

Counter Comments on the Responses Received to the Consultation Paper on Differential Pricing for Data Services

Executive Summary

The Internet creates new problems in policy, but they are not unprecedented. Traditional patterns of anti-competitive conduct recur, but the complexity of the technological details affords rich opportunities for obfuscation and confusion. After reviewing majority of the comments submitted by other parties, we offer our responses to the prominent arguments in an attempt to clear that confusion. The following points are highlighted in our submission:

- Internet is not cable television.
- Differential Pricing as applicable in other industries does not necessarily transpose to the Internet.
- Differential Pricing as proposed by Telecom Service Providers (TSPs) and Internet Service Providers (ISPs) to split the Internet into various slices and to price them separately violates their license agreements to provide Internet access.
- With TSPs slicing up the Internet, it becomes impossible for the start-ups to reach their customers unless they enter into deals with each ISP to get entry to their islands of access.
- Any competitive practices such as the ones proposed by TSPs cannot be allowed without proof of extraordinary social benefit and that benefit cannot be unequal access.
- Internet unlike DTH is not a one-way traffic medium and does not just constitute a medium where content is consumed by users.
- There are better models than differential pricing to provide wider Internet access.
- Misleading and incorrect analysis of how differential pricing is being treated in United States and European Union has been presented.¹
- Common Carriage rules must apply in order to prevent anti-competitive collusion.
- VOIP services compete with traditional telephone services, as they should, because all communications, whether characterized as "telephone calls" or "data packets" are in fact the same.²
- Regulator's job is not to save old and dying business models but keep anti-competitive and other misbehaviour by players in check.

1 Facebook's comments on the Consultation Paper, p. 6, available at: http://traf.gov.in/Comments_Data/Organisation/Facebook.pdf, last accessed on January 14, 2016

2 Bharti Airtel's comments on the Consultation Paper, available at: http://traf.gov.in/Comments_Data/SP/Bharti_Airtel.pdf, last accessed on January 14, 2016

- Not allowing differential pricing is the correct modus operandi in contrast to an overtly burdensome, new and expensive infrastructure.
- Vertical integration in whatever direction would give the intermediary vendors of TSPs and ISPs the whip hand in the key information market of the 21st century, and thereby throughout society.
- In the European Union the Recommendation CM/Rec (2016) of the Committee of Ministers to member States on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality adopted on January 13, 2016 by the Council of Europe, it is recommended that “3.1. Internet service providers should not discriminate against traffic from other providers of content, applications and services which compete with their own products”.
- The Canadian Radio-television and Telecommunications Commission (CRTC) issued a decision on 29 January 2015³ directing Bell Mobility to eliminate its unlawful practice of exempting its mobile TV service from data charges. It also held the data exemption of a TV app of Videotron to be unlawful.
- Proposals to allow price discrimination because data is "time-sensitive" or "more secure," as though HTTPS packets could be priced differently from HTTP packets, are the essence of anti-competitive routing.⁴
- If there is no business case for TSPs to offer free data services, why some providers insist that no consideration of any kind is being exchanged in proposals like “Free Basics”?⁵
- No telecommunications service provider should be allowed to sell the traffic it carries for its low-income subscribers, in bulk, to a data-mining company for surveillance and analysis, which thereby achieves a competitive advantage in the sale of Internet-based advertising.
- Important considerations like sale of de-anonymised packets of poor users cannot be overlooked by pleading lack of jurisdiction.

Detailed Analysis

1. **All communications, characterized as “telephone calls” or “data packets” are the same:** VOIP services compete with traditional telephone services, as they should, because all communications, whether characterized as "telephone calls" or "data packets" are in fact the same. What other commentators call "price arbitrage" by consumers between these services should be called "user efforts to eliminate anti-competitive routing practices,"

3 Canadian Radio-Television and Telecommunications Commission, *Broadcasting and Telecom Decision CRTC 2015-26*, 29th January 2015, available at: <http://www.crtc.gc.ca/eng/archive/2015/2015-26.pdf>, last accessed on January 14, 2016

4 Videocon's comments on the Consultation Paper, p. 1, available at: http://traf.gov.in/Comments_Data/SP/Videocon.pdf, last accessed on January 14, 2016

5 Idea Cellular's comments on the Consultation Paper, available at: http://traf.gov.in/Comments_Data/SP/Idea.pdf, last accessed on January 14, 2016

otherwise known as "net neutrality."

- 2. Case-by-case approach in the absence of network neutrality rules will be ineffective with no real benefits to the regulator or the public:** In contrast to the simplicity and low regulatory cost of a common carrier regime, even the supporters of some differential pricing, such as NASSCOM, concede that this would absolutely require individualized, case-by-case regulatory review before the inception of such pricing schemes. They concede that this would require the creation of new and expensive social infrastructure, the cost of which must be netted out against any hypothetical benefits. No party, no matter how audacious its taste in obfuscation, has ever asserted that vertical integration and price discrimination will never result in serious competitive harm. Instead, the expensive talent and fancy titles are employed to argue that in specific situations a wise regulator might discover occasional reasons why the dangers of such arrangements are absent or can be behaviourally confined. The cost of such a system, however, falls on the society and its regulators: the regulators must be committed to an indefinite series of complex reviews of individual deals, which the regulated parties evolve to make the task of the regulators as difficult and time-consuming as possible. Any acquaintance with the processes of merger approval or rule-making at the Federal Communications Commission in the United States, and the years of additional litigation that usually follow, shows the depths into which such regulators can be dragged. Any failures of regulatory scrutiny are visited on society through the costs in diverse markets of collusion between some market participants and the transportation infrastructure providers.

The alternative is to prohibit all such arrangements. This deprives society of some value, arguendo, which accrues from the small number of arrangements facially suspect, but which a perfectly vigilant regulator with infinite resources for analysis and deliberation would have discovered to be justified exceptions to the general rule. Despite all the shaded rectangles in all the graphs in all the articles by the best and highest-priced "independent" scholars, there is little reason to believe that game is worth the candle. Blanket prohibition on vertical integration of telecommunications network infrastructure with "layer seven" services, and similarly broad prohibition on discriminatory or differential pricing – that is, the treatment of telecom operators as common carriers – is a better and simpler solution. Some speculative welfare loss from over-regulation can be identified, more easily in theory than in reality. Vast harms otherwise difficult to reverse and productive of significant dangers to democracy, are cheaply and reliably avoided.

- 3. If FCC network neutrality Rules are adopted by India and TSPs are treated as Common Carriers, a case-by-case approach may be feasible:** Reference to the US FCC's "case by case" approach to zero-rating in the submissions of Facebook is misleading. The FCC's Open Internet Order changed the treatment of ISPs from "data services" to "telecommunications services," which subjected the operators to common carriage principles. In that context, FCC said in two short paragraphs in a landmark order, it would then take a case-by-case or "wait and see" attitude towards possible exceptions. If, indeed, TRAI were going to adopt the FCC's approach and impose "neutrality" in the form of

common carriage rules, we would then agree with other commentators that an FCC-style openness to case-by-case exceptions would be feasible.

4. **TV is dying and giving way to streaming, leaving TSPs in a state of panic:** The political economy of this inquiry is left indistinct, not surprisingly, by the TSP commentators. In wealthy societies, as smartphones become nearly ubiquitous, broadcast and cable television is dying, replaced by video streaming over wireless networks. Handset manufacturers can profitably make smartphones capable of 1080p, in effect pocket HDTVs. The various Internet and transmission architectures, none of them so far fully mature, that are candidates for the still-undetermined technology called "5G" will have to carry these vast volumes of video data packets. TSPs fear that the primary profits in such a post-TV world will belong to content licensors rather than packet transport wholesalers. In India, Aircel already provides free data service at 2G speeds to subscribers everywhere. In the US, T-Mobile is trying to persuade the FCC that it should be allowed to provide zero-rated "Binge On" video service, as long as it is allowed to throttle all video from 1080p to 480p, in effect offering free LDTV service so long as consumers can be prevented from getting HDTV quality instead.

But from a competition policy point of view, allowing such arrangements to replace broadcast and cable TV is just as deadly as it would have been to permit movie studios to own movie theatres in the mid-20th century, simply with the direction of vertical integration reversed. Around the world, not only in India by any means, highly-paid professionals are busy preparing arguments about how "the Internet should be structured like cable television," that is, broken up into a series of "channels" that can be marketed in bundles. This would give the intermediary vendors of transport services the whip hand in the key information markets of the 21st century, and thereby throughout society. But they are regulated industries, and their grab for power and pre-eminence should be resisted by democracies everywhere.

The political economy after TV is only one example of the way in which commentators, primarily TSPs, want to ignore or modify the nature of the Internet by distinguishing among packets. Proposals to allow price discrimination because data is "time-sensitive" or "more secure," as though HTTPS packets could be priced differently from HTTP packets, are the essence of anti-competitive routing. If transport intermediaries were allowed to price-discriminate services in this fashion, all innovation in the Internet would cease, except at the whim or with the permission of the carriers.

5. **Differential pricing on the Internet and in other sectors:** A common contention raised by TSPs is that differential pricing is prevalent in other industries and that there is nothing wrong in having such a model for data services. However, the differential pricing model advocated by TSPs is quite different from the business models in other sectors. The TSPs are granted a license to provide the service of access to the Internet to consumers as per their license agreements with the Department of Telecommunications. They are free to provide different pricing options based on download speed, download limit, usage time etc.

However, what the TSPs are proposing is a permission to split the Internet into various slices and to price them separately. This is in violation of the license to provide access to the Internet and interferes with the basic structure of the Internet. When utilities like water, gas and power are priced differently the basic product or service remains the same. The quality of water remains the same, whether it is consumed by the poor or by the rich. However, the TSPs are proposing a few select services as the Internet for the poor. This creates a digital inequality instead of solving the problem of digital divide. The TSPs cannot be permitted to decide the content that any user can access. The only difference in the offering that can be permitted is difference on the basis of factors like download speed, data limit or access time without affecting the access to the open internet.

6. **Internet is not just about consumption:** Internet is different from DTH television where channels are priced differently. Internet unlike DTH is not a one-way traffic medium and does not just constitute a medium where content is consumed by users. It offers endless possibilities of creating content, doing business, communicating and doing a lot more things limited only by the creativity of the user.
7. **Differential pricing and start-ups:** Another contention raised is that differential pricing will not affect start-ups and will only encourage them. Some submissions have given the examples of Google and Facebook to show that start-ups can win their battles against established businesses. There cannot be a difference of opinion that start-ups with the right business ideas can overcome the Goliaths in the field. However, Google and Facebook were never denied access to customers by TSPs. But if the new start-ups are denied access to the islands of networks controlled by the TSPs, they cannot combat the established players, however strong their product may be. Of the 4P marketing mix, even if the Product, Price and Promotion are taken care of, the offering cannot succeed if the “Place”, i.e. the channel to reach the customer is imperfect. With TSPs slicing up the Internet, it becomes impossible for the start-ups to reach their customers unless they enter into deals with each ISP to get entry to their islands of access.
8. **Differential pricing and forbearance:** The TSPs have proposed a policy of forbearance as far as tariffs are concerned. However, the differential pricing models proposed by TSPs results in tinkering with the very nature of the Internet service, with the Internet being sliced into islands of networks. The regulator will have to interfere in such a scenario as it is not a case of pricing alone and involves broader issues of discrimination and competition.
9. **There are better models than differential pricing to provide wider Internet access:** As a response to Question 3 in the consultation paper, it has been claimed by many TSPs, ISPs, and telecommunication associations that differential pricing is the most effective business model for providing free Internet access to the consumers. In our submission we have extensively elaborated the detrimental consequences of an ecosystem where differential pricing can be resorted to at the discretion of Internet Service Providers. It is duly considered that affordability is one of the prominent factors for increasing Internet penetration in the country, but the cost of this access should not determine the content that

would be made available. Differential Pricing permits the TSPs to zero rate certain services and hence, distort the competition dynamics in the market. Further, it would lead to the service providers performing functions of more than a pipe where they would be capable of providing customized packages for a higher quality, but few services. This would create a regime of paid prioritization by the wealthy wherein start-ups would be discriminated against. Moreover, in this business model, a small bouquet of the world wide web, would be produced in front of the uninitiated, completely disregarding the user's right to choose. The alternatives proposed to counter differential pricing eliminate the problem of affordability, as most of them are 'free' or 'subsidized' methods to provide Internet to the public. If there is no particular content that would be priced differently, the consumer's right to choose would remain intact. Following are a few alternatives that achieve the same objective without giving the reigns to TSPs:

- Free packs with a cap on volume of data: One of the alternatives suggested by many is that of free packs with a cap on the volume of data, but no restriction on the content that can be accessed, like a cap of 500MB per month. This would achieve TRAI's aim of providing free Internet access to a wider population, without the consequences of an ISP deciding the content.
- Free packs provided at low speeds using 2G networks: This model provides the entire internet, with no restriction on volume or content, but operates on a 2G network. This model would be better for an ISPs bandwidth usage and easy on the infrastructural demands, along with satisfying the requirements laid down by TRAI and providing an unrestricted access.
- Free Wi-Fi Hotspots and community centres: This method would enable people to access the Internet in public places by creating Wi-Fi hotspots from a single connection. This could be utilized in a community centre that could be a forum for digital literacy along with providing free Internet. This model would be effective in cutting down the cost and be a social force by bringing people together to learn about and access the Internet.
- Data coupons that can be redeemed for data: Data coupons having an expiry date and valid for a specific volume of data could be sold, or given for free (depending on the extent of access a particular population has), which could be redeemed as per the need and usage of the person.
- Direct Benefit Transfer for data packs: This is inspired from the Indian Government's DBT scheme on LPG subsidy wherein money would be transferred directly to the bank account. the Government could use this approach for internet data packs as well, by transferring an annual data cap in a SIM and breaking down the monthly limit for free usage.⁶ Unlike what is being claimed by some North American data miners- we believe

⁶ Nanan Nilekani & Viral Shah, Free basics is a walled garden: Here's a much better scheme — Direct Benefit Transfer for internet data packs, 1st January 2016, available at: <http://blogs.timesofindia.indiatimes.com/toi-editorials/free-basics-is-a-walled-garden-heres-a-much-better-scheme-direct-benefit-transfer-for-internet-data-packs/>, last accessed on January 14, 2016

that food security is also economically unsustainable or operationally challenging but does not prevent us from providing that.

- Internet data subsidy from watching advertisements: In this alternative, the end user could be compensated in monetary terms that are transferred directly in his account for watching advertisements that generate revenue for the TSPs. This could act as an incentive to make Internet services affordable for the population.⁷
- Advertisement supported data packs: This model supports the creation of revenue for the TSPs through advertisements, along with giving the users certain data credits for watching them while browsing the Internet. This model would be beneficial for both, the TSPs and the users where simultaneously they can earn revenue and extra data respectively.
- Data bundling with new devices: TSPs can offer schemes where with every new connection, a certain volume of data is given for free, valid for a particular period of time.
- Using USO funds to fund access to disadvantaged sections: The Government can fulfil its aim in the Digital India initiative by subsidizing access for certain sections of the society by using funds from the Universal Service Obligation Fund.
- On Venue & In Transit Model: TSPs can collaborate with certain venues like libraries, schools, railway stations, airports to provide Wi-Fi connectivity to the public. This idea can also be utilized in public transportation systems and cabs.
- As a part of Corporate Social Responsibility: Providing Internet access through a particular model could be made as a component of the mandatory CSR of companies.

The practice of Differential Pricing defeats the purpose of an open internet by creating a walled garden of a few hand-picked services. These not only restrict the right of choice of a user, but hamper the innovation and growth of emerging and present start-ups and smaller services. The above alternatives are more effective than differential pricing because these methods keep in mind the interests of businesses, along with fulfilling the criteria of a free and open internet.

10. **Jurisdictional Analysis**: Below are brief analyses of the net neutrality and zero rating regimes in a few external jurisdictions, namely the US, Canada and the EU, where zero rating, though not prohibited as such, is seen as a potential harm to the open Internet and therefore permitted only on case-by-case basis.

- a) **United States of America**: In the US, the earliest instance of policy recognition to the principle of net neutrality came in 2010, the FCC in February 2015 reclassified ISPs as common carriers under Title II of the Communications Act, thereby making Section 706

⁷ See <https://medium.com/@inw/internet-access-alternatives-to-internet-org-for-the-digittaly-excluded-don-t-let-access-providers-7aa481c03569#.7vbxo62e2>, last accessed on January 14, 2016

of the Telecommunications Act 1996 applicable to ISPs.⁸ Pursuant to this, the FCC also released a fresh Open Internet Rules and Order in March 2015, which introduced the following “Bright Line Rules” applicable to providers of both fixed and mobile broadband services:

- **No Blocking:** broadband providers may not block access to legal content, applications, services, or non-harmful devices.
- **No Throttling:** broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.
- **No Paid Prioritization:** broadband providers may not favour some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind – in other words, no "fast lanes." This rule also bans ISPs from prioritizing content and services of their affiliates.

However, the Rules do not include an outright ban of the practice of zero rating. Instead, the FCC will investigate alleged abuses of zero rating on a case-by-case basis, under a “no unreasonable interference/disadvantage standard”, where services that unreasonably interfere with or disadvantage the ability of users to access Internet content will be disallowed. While this is not nearly as good as a ban, it nevertheless reserves authority for the FCC to prohibit such abusive practices. The move also leaves the door open for users to petition the agency to stop these practices.

- b) **Canada:** The Canadian Radio-television and Telecommunications Commission (CRTC) issued a decision on 29 January 2015⁹ directing Bell Mobility to eliminate its unlawful practice of exempting its mobile TV service from data charges. It also held the data exemption of a TV app of Videotron to be unlawful. It found that Bell Mobility and Videotron, in providing the data connectivity and transport required for consumers to access the mobile TV services at substantially lower costs to those consumers relative to other audiovisual content services, have conferred upon consumers of their services, as well as upon their services, an undue and unreasonable preference. Thus, the Canadian regulator has made its stand very clear on the aspect of differential pricing of data services.
- c) **European Union:** Regulation (EU) No. 2015/2120 is the first EU-wide regulation that addresses net neutrality and zero rating, albeit without explicit references to the terms as such. Adopted on November 25, 2015 and bearing a compliance date of April 30, 2016, the new Regulation aims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights. However, the Regulation has been criticized on counts of undermining

⁸ Section 706 requires the Federal and State Communications Commissions to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

⁹ Supra. 3

its own net neutrality laws, as it is accused of containing several loopholes that “open the door to an end to net neutrality”.¹⁰

Regulation 2015/2120 provides that *all* agreements and commercial practices that deal with attributes of Internet access such as price, data volumes or speed are permitted so long as they do not limit certain end-user rights, namely the rights to access and distribute information and content, use and provide applications and services, and use terminal equipment of one's choice. Such agreements and practices would naturally include zero rating, which means the Regulation does not expressly prohibit zero rating.

While the Regulation does not prohibit the practice of zero rating, the European Commission in a press release¹¹ date 30th June, 2015 clarified that commercial agreements and practices, including zero rating, must necessarily comply with the other provisions of the Regulation, in particular with those on non-discriminatory traffic management. The fact sheet also acknowledged that zero-rating could in some circumstances have harmful effects on competition or access to the market by new innovative services and lead to situations where end-users' choice is materially reduced in practice. National authorities are entrusted with monitoring market developments, and will have both the powers and the obligation to assess such practices and agreements, and to intervene if necessary to stop and to sanction unfair or abusive commercial agreements and practices that may hinder the development of new technologies and of new and innovative services or applications.

Finally, the fact sheet expressly provided that certain Member States' existing national rules do not need to change if these can be interpreted by regulators and courts consistently with the Regulation, including to protect end-users from commercial practices that are shown to circumvent the rules and materially reduce users' freedom of choice in the specific national circumstances.

The national rules of Netherlands and Slovenia are of particular interest in this context, as these constitute two European jurisdictions that have explicitly prohibited zero-rated services in the past. Following widespread reports in 2011 that a handful Dutch ISPs had been engaging in discriminatory blocking of services such as VoIP and instant messaging, Article 7.4a was added to Netherlands' Telecommunications Act, whereby ISPs were prohibited from hindering or slowing down services or applications on the Internet. It also stipulated that ISPs may not impose differential charges on end-users for the use of different Internet content, applications and services, serving as an effective prohibition of zero rated services in the country. In December 2012, Article 203 was added to Slovenia's Electronic Communications Act, under which the Slovenian Parliament reiterated the nation's commitment to the open and neutral character of the

10 Alex Hern, *EU net neutrality laws fatally undermined by loopholes, critics say*, The Guardian, 27th October 2015, available at: <http://www.theguardian.com/technology/2015/oct/27/eu-net-neutrality-laws-fatally-undermined-by-loopholes-critics-say>, last accessed on December 13, 2016

11 European Commission, *Roaming charges and open internet: questions and answers*, 30th June 2015, available at: http://europa.eu/rapid/press-release_MEMO-15-5275_en.htm, last accessed on December 13, 2016

Internet and forbade network operators and ISPs from restricting, delaying or slowing down Internet traffic at the level of individual services or applications and from implementing measures for their devaluation. Article 203 also says that the services of network operators and ISPs must not be based on the services or applications that are provided or are used over the Internet. In other words, ISPs are prevented from charging subscribers differently on the basis on the services provided over the Internet, constituting another national prohibition on zero-rated services.

In the Recommendation CM/Rec(2016) of the Committee of Ministers to member States on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality adopted on January 13, 2016 by the Council of Europe¹², it is recommended that “3.1. Internet service providers should not discriminate against traffic from other providers of content, applications and services which compete with their own products. This requires that traffic management decisions be strictly dissociated from content-related decision-making processes of the operator in the spirit of the 2007 Committee of Ministers’ Declaration on protecting the role of the media in democracy in the context of media concentration”.

12 Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2016)1 of the Committee of Ministers to Member States on the European Prison Rules*, 13 January 2016, CM/Rec(2016)1, available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec%282016%291&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>, last accessed on January 14, 2016