the EC decided that Google had infringed the prohibition on the abuse of a dominant position, it could

impose a structural remedy on Google," said Paul Stone, Partner at Charles Russell Speechlys. "In practice we have only seen structural remedies in abuse of dominance cases where a party has voluntarily offered them as commitments in return for the EC closing its investigation."

The leaders of two Senate committees are among the US Congress members who have written to EU parties about the motion, expressing concerns that the proposals target US technology companies.

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