

CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI

COMMENTS ON THE CONSULTATION PAPER ON FREE DATA

Authors: Rishabh Bajoria and Sarvjeet Singh

Question 1: Is there a need to have TSP agnostic platform to provide free data or suitable reimbursement to users, without violating the principles of Differential Pricing for Data laid down in TRAI Regulation? Please suggest the most suitable model to achieve the objective.

In its consultation paper, TRAI proposed three models of providing free data: (a) Rewards, (b) Toll-Free and (c) Direct Cash Transfer.¹

The underlying principle of the Rewards and Cash-Transfer frameworks is that end-users are incentivized to use certain platforms. These incentives include free data and cash for use of the platform. Such platforms usually host only a limited number of applications, which depend on private agreements between the platform and application owners.²

Some may argue that such an arrangement disincentivizes users from using other platforms or applications. Professor Van Schewick points out that users

¹ Telecom Regulatory Authority of India, *Consultation Paper on Free Data*, TRAI (June 28, 2016), pp. 5-6, http://traigov.in/WriteReadData/ConsultationPaper/Document/CP_07_free_data_consultation.pdf.

² Gadgets 360 Staff, *5 Net Neutral Mobile Apps that give you Free Mobile Data*, GADGETS 360 (June 28, 2016), <http://gadgets.ndtv.com/apps/features/5-net-neutral-apps-that-give-you-free-mobile-internet-data-786836>.

suffer from a cognitive bias against switching to new TSPs or applications.³This might be amplified when particular applications or platforms introduce an large percentage of users to the internet. Hence, it is important to account for the fact that this system of incentives may have a discriminatory effect on applications.

The “Direct Cash Transfer” model raises concerns that are similar to the ‘Reward’ mode except that the user is receives cash instead of usable free data. Such a cash transfer is likely to increase the likelihood that the user will never venture beyond the platforms or applications that have the market-power to offer such an arrangement. The reason for this is that a user with free data may use the date to seek out alternative information whereas a user who receives cash would need to weigh her choice to buy data against the choice to purchase food, clothes, home appliances or other such options that may seem more essential than browsing the larger internet, of which the user might have little knowledge. Here, the platform provider may create a “walled garden” of privileged services on the internet,⁴ even though in theory the user may be able to purchase additional data. The competing economic choices once cash is offered are such that it is not reasonable to assume that the user will purchase data.

The second model, which is the “toll-free” or “don’t charge” model,⁵ is one in which platform provider gives access to certain applications and websites free of cost.⁶ Proponents of this model argue that the platform provider has a business incentive to allow all websites.⁷ However, the platform provider is likely to realise that its service is valuable to application owners. Hence, it will likely demand suitable

³ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 17-18 (2015).

⁴ Susan P. Crawford, *Zero for Conduct*, MEDIUM (June 24, 2016), <https://medium.com/backchannel/less-than-zero-199bcb05a868#.lq308jucl>.

⁵ Telecom Regulatory Authority of India, *Consultation Paper on Free Data*, TRAI (June 28, 2016), p. 5, http://traigov.in/WriteReadData/ConsultationPaper/Document/CP_07_free_data_consultation.pdf.

⁶ Telecom Regulatory Authority of India, *Consultation Paper on Free Data*, TRAI (June 28, 2016), p. 5, http://traigov.in/WriteReadData/ConsultationPaper/Document/CP_07_free_data_consultation.pdf.

⁷ Telecom Regulatory Authority of India, *Consultation Paper on Free Data*, TRAI (June 28, 2016), p. 5-6, http://traigov.in/WriteReadData/ConsultationPaper/Document/CP_07_free_data_consultation.pdf.

remuneration for the same. Those who cannot afford this, will be excluded. This model essentially puts the provider in a gate keeping role, raising concerns that are similar to those that emerged in the context of zero-rating. In the former, the user can access websites without being charged, even if her credit balance is nil.⁸ This is almost identical to zero-rating where the data used on certain applications/websites is not counted towards the users' monthly bandwidth cap. Therefore, the accompanying harms are also similar.

This will likely have a discriminatory effect on applications (as described above).⁹ It gives platform providers the powers of a "gatekeeper".¹⁰ This leads to entry barriers in the market, distorting competition and innovation.¹¹ Users' choice and right to receive information is also harmed.¹²

⁸ Telecom Regulatory Authority of India, *Consultation Paper on Free Data*, TRAI (June 28, 2016), http://traai.gov.in/WriteReadData/ConsultationPaper/Document/CP_07_free_data_consultation.pdf.

⁹ Barbara van Schewick, *Network Neutrality and Zero-rating* (June 28, 2016), <http://apps.fcc.gov/ecfs/document/view?id=60001031582>; Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 62 (2009); Tim Wu, *Closing Time for the Open Internet*, THE NEW YORKER (Jan. 15, 2014); Susan P. Crawford, *Zero for Conduct*, MEDIUM (June 24, 2016), <https://medium.com/backchannel/less-than-zero-199bcb05a868#.lq308jucl>.

¹⁰ Barbara van Schewick, *Network Neutrality and Zero-rating* (June 28, 2016), <http://apps.fcc.gov/ecfs/document/view?id=60001031582>.

¹¹ BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 57-81, 277 (2010); Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 65 (2015); Barbara van Schewick, *Network Neutrality and Zero-rating* (June 28, 2016), <http://apps.fcc.gov/ecfs/document/view?id=60001031582>; Brief Amicus Curiae of Professors Jack M. Balkin, Jim Chen, Lawrence Lessig, Barbara van Schewick, & Timothy Wu Urging that the FCC's Order Be Affirmed at pp. 13-14, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (No. 08-1291), <https://law.stanford.edu/publications/brief-amicus-curiae-of-professors-jack-m-balkin-jim-chen-lawrence-lessig-barbara-van-schewick-and-timothy-wu-urging-that-the-fccs-order-be-affirmed/>; Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 145 (2003); Susan P. Crawford, *Zero for Conduct*, MEDIUM (June 24, 2016), <https://medium.com/backchannel/less-than-zero-199bcb05a868#.lq308jucl>.

¹² Barbara van Schewick, *Network Neutrality and Zero-rating* (June 28, 2016), <http://apps.fcc.gov/ecfs/document/view?id=60001031582>; Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 62 (2009); Tim Wu, *Closing Time for the Open Internet*, THE NEW YORKER (Jan. 15, 2014); Susan P. Crawford, *Zero for Conduct*, MEDIUM (June 24, 2016), <https://medium.com/backchannel/less-than-zero-199bcb05a868#.lq308jucl>.

Non-discrimination is crucial to innovation on the Internet.¹³ It fosters competition and provides a level playing field for content providers.¹⁴ This helps the Internet create value in “social, cultural and political domains”¹⁵ and serve as a medium for free exchange of ideas.¹⁶

The right to freedom of expression under Article 19 of the Constitution¹⁷ includes the right to receive information.¹⁸ The Supreme Court stated:

*“The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an ‘aware’ citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. This cannot be provided by a medium controlled by a monopoly – whether the monopoly is of the State or any other individual, group or organisation...”*¹⁹

The importance of this right is recognised across the world. The European Charter of Fundamental Rights states that “the freedom and pluralism of the media

¹³ Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 62 (2009); Tim Wu, *Closing Time for the Open Internet*, THE NEW YORKER (June 20, 2016), <http://www.newyorker.com/tech/elements/closingtime-for-the-open-internet>.

¹⁴ Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 62 (2009).

¹⁵ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 17-18 (2015).

¹⁶ Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79(1) NYU L. REV. 1-58 (2004); Jack M. Balkin, *Media Access: A Question of Design*, 76(4) GEO. WASH. L. REV. 101-118 (2008).

¹⁷ Article 19(1) (a), Constitution of India, 1950.

¹⁸ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

¹⁹ *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161, ¶¶ 201(3)(a) and (b).

shall be respected”.²⁰ General Comment 34²¹ to Article 19 of the International Covenant on Civil and Political Rights²² emphasises the importance of pluralism in the media.

TRAI in its *Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016*²³ laid down that technical discrimination between applications and zero-rating is harmful as it appoints TSPs as gatekeepers. Professor Van Schewick argues that even non-technical discrimination has similar effects:

“The scope of non-discrimination rules is, however, not restricted to differential handling of packets in the network. Network neutrality rules aim to prevent network providers from distorting the playing field among applications or classes of applications and from interfering with users’ choices regarding the use of the network. In line with this goal, non-discrimination rules apply to any form of differential treatment that may make some applications, classes of applications, or uses relatively more attractive to users than others. For example, Internet service providers can favour certain applications over others by not counting them towards users’ monthly bandwidth caps or by charging a lower bandwidth- adjusted price for these applications. Therefore, these forms of differential treatment are subject to the non-discrimination rules described in this Article, regardless of whether the packets associated with the favoured applications receive

²⁰ Charter of Fundamental Rights of the European Union, [2010] OJ C 83/02, art. 11(b).

²¹ International Covenant on Civil and Political Rights General Comment 34, Article 19: Freedom of Opinion and Expression, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 7 (Aug. 31, 2001).

²² International Covenant on Civil and Political Rights, art. 19 (Dec. 16, 1966), 999 U.N.T.S. 171.

²³ “Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016”, *TRAI* (June 28, 2016), http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf.

*the same technical treatment in the network as non-favoured applications.*²⁴

While she uses the example of zero-rating, the principle holds true for TSP agnostic platforms as well. We would therefore categorically advise against options two and three, and advocate caution in proceeding with option one. Although option one may seem reasonable on a surface-level look, it may lead to a discriminatory impact on the market on account of the bounded rationality and cognitive bias of users, both of which ought to be accounted for while framing regulations.

We applaud TRAI's commitment to access and suggest that other options may be better suited to the cause of universal access in combination with information diversity. For example, Professor Susan Crawford of Harvard Law School argues:

*"The better approach for closing it [digital divide] is the adoption of policies that drive towards openness and competition—steps like requiring carriers to offer dark fiber services (unused capacity that retail providers can use to send information) that can be used by competitors as essential infrastructure. Policies requiring the sharing of basic infrastructure, in general, make sense in the world of high-fixed-cost communications lines. (Think basic street grid shared by many forms of transportation.) And digital literacy for non-adopters plus heightened awareness of how the Internet is relevant to their lives are clearly needed as well."*²⁵

Professor Van Schewick suggests that the Government could try requiring mobile operators to provide a minimum free data pack as part of their terms of license.²⁶

²⁴ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 65 (2015).

²⁵ Susan P. Crawford, *Zero for Conduct*, MEDIUM (June 24, 2016), <https://medium.com/backchannel/less-than-zero-199bcb05a868#.lq308jucl>.

²⁶ Barbara van Schewick, *Network Neutrality and Zero-rating* (June 28, 2016), <http://apps.fcc.gov/ecfs/document/view?id=60001031582>.

Question 2: Whether such platforms need to be regulated by the TRAI or market be allowed to develop these platforms?

These platforms need to be regulated by TRAI. There must be an ex-ante regulatory framework²⁷ which TRAI has recognised in its recent Differential Pricing Regulations²⁸. Professor Van Schewick highlights the faults of a case-by case evaluation system:

“Lack of certainty and predictability: First, network providers need to be willing to engage in discriminatory conduct and take the risk of being faced with a complaint and having the behavior declared socially harmful. If network providers do not engage in a particular practice (e.g., if they do not deploy Quality of Service in their networks), there is no basis for a complaint, and the legality of the practice will never be determined. Second, contrary to a rule that clearly specifies which behaviour is and is not allowed, an adjudicatory regime puts the burden on a particular party to bring a complaint that will allow the uncertainty to be resolved. Third, future adjudicators may not be any more willing than the current legislator or regulator to do more than absolutely necessary to resolve the case under consideration. Narrow decisions that are deliberately tied to the facts of the specific case and refuse to elaborate broader principles may not provide meaningful guidance for future cases.

High costs of regulation: For example, when the FCC ordered Comcast to stop interfering with BitTorrent and adopt application- agnostic ways of managing congestion,²⁴⁴ the Commission based its decision on three different rationales: First, the specific practice used by Comcast— sending RST packets to terminate BitTorrent connections—was quite questionable and violated the Internet Engineering Task Force (IETF) standards for the operation of the TCP.²⁴⁵ Second, the discriminatory practice, which singled

²⁷ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 65 (2015).

²⁸ “Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016”, TRAI (June 28, 2016), p.13, ¶ 27, http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf

out BitTorrent and other peer-to-peer file-sharing applications for differential treatment, was not narrowly tailored to Comcast's stated goal of managing congestion.²⁴⁶ Third, Comcast had not disclosed the use of the practice to its Internet access customers.²⁴⁷ The order did not explain whether each of these factors alone would have made the network management "unreasonable" or whether the Commission's decision was based on the confluence of these factors, providing ample room for network providers to distinguish their case on the basis that their behavior violated only one, but not all, of the criteria used in the Comcast case.

Limited ability to protect values and actors that network neutrality rules are designed to protect: Case-by-case approaches provide an advantage to well-financed actors and tilt the playing field against those—end users, low-cost application developers, start-ups, nonprofits, independent artists, and members of underserved communities—who do not have the resources necessary to engage in extended fights over the legality of specific instances of discrimination in the future²⁹

This is supplemented by the harms of a TSP agnostic platform providing free data (described above). Therefore, TRAI cannot allow market based self-regulation. A regulatory framework complementing the *Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016*³⁰ must be developed.

²⁹ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 65 (2015).

³⁰ "Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016", TRAI (June 28, 2016), http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf.

Question 4: Any other issue related to the matter of Consultation.

We affirm the necessity of extending Internet access to the entire population in the interests of diversity of content and viewership. The right to a diverse media environment has been held by the Supreme Court to be an integral part of the right to Freedom of Speech and Expression under Article 19(1)(a) of the Constitution of India.³¹ This interpretation of the Indian Constitution is consistent with the internationally recognized principle of freedom of expression codified in Article 19 of the International Covenant on Civil and Political Rights³² to which India is a signatory.

The Internet is a public good as has been recognized by the Indian Government at various global fora.³³ It is a universal platform to which access is enabled by spectrum and fixed-line infrastructure which are both licensed and regulated in public interest by the Indian government. Spectrum is a public resource (as clarified by the Supreme Court of India in the *Bengal Cricket Association* case³⁴), and can therefore only be used for the purpose of in the best interests of society.³⁵ This implies that commercial considerations, including private interests, cannot determine the use of a public resource like spectrum.

It is the duty of the government to ensure that the next billion users are able to access a free and open Internet. This cannot co-exist with arrangements mediated by powerful private gatekeepers who have minimal accountability to Indian citizens, and who would make crucial decisions (arguably the domain of constitutional courts)

³¹ *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161, ¶¶ 201(3)(a) and (b).

³² International Covenant on Civil and Political Rights, art. 19, (Dec. 16, 1966), 999 U.N.T.S. 171.

³³ Government of India's initial submission to Global Multistakeholder Meeting on the Future of Internet Governance ¶ 1 (April 23-24, 2014), available at <http://content.netmundial.br/files/138.pdf>; Statement by Mr. Santosh Jha, Director General, Ministry of External Affairs, at the First Session of the Review by the UN General Assembly on the implementation of the outcomes of the World Summit on Information Society in New York, ¶ 8 (July 1, 2015), available at https://www.pminewyork.org/adminpart/uploadpdf/74416WSIS_stmnt_on_July_1,_2015.pdf.

³⁴ *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161.

³⁵ *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161.

about the limited sets of content made available to large groups of users. This would result in masses of Indian citizens accessing a stunted Internet, with limited information. Users will not have the freedom to explore and access different applications, platforms or points of view – their information universe will be limited to what private service providers deem to be necessary or appropriate to make available to them.

It is our position that access to the whole or part of the Internet mediated by a private gatekeeper with no accountability to the government or the public, will undermine the Indian public goal of a universal, diverse Internet, which is open and freely accessible. We therefore submit that the government must categorically prohibit any efforts that take advantage of the vulnerability and lack of bargaining power of the citizens. Replacing the universal Internet access commitment of the Digital India project with a privately managed Internet access which is not only subject to gatekeeping but may also be subject to other terms and conditions (potentially violating the right to privacy for example), is unacceptable and goes against the constitutional norms that have governed India telecommunication networks and spectrum management thus far.

We want to note our concern that the Internet is transforming from a diverse and democratic medium into restricted system controlled by powerful economic interests. Any reduction of content plurality and diversity in the Internet would be antithetical to the spirit of the Internet, which has been characterized by its horizontal, universally-accessible environment that embraces content diversity by raising little or no transaction costs for everyday users who want to become content providers. Restricted access to the Internet would also be antithetical to the spirit of the Indian constitution and democracy, which requires that the rules of public information systems facilitate a rich and diverse public discourse.

In this context, action taken by the government needs to be towards making the open Internet more accessible to Indian citizens, without hampering or diluting this access. This means that content providers should face lesser hurdles to make their material and services available to users. Users should not face commercial

discrimination or regulatory hurdles to become content creators and reach the whole of the Internet with their content. And all consumers must enjoy the same kind of access to the same open Internet so that they have the viewpoint diversity which is their fundamental right in this country.

We at the Centre for Communication Governance at National Law University, Delhi are of the opinion that the public debate about net neutrality has framed the points of view inadequately. The debate currently pitches potential competition law concerns (such as harm to competition caused by differentially priced platforms, and the related concern of monopolization of a section of the country's user base) against the need to increase the accessibility of the Internet to marginalized people. This framing misses the very critical element of the right of users to access a diverse set of Internet content from multiple sources of media.

It is crucial to approach this very critical issue with a focus on users and their rights with respect to being entitled to a free, open and diverse Internet, unencumbered by the undue influence of service providers and content providers.