



Stand Up For Digital Rights

Key Issues: Net Neutrality

As the Internet has grown, and become more lucrative, a debate has been taking place about the foundational principle of network neutrality, which means that Internet traffic should be treated equally, without any discrimination, restriction or interference based on the device, content, author, origin and/or destination of the content, service or application. Net neutrality prevents private sector intermediaries from favouring or disfavouring the transmission of certain types of Internet traffic.¹

There are several reasons why net neutrality is fundamentally important. A commonly cited one is that it promotes free competition by preventing bigger players from abusing their position to obtain preferential access to customers. This also reflects concerns about the global digital divide, since allowing major firms to obtain preferential access would tip the balance in favour of early roll-out countries such as the United States and against emerging digital markets in the global south. Another benefit of net neutrality is that it limits the ability of private intermediaries to control the conversation that takes place over their networks, for example by blocking or slowing access to a website whose content they disagree with.

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The net neutrality debate across South Asia has largely focused on differential pricing and price discrimination. Price discrimination can be:

- Positive (sponsored data or zero rating): For example, an Internet service provider may favour an application, service or platform over others for a fee or a competitive advantage.
- Negative: For example, an Internet service provider may discriminate against a service or platform and the end user is implicitly or explicitly assessed an additional fee to access that service or platform.

¹ There are recognised exceptions to this rule, such as where necessary to protect the integrity or security of a network or to combat spam. For a more thorough description, see: www.thisisnetneutrality.org/.

Differential pricing is the practice of charging different consumers different prices for the same product, and can be based on services, content or application. Zero rating, where a service or content is offered for free or at a very low cost, is one type of differential pricing. There are a number of arrangements for zero rated services including:

- Subsidised: The ISP, the content provider, the government or another third party pays for a service to be offered at a subsidised rate.
- Negotiated: A third party, such as a content provider, enters into an agreement with the ISP to have the service offered for free or at a lower rate.
- Mandated: The government requires a service to be zero rated.
- Self-imposed: An ISP selects which services to offer at lower rates or allows consumers to choose.

Such arrangements can zero rate based on content (including applications and platforms), services, protocols and carriers, or can be neutral with regard to content, service and carrier.

The reception, success and impact of zero rated services and can be both positive and negative and can be influenced by whether a company is foreign or local, the size of an ISP or the company offering a zero rated service, the specific market structure, the service that is zero rated, and the degree of Internet penetration in a specific context. For example, the Centre for Internet and Society and others have argued that when communication or publishing services are zero rated it can positively enable freedom of expression. Zero rating can also enable the right to access by reducing costs and can provide market advantage for services offering local content and services offering access to under served communities. At the same time, if not transparent and left unregulated, the impact of zero rated services can be harmful.

Net neutrality is among the Internet's most revered principles, as a reflection of the medium's underlying egalitarian nature and as a prerequisite for continued innovation. One of the reasons for the increase in debate about it is the rise of bandwidth-intensive activities, in particular streaming high-quality video, which can place a heavy burden on existing networks, requiring greater investment in new infrastructure, with access providers then looking for ways to cover the costs.

States have approached this issue in different ways. In the United States, net neutrality is governed by the Federal Communications Commission's (FCC) Open Internet rules, which prohibit Internet access providers from blocking access to legal content, applications, services or non-harmful devices, from impairing or degrading lawful Internet traffic on the basis of its content and from favouring some

lawful Internet traffic over other lawful traffic in exchange for consideration, which effectively precludes access providers from prioritising their affiliates.²

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The ultimate goal of net neutrality is to keep the architecture of the Internet as it was first conceived: as a highway on which information flows freely and equally, with no more intervention than is necessary to manage traffic flows. Of course, net neutrality is not an end in itself but rather a response to the extraordinary usefulness of the Internet as a tool for freedom of expression and knowledge sharing. From a democratic point of view, allowing ISPs to block or discriminate between content would grant them a powerful weapon of censorship in the service of private interests. From an economic point of view, quasi-monopolistic situations would lead to rapid market concentration of communications and content.

The business context cannot be neglected in the discussion about net neutrality, specifically the merger between owners of telecommunications networks, owners of companies providing Internet services and owners of content. The adoption of net neutrality by the Federal Communications Commission (FCC) of the United States shows that regulation of anti-competitive behaviour lies at the core of the issue. Comcast, one of the largest Internet access providers in the country, was the first company to sue the FCC over its authority to impose net neutrality rules. This managed to delay the imposition of rules for a while. Years later, with the neutrality rules in place, Comcast was forced to stop a planned purchase of Time Warner Cable due to concern over the merger of the largest Internet service provider with the largest provider of cable. The merger of AT&T and DirectTV had better luck, notwithstanding the FCC-imposed condition that AT&T substantially extend access to the Internet and "refrain from imposing discriminatory usage-based allowances or other discriminatory retail terms and conditions on ITS broadband Internet service." This shows that net neutrality regulation and competition are two sides of the same coin, at least in the minds of the FCC Commissioners.

On 27 October 2015, the European Parliament approved their own set of net neutrality rules, which state in part:

Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.³

² Federal Communications Commission, Open Internet, 23 October 2015. Available at: <https://www.fcc.gov/openinternet>.

³ Council of the European Union, Regulation 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications

Although the proposal appears to guarantee broadly net neutrality, critics have pointed to an exception for “specialised services” which could potentially be abused to circumvent the spirit of the rule, as well as the fact that zero rating systems are not expressly prohibited.⁴

The Internet is constantly changing and there is no single and immutable rule for how networks should be managed. Access providers constantly face evolving challenges and threats. However, certain fundamental principles should guide their decision-making.

First and foremost, policies and technical protocols for managing Internet traffic should aim to improve the functioning of the Internet for all users. It is accepted that there is a need to manage the flow of information over the Internet in a smooth, efficient manner and traffic policies and technical protocols which aim to facilitate that will generally be legitimate, while those which provide other less public interest objectives may not.

Second, arrangements which favour traffic from or to users who pay a premium, or who have any sort of preferential or partnership arrangement with network managers, are unacceptable.

Third, transparency is very important. Access providers should be clear about any traffic or information management practices they employ. This should include publishing information about their policies and technical protocols for managing traffic, as well as periodic data summarising how traffic and information was handled over the preceding period, subject only to legitimate business confidentiality interests, such as to protect the efficacy of spam and malware mitigation techniques.

Fourth, where strong net neutrality principles are codified in law, access providers and other online service providers should respect the rules and avoid lobbying for change. Where the law is unclear or unsettled, they should act in a way that fully respects the principle of network neutrality.

Zero Rating

Probably the most contentious aspect of the debate over net neutrality concerns zero rating projects which are implemented to expand Internet access. Among the

networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (25 November 2015). Available at: eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32015R2120.

⁴ Jeremy Gillula and Jeremy Malcolm, “Closing the Loopholes in Europe's Net Neutrality Compromise”, Electronic Frontier Foundation, 23 October 2015. Available at: www.eff.org/deeplinks/2015/10/closing-loopholes-europes-net-neutrality-compromise.

most well known of these is Free Basics, a Facebook-led initiative which essentially provides people with free access to a limited range of Internet services, notably a basic version of Facebook, along with weather reports, health information, Wikipedia, communication tools, and some news and other services via an app on mobile phones. According to its proponents, by offering users even a stripped-down version of the Internet for free, Free Basics is helping to generate interest among these users, who can then move on to paying for a full connection. The design of Free Basics also serves to expand Facebook's user base and to ensure that Facebook is central to these new users' understanding of the Internet. Although Free Basics is the most globally well known zero rating programme, many others are currently in operation.

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All of the service providers studied as part of our research have entered into partnerships with different companies to offer zero rated services, increased data capacities or reduced tariff services. Examples of the different services that have been adopted by the service providers which were studied include:

- **Free Basics:** This provides users with free access to a select set of websites as long as the user browses through the Free Basics platform or app. Free Basics also allows application developers to launch their applications on the Free Basics platform, and allows organisations to host their websites and services on the Free Basics platform as long as the application or website complies with Free Basics participation guidelines which include technical guidelines, legal terms, and a platform policy. Free Basics has positioned itself to the public as working towards bridging the digital divide and enabling digital empowerment. Free Basics is presently available in eleven Asia-Pacific countries, although it has been banned in India.
- **Google Free Zone:** In 2013, Airtel implemented a scheme called "Google Free Zone", whereby Google services were offered for free over its network. These services included Google Search, Gmail and Google Plus. Users could only access content linked on these pages and had to pay for any other links. The service was free as long as usage did not exceed 1GB per month.
- **Wiki Zero:** In 2015, GrameenPhone introduced zero rating services for Wikipedia in partnership with the Wikimedia Foundation for the purpose of developing more content in Bengali. Wikimedia Bangladesh and Grameenphone also provided training to students on how to edit Wikimedia.
- **Equal Rating:** GrameenPhone partnered with Mozilla in a collaborative effort to provide non-tiered and open access to the Internet. The model allows users to receive up to 20MB of unrestricted data per day, after watching a short ad in the phone's marketplace. This effort avoids zero rating any particular service.
- **Airtel Zero:** In 2015, Airtel introduced the platform Airtel Zero, which gave free access (zero rating) to a limited set of services curated by Airtel,

including Flipkart and the Hike messaging service.

- Easy Net: In 2015, GrameenPhone introduced a programme which provided free video tutorials about the Internet as well as access to Facebook and Wikipedia on the GrameenPhone network. Consumers were also given the choice of purchasing small data packs without a subscription.

Since Free Basics was launched, it has expanded to 37 countries. It has also faced significant criticism for a few reasons. The main complaint is that the service undermines the principle of net neutrality.⁵ Free Basics has been ruled out by some regulatory agencies on these grounds. Opponents also claim that Free Basics undermines the development of the digital economy in poor countries by giving core apps away for free and that, rather than using Free Basics as an “on ramp” to the Internet, it creates a two-tiered system of Internet access whereby some sites can be accessed without charge while others require payment. Free Basics has also been criticised for privacy invasions by engaging participants in Facebook’s system of generating revenue, which relies on selling otherwise private user information (although the app itself does not show ads and Facebook notes that access to Free Basics does not require a Facebook account).

On 24 September 2015, Facebook responded to criticism of Free Basics by implementing a number of changes, including expanding the programme to provide access to more websites and creating a platform for developers to submit content for inclusion.⁶ Facebook also announced that it would support encrypted HTTPS services on both the Android app and the web version of Free Basics.

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The debates that have emerged in India, Singapore, and Bangladesh demonstrate that net neutrality impacts a number of issues – including access, privacy, competition, innovation, jurisdiction, and security – and that it is also raising larger questions about governance and the role of the private sector.

Mark Zuckerberg himself (perhaps unintentionally) began to touch on this when justifying Free Basics in an open letter, which stated: “We have collections of free basic books. They’re called libraries. They don’t contain every book, but they still provide a world of good. We have free basic healthcare. Public hospitals don’t offer every treatment, but they still save lives. We have free basic education. Every child deserves to go to school. And in the 21st century, everyone also deserves access to

⁵ The most energetic campaign against Free Basics has emerged in India under the banner “Save the Internet”. A summary of their arguments against the programme is available at: blog.savetheinternet.in/what-facebook-wont-tell-you-about-freebasics/.

⁶ “Update to Internet.org Free Basics”, Facebook, 24 September 2015. Available at: <https://info.internet.org/en/2015/09/24/update-to-internet-org-free-basic-services/>.

the tools and information that can help them to achieve all those other public services, and all their fundamental social and economic rights." All of the services listed by Zuckerberg are services traditionally offered by governments.

As ICT companies become key delivery mechanisms for core rights, questions about the duty of these companies to be responsible and accountable for the rights of users become more relevant and important. More than ever companies need to be transparent and precise about their services and agreements, and to be willing to engage democratically with users and governments.

Ideally, access schemes which are designed to get people online at a lower cost or for free should be designed and executed in a non-discriminatory manner. There is no question that zero-rating programmes which prioritise certain services violate net neutrality. There may, however, potentially be an argument that the harm inherent in these schemes is outweighed by their benefit in bringing new people online if these schemes are unequivocally shown to be more effective than other access options which respect net neutrality.

There is something to be said for the argument that even limited Internet access is better than nothing and for Free Basics' argument about an "on ramp" to spur demand for and interest in the Internet. However, as noted above, many projects exist which provide a similar "on ramp" to the Internet which do not compromise net neutrality, for example by offering Internet with a low data cap or other service limitations, raising questions about whether zero rating is necessary to bring people online. Aircel, an Indian mobile network operator, launched its own service in October 2015 called (somewhat confusingly) Free Basic Internet, which provides users with free access to the web at a slower speed for three months (or longer, if the users carry a specified monthly balance on their mobile account).⁷ GrameenPhone, based in Bangladesh, grants users up to 20 MB of unrestricted data per day after watching a short advertisement.⁸

Facebook claims that Free Basics has brought over 25 million people online,⁹ and that 50 percent of Free Basics users end up paying for Internet services beyond the limited free package that it provides within a month of signing up.¹⁰ However, these statistics are impossible to verify and, anyway, offer only a partial picture of the service's overall impact. There is no telling whether, for example, Free Basics users who move to paying for Internet access continue to use Free Basics to connect to Facebook for free, or whether Free Basics' user base is really composed of new

⁷ Shashidhar KJ, "Aircel to offer free Internet across India at 64 kbps", Medianama, 16 October 2015. Available at: www.medianama.com/2015/10/223-aircel-free-internet/.

⁸ Nathan Eagle, "How To Make The Internet Free In Developing Countries", TechCrunch, 1 June 2015. Available at: techcrunch.com/2015/06/01/how-to-make-the-internet-truly-free-in-developing-countries/.

⁹ Facebook, "Our Impact", available at: info.internet.org/en/impact/.

¹⁰ Facebook, "Free Basics: Myths and Facts", 19 November 2015. Available at: <https://info.internet.org/en/2015/11/19/internet-org-myths-and-facts/>.

Internet users. Most important of all, there are no accurate statistics comparing the efficacy of Free Basics against “on ramp” programmes that respect net neutrality.

While we do not completely reject zero rating schemes, they inevitably fail to respect net neutrality principles and so they face a heavy burden of justification and proof that they serve the greater good. In particular, their operators should demonstrate that such programmes are clearly the most effective way to bring people online, and that the benefits are significant enough to justify making compromises to the principle of net neutrality. If this case can be made, the operators of zero rating schemes have a responsibility to work to mitigate their negative effects, such as by providing training for users in digital literacy and by actively working to educate users about the potential benefits of Internet access beyond the zero rated offerings.¹¹ In the case of Free Basics specifically, an additional problem is the pervasive confusion among millions of people between Facebook and the Internet and the fact that many people use Facebook without understanding that a broader Internet exists. This suggests that Facebook bears an even greater burden of justification for any zero rating it operates.¹²

¹¹ For a broader discussion of how specific zero rated plans should be assessed, see: Center for Democracy and Technology, "Zero Rating: A Framework for Assessing Benefits and Harms", January 2016. Available at: cdt.org/files/2016/01/CDT-Zero-Rating_Benefits-Harms5.pdf.

¹² Leo Mirani, "Millions of Facebook users have no idea they're using the internet", Quartz, 9 February 2015. Available at: qz.com/333313/millions-of-facebook-users-have-no-idea-theyre-using-the-internet/.



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Recommendations for Net Neutrality:

Supporting Net Neutrality:

- **Internet access providers should respect the principle of net neutrality, even when they are not required to do so by law. Among other things, this implies:**
 - **There should be no discrimination in the treatment of traffic across their networks and systems.**
 - **Their traffic management policies and technical protocols should be designed to promote objective traffic management goals.**
- **Internet access providers should be transparent about the traffic or information management policies and practices they employ, and provide detailed statistical information about how traffic and information is actually handled.**
- **Intermediaries should support and promote the idea of network neutrality and, at a minimum, never lobby against law reforms to the extent that those reforms promote this goal.**

Net Neutrality and Expanding Access:

- **Programmes to expand access to the Internet which offer a trade off in terms of services or connectivity should be designed in an open, non-exclusive, transparent manner which respects net neutrality and the right of users to choose what material they wish to access. For such programmes, the goal of giving the access provider a competitive advantage should not undermine the broader goal of connectivity.**
- **Programmes to expand access that employ zero rating (i.e. that provide free access to certain select applications or services) should be avoided unless it can be demonstrated clearly that these are significantly more effective than similar programmes which do not offend against net neutrality. Access providers which offer such programmes should make available information about their effectiveness for purposes of independent verification.**