9

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# South Asian Perspectives on Net Neutrality

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## ABSTRACT

This Special Report examines key themes highlighted during a series of panel discussions exploring South Asian Perspectives on Net Neutrality, hosted by the Observer Research Foundation and the Centre for Internet and Society in New Delhi on 12 December 2015. The first panel analysed the potential of net neutrality regulation and zero-rated platforms on the market. The second explored viable regulatory frameworks for net neutrality that could be adapted to South Asian markets. The key findings emphasised the need for evidence-based empirical research to balance a fair market with the imperative to connect the next billion.


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## THE NET NEUTRALITY DEBATE

Over the last decade, net neutrality has become one of the most polarising debates of our time. It can broadly be understood as the principle of non-discrimination in the transference of data packets over the internet from content providers to internet users. Over time, however, many layers of complexity have been added to this debate. At its corethe discourse on net neutrality is dichotomous. On the one hand, supporters of net neutrality have claimed that access to an open and unhindered internet is a basic right of every user; while on the other, opponents have argued that to those without even minimal internet access, a subsidised albeit truncated internet is better than no internet at all. South Asia, with its striking levels of income inequality and consequently pronounced digital divide, has proved to be one of the most appropriate theatres for this debate.

On December 12, 2015, the Centre for Internet and Society, Bangalore and the Observer Research Foundation, New Delhi, in association with the Annenberg School for Communication, University of Pennsylvania organised a series of round table discussions to take stock of the net neutrality debate across South Asia. The objective of the round tables was two pronged: To identify effects of net neutrality on the market and to consider the regulatory models that are viable for South Asia. Participants at the round tables included members from India's telecom industry, former advisors to regulatory bodies, academics, lawyers and other civil society representatives. The discussion, which followed the Chatham House Rule, was intended to identify specific issues in net neutrality research that will guide regulators and academics in developing a regulatory framework for net neutrality that straddles the delicate line of increasing investment in innovative technologies and bringing the next billion online.

In India, the net neutrality debate first gathered momentum with the release of a consultation paper on regulation of over-the-top services by the Telecom Regulatory Authority of India. A similar debate has seen a resurgence over the past few months with the aggressive ad-campaign by Facebook for its zero-rated platform, Free Basics and the resultant civil society backlash to it. In part, this debate is fuelled by a principled difference on the value that the open internet holds for freedom of expression and innovation versus the need for increasing access to the internet to the disenfranchised. In part, however, the debate eludes conciliation due to the lack of evidence-based empirical research on the effects of zero rating. This is further exacerbated by the fact that effects of zero rating, largely beneficial or otherwise, will only be realised in the long term. To net neutrality proponents, this is cause for implementation of a light-touch regulation that is based on the theoretical underpinnings of net neutrality, such as the common carriage principle. To opponents, however, the difficulty in gathering empirical data makes the case for forbearance. They claim that when only nearly 1% of the telecom service providers' revenue is associated with the zero rated services, the adverse effects of these services are exaggerated and not as detrimental as claimed. However, their claims that zero rated services are the only way of increasing access to the internet are faltering in the face of ideas like equal rating and app neutrality. While zero rating is subsidized or free access to certain destinations on the Internet, equal rating is

subsidized or free access to all services on the Internet with no discrimination between any of the services.

These differences, however, are not unique to South Asia. Other parts of the globe that are also faced with the challenge of increasing access have taken diverse stands on net neutrality. Brazil, the Netherlands and Chile, for instance, were some of the first countries to pass legislations affirming net neutrality. Laws, however, are only one of the many ways of protecting a neutral internet. Other options such as enshrining open access policies in telecom licensing agreements, which will ensure that infrastructure is shared and used to the benefit of most people are one such option. Some markets may also rely on self-regulation which tasks telecom service providers with managing traffic as best they can to ensure the smooth functioning of a network without favouring particular groups or interests.

At this stage, it would not be pragmatic to import these options into the Indian market directly. In the telecommunications sector, India is a highly competitive market. This is in stark contrast to the United States where in certain regions, certain actors operate practically as monopolies. Therefore, a net neutrality law that works for the United States may do more harm than good for India.

Policy makers in India cannot just wait for the market effects of net neutrality to reveal themselves. There has to be an active effort on the part of the state to identify what the potential effects of a net neutrality regulation could be and how it would affect investment in the telecom sector. One view that is fast emerging is that perhaps instead of relying on sectoral telecommunications regulators, we should implore antitrust regulators to undertake this examination. In a market like India where empirical research is lacking, an ex anteregulation of net neutrality may not be desirable. Zero rating plans which are vertical agreements between content providers and telecom service providers are adjudicated upon by the Competition Commission of India under the Competition Act, 2002. These agreements are deemed illegal only if they have an appreciable adverse effect on competition on the market.This form of ex post regulation may prove to be a viable alternative that keeps a close eye on the market to identify adverse effects of non-neutral platforms and readily provided a means of adjudication in case of disputes. The applicability of competition law to net neutrality regulation was one of the alternatives considered by the panellists. Over the course of the two panel discussions, many such issues were identified as avenues for further research efforts.

## PANEL 1: MARKET EFFECTS OF NET NEUTRALITY

The first of the tworound tables focussed on the “Market Effects of Net Neutrality”, in particular the commercial aspects of net neutrality, industry perspectives and current initiatives fuelling the debate on net neutrality and zero-rating. The discussion touched on the complexity of the discussions in the context of growing public awareness, and a degree of confusion about what the term 'net neutrality' entails and what it does not. It was suggested that another term, like 'open internet' might serve as a better goal and more accurate descriptor of how the internet should function in the emerging digital markets of South Asia. The variation across South Asian countries – of internet penetration rates, volume of users, existing regulation,

attitudes to zero-rating and future initiatives – indicates a certain need for regulatory flexibility to cope with the challenge of inclusive access, and the role that net neutrality regulation might play in overcoming it. However, the absence of concrete data about how net neutrality regulation affects internet access and internet use proved to be a barrier to suggesting optimum regulation levels or predicting their overall market effects.

A consensus emerged that debates around net neutrality and zero-rating and attendant regulation would be highly dependent on the market in question. The debates that take place in high-penetration markets, where access is a muted aspect, will necessarily differ from a market where increasing access and making it inclusive are national priorities. Other factors include the makeup of markets – the number and competitiveness of telecom and internet service providers, the number of suggested platforms, and the adaptability of start-ups, other companies and application developers. This is evident in the Indian context, where there is high mobile penetration but low internet penetration, where the mobile industry is competitively priced and yet even small price fluctuations can change usage patterns, and where universal access is a national goal but questions of what that access entails persist.

While acknowledging that net neutrality and, more significantly, zero-rating arguments cannot be divorced from the question of access, the ultimate solution will also depend on what other measures are being taken to increase internet penetration in a particular market. Relying on zero-rating alone to boost access would be problematic and require more onerous regulation to ensure fairness in terms of services provided. By contrast, a market in which access is going to supplemented by other measures can have more flexibility in terms of the kinds of content provided without cost.

Many large internet companies and indeed telecom service providers have business interests in various content-related aspects of the internet: ownership of platforms, services and applications. This is a key concern as these business interests could dictate what kind of content is available on the zero-rated plan of a particular network. Transparency of requirements to join a zero-rated platform would be critical to ensure that smaller content providers are not locked out. One possible solution would be to restrict zero-rated platforms to those run by telecom network operators only; this would serve the dual purpose of ensuring security across the network and reducing the 'gatekeeping' threat.

Centralising internet services through zero-rating also poses fundamental questions about the security of such platforms. It is likely that a large amount of personal data will be moving on those free networks – how would such data be collected, stored, and used later? Additionally, if zero-rated platforms are to emerge as the sole form of internet access for potential millions, the possibility of the platform going down – due to technical malfunction or commercial motivation - would leave those dependent on it without any internet access at all, a threat which is less likely in a more decentralised structure.

Substituting zero-rated platforms and data plans for other methods of increasing internet usage and access also fails to take into consideration what kind of access is being provided by these platforms. For example, in Colombia, different

data plans exist for different types of services – one pack for social networking apps, one for music, one for messaging etc – and yet a user who has even one of those packs will be classed as having 'internet access', despite not being able to access large parts of the internet. This will ultimately have an impact on how consumers, particularly low-income and other vulnerable groups use the internet and how they define that usage.

This difficulty could be overcome by guaranteeing the ability to move beyond the 'walled garden' – making sure that a zero rated platform has at least some amount of data dedicated to accessing the open internet. This again would depend on the peculiarities of the market in question. While some felt that given the competitiveness of the market, no Indian was priced out of a data plan, others suggested that poor users would not opt for any plan involving payment when a free (albeit limited) plan was on offer. Initial data has not resolved the question of whether users of walled-garden platforms actually move on to paid plans or not.

The government is the traditional actor responsible for the provision and management of public goods, but while universal connectivity is a goal for many governments, there is no firm consensus on whether the internet is a public good or not. In this space network operators could be considered proxies of the government – they have certain requirements to provide services and rollout those services widely. Net neutrality regulations could cause a conflict with these provision requirements. Furthermore, if operators are said to have taken on the role of the government, then price discrimination and differentiated zero-rating platforms would not be feasible, as they would be inconsistent with the public policy imperative.

The public perception of the internet as a public good has shed light on the network management practices of several operators. Though it is acknowledged that some network traffic management is necessary, in the same way that traffic lights are necessary to ensure smooth travel, greater transparency about that management is crucial. This is one of the key pillars of the 'Singapore model', where 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. Since the operator community in India, and to a large extent globally, supports a system of no discrimination and no throttling, providing more information could be one way to alleviate concerns about net neutrality violations.

Though not going so far as to suggest new competition rules for the telecom/internet sector, many participants posited that broader telecom reform is required before concerns about net neutrality can be adequately addressed. There was also a suggestion that regulatory harmony across different sectors would be beneficial, with similar principles for regulating cable television and the internet, for example.

The internet is one of many markets undergoing rapid change in India, and the ability to adapt regulation accordingly will be essential to achieve widespread and equal access. This could take the form of eclipse phases for zero-rated platforms,

guidelines for net neutrality rather than strict regulations, and an overall increase in transparency about consumer choice.

## PANEL 2: REGULATORY PERSPECTIVES ON NET NEUTRALITY

The second round table, "Regulatory perspectives on net neutrality" saw panellists discuss four broad themes: Regulatory Options, Zero Rating, Competition and Access.The process of regulation was described as designing a menu of contracts for players in the market to achieve multiple public policy goals. It was pointed out that we have no specific regulations on net neutrality at the moment- Chapter 9 of the telecom licenses or the Unified Licensing System currently refers to the fact that operators are not supposed to discriminate against content, however this is not a strong requirement. With multiple fora such as TRAI, DeitY, DoT, the I&B Ministry deliberating on the problem, there is no coherence in the stated objectives of these bodies but their decisions have wide ranging implications. There is a need to identify a single forum that can be approached regarding issues surrounding network neutrality violations. This would clear up a lot of confusion surrounding the issue and send an important signal to the market regarding India's engagement with and commitment to net neutrality. TRAI has the power under Section 11 of the TRAI Act to issue binding regulations, and one dominant narrative is that they should be the primary nodal body tasked with engaging with all aspects of net neutrality.

There was disagreement about the need for regulation at all; while one opinion was to have regulation sooner rather than later, a contrasting point of view laid out that having network neutrality enshrined in law is not optimal considering that there is a lack of consensus on what the issues involved are. The regulator must have the flexibility to respond to what the market throws up because then incentives can be aligned to achieve larger public policy goals. This view was partly countered by the fact that the telecom market is not an open market, but a quasi-oligopolistic market determined by government fiat, so it must be proactive about the need to reduce barriers to entry for new ventures and firmly focus on creating an internet driven by end users.

Another point of contention was competition law and its place within this debate. In an oligopolistic market like telecom, free competition and perfect competition were opined to be neither desirable nor possible. However, the strategies that have been adopted by telecom players that have a bearing on competition can be dealt with after the effect has come into play by adequate instrumentalities. The response to this view, however, posits that competition law is not adesirable solution as it leads to an adversarial process of adjudication and is highly dependent on the availability of perfect information about the functioning of the market. Concerns were also voiced surrounding the competence of the Competition Commission to deal with matters relating to technology. These, however, were countered by stating that adequate instrumentalities were in place to deal with potential consumer and competition harms, and the fact that the Competition Commission is presumed to have, or in time obtain, the expertise to deal with matters relating to all sectors.

In dealing with the questions of zero rating, there were two distinct schools of thought. The first focussed on its impact on diversity of content that we can consume, which is rooted in the freedom of expression, and should not be compromised. Content is at the core of our polity and therefore, content or diversity being threatened is one of the principal concerns. The other point of view was that walled gardens need not be viewed with suspicion for multiple reasons. The first, because access should be understood to be intertwined with network neutrality given the sub-10% broadband penetration in our country, and inadequate roll outs with sub-8% penetration. The second, because the network is designed to circumvent walled gardens and so they cannot be looked at as a sustainable solution. The question really is whether zero rating is a legitimate way to deal with the access issue. Onepanellist focussed on the need to decide whether we want to go back to a model in which access is the responsibility of the private company or whether we want to stick to the model of Universal Service Obligation in which access is the responsibility of the government and paid for through taxes. It should be looked through the prism of price discrimination by platforms who charge for content or divide revenue streams between the OTT providers and the end consumers. Zero rating can also described as an economic issue, and the fact that data and information have economic value should be brought into focus. Creation of walled gardens can also be considered a suboptimal solution because the lack of investment for improving the network is being fed by collecting revenues from OTTs. In order to avoid congestion, somebody must be charged for the internet, and if the choice is between the app provider and end user, it must be the app provider as they are less price sensitive than the end user and so this will create less distortion in the traffic on the internet.

It was also recognised that content cannot move from place to place without there being some sort of network management to take care of errors. An important observation was that the end to end principle of traffic management is compromised not just by ISPs but also by content and access providers some of whom are heavily vertically integrated. The question of how to manage traffic remained- do we follow the principle of first in first out as far as possible or do we have policy driven routers that can discriminate between packets of data that move there?

The only consensus that emerged out of the roundtables was that the lack of empirical data on net neutrality and zero rating hinders the creation of a comprehensive framework that could both guide industry and fulfil the public policy obligation of achieving universal access.

## ABOUT THE AUTHORS

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The Centre for Internet and Society (CIS)-is a non-profit research organization working to explore, understand and affect the shape and form of the Internet and its relationship with the political, cultural, and social milieu of our times. CIS' multidisciplinary research, intervention and collaboration engages with policy issues relating to freedom of expression, privacy, accessibility for persons with disabilities, access to knowledge and IPR reform.

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