

POLICY BRIEF

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NET NEUTRALITY REGULATION ACROSS SOUTH ASIA

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Network Neutrality Regulation Across South Asia

A Policy Brief towards an evidence based research agenda

Introduction

This policy brief examines key themes highlighted during a series of roundtable discussions exploring South Asian Perspectives on Net Neutrality, hosted by the Centre for Internet and Society in association with the Annenberg School for Communication, University of Pennsylvania, Observer Research Foundation and IT for Change and provides recommendations for future research agendas on net neutrality towards the development of evidence based policy and regulatory solutions.

The first roundtable “South Asian Perspectives on Net Neutrality” was held in New Delhi on 12th December, 2015, where the potential market effects of net neutrality regulation and zero-rated platforms were discussed, and the themes of competition and regulation within the market were analysed in detail.¹ The second roundtable, “Network Neutrality Regulation across South Asia: A Roundtable on Aspects of Differential Pricing”, was held in Bangalore on 22nd January, 2016² where the discussion revolved around differential pricing and viable regulatory frameworks for net neutrality that could be implemented in South Asian markets.

The core objectives of these roundtables was to develop a research agenda around net neutrality, analyse the impact of net neutrality on the market, and also to consider viable regulatory frameworks for the South Asian ecosystem. The roundtables were attended by various members of the Indian telecom industry, former advisors to regulatory bodies, lawyers, civil society representatives and other stakeholders. The discussions from the roundtables emphasized the need for evidence-based empirical research to inform policy that enables a fair market with the objective of providing equal and affordable internet to all sectors of society.

Across South Asia, the net neutrality debate is largely in the context of zero rating or differentially priced services. Differential pricing involves offering services or content at different prices and zero rating can be understood as “not counting most data traffic towards a

1 South Asian Perspectives on Net Neutrality. Available at: http://cis-india.org/internet-governance/blog/NN_Conference%20Report.pdf/view

2 Network Neutrality Regulation across South Asia: A Roundtable on Aspects of Differential Pricing. Available at: <http://cis-india.org/internet-governance/events/network-neutrality-regulation-across-south-asia-a-roundtable-on-aspects-of-differential-pricing>

consumer's regularly metered data usage".³ There are a number of arrangements that can be understood as differentially priced or 'zero rated' including those where:

- The cost of the data or the service is carried by a third party such as the ISP, the content provider, the government, or the end user.
- A service is zero rated based on a negotiated deal.
- The ISP chooses to offer a zero rated service – often their own service.⁴

Factors that are influencing the net neutrality debate in South Asia include:

- **Market Structures:** The structure of a market will influence the amount of choice users have as well as the extent of influence service providers might have on regulatory decisions.
- **Jurisdictional Dimensions:** Foreign companies offering zero rated services raise questions of data ownership and applicable laws.
- **Access and Connectivity:** In countries with low levels of international bandwidth, there is a need to conserve bandwidth which impacts which services can be offered or accessed.
- **Digital Divides:** Due to existing digital divides zero rated services and differential pricing could provide free and easier access to a limited internet service.

The discussions at the roundtables focused on zero rating and differential pricing and delved into a few broad themes within this context including: markets, access and competition, and regulatory aspects. These are discussed below.

Markets

Market Structures

In addressing the question of the impact of zero rating on the market, discussions at the roundtables emphasized the unique aspects of markets in South Asia. It was noted that South Asian markets are different from other jurisdictions around the world as they tend to have a high penetration of mobile phones and low penetration of the internet, and thus the majority of internet users access internet via mobile devices. This influences the type of services and applications available and popular in South Asian markets. Furthermore, many South Asian

3CIS Submission to TRAI on Differential Pricing. Available at: http://cis-india.org/internet-governance/resources/net-neutrality/2016-01-07_cis_trai-submission_differential-pricing/view
4Ibid

telecom markets are quasi-oligopolistic in nature and have large price sensitive segments. This impacts the question of 'anti-competitive' behaviour that zero rating and differential pricing practices raise, as perfect and fair competition in such market structures is neither achievable nor desirable.

Market Impact

In discussing the impact of various practices on the market, some panellists were of the view that non-neutral practices could result in multiple anti-competitive outcomes including gatekeeping, network management, vertical integration between ISPs and service providers, lockout of small developers, and formation of cartels between the content developer and the internet service provider. In such a case, the entry of small application developers may be denied on the platforms controlled by zero rated service providers.

The possibility of vertical integration in the market by giving greater priority or greater transmission speeds to the data packets of one content provider over the data packets of another was also highlighted. Singapore's regulatory model was pointed to as a way to address prioritization. According to the Singapore approach some amount of network management is an absolute necessity. However, under this model, operators are not allowed to block legitimate content, or render that content effectively inaccessible through discriminatory practices. Minimum quality of service standards and information transparency (where users know how network management affects their internet and download speeds) are supplemented by special competition rules for telecom networks and the media.

Economics of Zero Rating

The fact that information collected via the zero rated platforms in the form of personal data of the users has an economic value was pointed out, leading to the question of who benefits from such value. It was also noted that zero rating was a suboptimal method to finance hardware improvements and thus, OTTs were being used to finance hardware improvements. Under these circumstances, cost would be either transferred to the end users or to the application designers and it was suggested that it is reasonable to impose such cost on application and content developers because they are less price sensitive, touching on the concept of Dynamic Efficiency. Further imposing costs on end users would also defeat the entire purpose of zero-rating services.

Access and Competition

Competing rights and interests

As noted in the introduction, a large part of the dialogue associated to zero rated and differentially priced services revolves around access and enabling access to the internet for all sectors of society. In the roundtables the right and goal of access was positioned as a competing interest that must be balanced against the right to freedom of expression and fair market competition. An interesting and nuanced question was raised in this regard, that inquired whether simply accessibility in a market was desirable or accessibility along with inclusion was to be preferred. This distinction is important as state financing would be necessary to achieve inclusive accessibility as private corporations focus simply on greater user base in order to make greater profits. This point brought in questions about the role of the government vs. the private sector. It was noted that with present market circumstances there is no reason for the government to make additional investment in the telecommunication infrastructure because the private sector has already developed a compatible infrastructure. This led to the conclusion that this leaves ISPs and private corporations to play the role of the government – a role that they are readily undertaking. The fact that ISPs control such large user bases gives them unprecedented power which leads to private regulation. Further, UBER and Facebook would be example of private regulators and gatekeepers with an unprecedented power to licence, regulate and control the entry of content, content providers and end users. It was found that such a situation is fundamentally problematic because under no circumstances could the government or a representative of the same be allowed to resort to differential pricing or zero rating, as it is inconsistent with the public policy imperative.

Moving from walled gardens to the open internet

Though zero rated services do enable access to the internet for free, in service models like Free Basics, internet access is limited to pre-selected websites – giving rise to the critique that such services are creating a walled garden or a 'poor man's internet'. Companies like Facebook argue that Free Basics is a 'launching pad' for disconnected users, who will readily move onto the open internet once exposed to Free Basics. Indeed, Facebook quotes that over 50% of users accessing Free Basics move to paid data plans and the open internet within 30 days of using the service.⁵ Yet, during the roundtables, many questioned such claims. It was argued that in a market like South Asia, with a substantially resource deprived population, such a shift would not be

⁵<https://info.internet.org/story/mobile-operator-partnership-program/>

possible as most of the users are so poor they cannot afford the unsubsidised version of the internet. Thus, the expected mobility from walled gardens to the open internet, in reality, will never be achieved. It was further argued that this stagnation of consumers on such platforms would result in giving corporations running zero rated platforms an unprecedented power of gatekeeping. The counter argument was that though the consumers might not completely shift from the walled gardens, they might still adopt limited usage of the open internet. Further, with prior experience and upward economic mobility, these individuals are more likely to use the open Internet.

Regulatory Aspects

The need for regulating zero rating services

Discussion at the roundtables revolved around whether or not there was a need for regulating zero rating services. One school of thought shared argued that emerging business models like zero rating and differential pricing should not be regulated and that it should be left to competition within the market to determine neutrality. In contrast, another school of thought held that there is a need for a clear and comprehensive network neutrality regulation that also covers zero rating and differential pricing, as these service models will have an impact on competition within the market. Yet, it was noted that there is a lack of empirical research and data to justify either position. In order to counter the lack of empirical data, it was suggested that the whole concept of network neutrality be treated under the Doctrine of Eclipse and should be allowed to operate without regulation for a reasonable period of time. Thereafter, depending on the empirical data collected in that time period, modifications can be brought about in the regulations. Despite there being a lack of empirical evidence, an alternative legal argument was offered, stating that the failure to regulate net neutrality would result in the violation of fundamental rights as spectrum is a national resource and is given to private players by the state. Thus, empirical evidence on the impact on competition that such services have is not necessary as any monopoly or anti-competitive practice resulting in denial of an individual's right to freedom of speech will be a violation of the fundamental rights of an individual and in turn will be a violation of many Constitutions across South Asia.

On the question of whether or not a ban was needed on zero rating services, those who were of the view that a complete ban was desirable, argued that allowing such differential pricing would be detrimental to the unobstructed access to content on the internet, which in turn will impact a number of rights including freedom of expression and right to access. On the other hand opposition to a blanket ban on zero rating was grounded on accessibility and feasibility. It was

argued that subsidised access should be allowed in some manner, but particulars of such an access should not be determined by a private corporation. Further, it was also stated that differential services should be allowed as long as it does not result in negative discrimination and all options within a class are communicated to the consumers in a transparent and understandable manner.

Discussing other jurisdictions dealing with the question of zero rating, it was found that no country has express laws banning any discriminatory or zero rating service. Most bans were based on older legislations and regulations, and involved interpretation of legislations in a manner which would involve a case by case analysis, but there have been no instances of a blanket ban on differential pricing or discriminatory pricing models. Examples of Canada, Chile etc. were cited to back this claim. Contrasting this, the example of the Netherlands was cited to show the positive implications of a ban on discriminatory services where the service provider KPN is offering more internet for less money which is postulated as a direct outcome of net neutrality regulation.

Regulatory Models

The roundtables discussed appropriate regulatory models for zero rating as well as network neutrality more broadly. While some were of the view that a regulator was not required, those that were in favour of a regulator pointed to two existing types of regulators: competition commissions – to address potential anti-competitive behaviour- and Telecom regulators – to address the technical aspects of regulating net neutrality. It was discussed that an ideal regulator would be a mixture of the two – one central agency that could address the technical and competition aspects of net neutrality and emerging business models. Indeed, factors that any regulatory body must be able to address include market dimensions, capacity constraints, anti-competitive behaviour, and consumer rights and choice. On network management, the core question was to determine whether packet data should be transferred on a first in first out basis or there should be a policy driven router, but no such conclusion was offered or reached.

Conclusions and future research agendas

The dialogue and debate on net neutrality that emerged from the series of roundtables demonstrated the complexity of the topic and shed light on the nuances of the South Asian context. The roundtables also underscored the multi-facets of net neutrality – being a topic that is political, entails the rights of individuals and the responsibilities of governments, questions

the role of the private sector, and involves the market as a tool for achieving equality. Importantly the discussions underscored the need for further research to back business and regulatory decisions and arguments with empirical evidence. Clear questions that emerged out of the roundtables that can be pursued through future research agendas include:

Access:

- How can online accessibility be increased without compromising the freedom of expression of users and competition in the market?
- How can diversity be ensured in the population accessing the internet?
- What number of consumers in South Asia using a 'zero rated' service move to the open internet and in what period of time?
- How can this move be measured? Is it complete or partial?
- Does this number differ from other regions in the world?
- Are there other factors besides income that impact a consumer's decision to shift or not to shift to the open internet?

Competition:

- Do zero rating services behave differently in different market structures?
- What are methods that can be developed to measure the market impact of 'zero rating' services?
- What are alternatives to 'zero rating' which still enable users to access subsidized internet? Can these balance the needs of the ISP and the consumer?

Regulation:

- When forming regulations, how much relevance should be given to empirical evidence from other countries and legal system?
- Which regulatory agency has best legal and technological resources in order to regulate the net neutrality issue?
- What are potential repercussions from different regulatory models?

To address these questions effectively, innovative research methods, collaboration, and multi-stakeholder dialogue with all stakeholder groups is essential.