

To,
Shri Arvind Kumar,
Advisor (Broadband & Policy Analysis)
Telecom Regulatory Authority of India
broadbandtrai@gmail.com

June 30, 2016

Dear Sir,

We would request you not to publish our email address, and request that you publish all submissions online for review, in case there are counter comments. We would also appreciate being allowed to participate in an open house discussion, if there is to be one.

I'm writing on behalf of MediaNama, an online publication read by around 250,000 people each month. We cover developments in the digital ecosystem in India, with the objective of providing news and analysis to help create a **fair, open and competitive digital ecosystem in India**. We've participated in consultations with the TRAI and the DIPP in the past, as well as in the process initiated by Parliamentary Standing Committee on IT on the issue of Paid News in the Media and Net Neutrality. Over the years, we have focused on policy issues related to Internet Freedom, censorship, paid news, surveillance and privacy, and from a business perspective, lowering of regulatory barriers and the easing of controls on Internet businesses and mobile operators. This, combined with our reportage on business financials and on investments and financing of Internet startups gives us a breadth of understanding of business and policy across content and carriage, large companies and small, and Internet and mobile, from an independent perspective.

We are greatly appreciative of the TRAI, for giving us this opportunity to participate in this consultation paper on Free Data, which appears to be a follow up to the previous consultation paper on Differential Pricing, a core element of Net Neutrality, and an issue which will impact the availability of information to the citizens of India, and the future of India's digital startups and entrepreneurs.

We are greatly appreciative of the stand that the TRAI took on the issue of Discriminatory Pricing, wherein it disallowed telecom operators from playing the role of a gatekeeper, and preventing them from pricing access to different websites differently. We are also appreciative of the stand that the TRAI took, in terms of

disallowing replicating Internet content and services on closed electronic communications networks (CECN), which would have led to the TRAI's Discriminatory Pricing regulations becoming redundant.

At the outset, we wish to highlight certain concerns about the Free Data consultation paper and TRAI processes:

1. We are concerned that some of the models which the TRAI has mentioned in this consultation paper might be used to evade or bypass the Discriminatory Pricing regulations, in case they allow telecom operators to collude with content providers.
2. We believe that the CECN ruling needs to be clarified by the TRAI, and that any replication of content or services, or provisioning of content or services available online on the CECN, needs to be prevented.
3. The large number of consultation papers brought out by the TRAI in a short space of time, all related to issues of great concern to the Internet users, some of them related to issues that have already been addressed in previous consultations, makes it difficult for citizens to contribute meaningfully, and goes against the spirit of the process.

In addition, we are reiterating the definition of Net Neutrality:

Principles of Net Neutrality

1. All sites and apps must be equally accessible: ISPs and telecom operators should not block certain apps and sites, just because they don't pay them a revenue share. No gateways to the Internet should be allowed, and no preferential listing of certain sites, whether via commercial arrangements or not.
2. All sites must be accessible at the same speed (at an ISP level): This means no speeding up of certain sites because of business deals. More importantly, it means no slowing down some sites.
3. The cost of access must be the same for all sites (per Kb/Mb or as per data plan): This means no "Zero Rating", or differential rating for different sites, apps or services. In countries like India, Net Neutrality is more about cost of Internet

access than speed of Internet access, because we don't have fast and slow lanes: all lanes are slow.

Our responses to the questions raised by the TRAI in the consultation paper on Free Data:

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.

Our response:

1.1 On Free Data: We welcome a minimum data allowance to be provided free by TSPs to subscribers. This will be an powerful force to increase Internet usage in the country. This may be implemented in one of two ways:

- a. Making it mandatory for mobile operators to provide a minimum free data pack as part of their license conditions
- b. Making it optional, but offering an incentive to operators who provide a free data pack and funding this out of the USO Fund which the government collects for the purpose of digital inclusion.

Any free data offered by TSPs should be unconditional: it must not be limited to any website, nor must it be linked to activities linked to access of certain specific websites. **TSPs should not be in a position to give one content provider an advantage over another, nor should they be in a position to give their own products and services preference over others. This advantage can be by means of allowing giving of free data for consumption of some services over others.**

As we had mentioned in our submission on differential pricing:

“At the core of this debate is the issue of how we let one business (a network operator) regulate the consumer's ability to access another (app or website), given that the availability to provide Internet access (spectrum and right-of-way access) is not unlimited, and exclusively with a few entities (network operators). A genuine free market requires restrictions on the ability of large predatory companies, whether multinational or otherwise, to create monopolies¹. A non-discriminatory

¹ http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1222&context=fss_papers

Internet decentralizes the sources of innovation because everyone can create Internet services and applications without having to obtain permission from network providers.”

To that end, network providers should not be allowed to control which platforms or services can give free data or reimburse or reward users. **Mobile Data and money in the telco wallet are telecom resources. Telecom operators have the ability to offer users, as incentive, unlimited data-back and unlimited cash-back for the usage of specific websites and services. Both these schemes would have the exact same impact as zero rating or differential pricing.**

How would this work? Consider two cases:

- If a user has 100 MB data left for consumption. In a zero rating scenario, if a user uses the equivalent of 10 MB, she will be left with 100 MB, and the 10 MB is reimbursed **as it is being used: i.e. for every byte used, a byte is given back immediately**. In a data back scenario, if the usage is metered and the user is given 10 MB back, but after a short period of time, or upon completion of a target amount of usage. However, the effect is the same, and the user still has 100 MB. This means that the usage of that specific website has cost the user nothing in terms of data, and the usage is zero rated.
- If a user has Rs 100 left in her wallet: In a zero rating scenario, if a user uses the equivalent of Rs 10, she will be left with Rs 100, and the Rs 10 is reimbursed **as it is being used: i.e. for every paisa worth of data used, a paisa is given back**. In a mobile telco wallet cash-back scenario, if the usage is metered and the user is given Rs 10 back, but after a short period of time or upon completion of a target amount of usage. However, the effect is the same, and the user still has Rs 100. This means that the usage of that specific website has cost the user nothing in terms of data, and the usage is zero rated.

Therefore, data back or cash back to the telecom operator wallet when it is linked to the usage of a particular website or wallet, has the same effect as zero rating and is equivalent to differential pricing.

1.2 On Telco Agnostic Platforms: The TRAI needs to ensure that platforms which are used to provide data are truly agnostic. For platforms to be truly independent, the TRAI must not allow any form of vertical integration between a telecom operator and the platform. This includes not only shared ownership between the telecom operator and the platform, but also cross holdings via group companies.

For example, the Bharti Group, the parent of telecom operator Bharti Airtel, has a co-owned Internet company with Softbank, called Bharti Softbank (BSB), which runs messenger services such as Hike, and built music streaming services such as Wynk.

1.3.1 On Telco agnostic platforms providing free data (in exchange for payment, or otherwise):

As per the TRAI's regulation on Differential Pricing:

“On the other hand, differential tariffs result in classification of subscribers based on the content they want to access (those who want to access non-participating content will be charged at a higher rate than those who want to access participating content). This may potentially go against the principle of non-discriminatory tariff. Secondly, differential tariffs arguably disadvantage small content providers who may not be able to participate in such schemes. This may thus, create entry barriers and non-level playing field for these players stifling innovation. In addition, TSPs may start promoting their own websites / apps / services platforms by giving lower rates for accessing them.”

Of these three points made in the explanatory memorandum, only one point relates to telecom operators: vertical integration. This is addressed above, in 1.2.

The other two points are just as applicable to telecom operator agnostic platforms as they are to telecom operators: **differential tariffs when run via telco agnostic platforms (or telcos) also result in classification of subscribers based on the content they want to access, which goes against the principle of non-discriminatory tariff.**

Secondly, differential tariffs when offered by telco agnostic platforms (or telcos), disadvantage small content providers who may not be able to participate in such schemes. **This will create entry barriers and non-level playing field for these players stifling innovation.** This creation of entry barriers, and using that, differential access to content via differential pricing is gatekeeping.

Therefore, when it comes to differential pricing, it is essential that **neither telecom operators, nor a telco agnostic platform, nor a content provider is in a position to make access to a specific website, application or content for free: it gives disproportionate power over access to the entity enabling differential pricing.**

1.3.2 On ensuring that platforms don't price access differentially: Differential pricing of access isn't possible by a telco agnostic platform without close integration with a telecom operator: a platform directly pricing an application or website differentially can only do this with **active participation and an agreement with telcos**. The only difference here is that the payment for differential pricing, or the decision to price differentially, is being taken by the platform, which then takes on the role of an access service provider, and performs the role of a **gatekeeper**. This appears to go against what the TRAI Chairman had said²:

"We are looking for an automated scalable telecom service provider-agnostic technology solution to this problem, which does not require any agreements with or consent from telcos. Telcos will stand to gain as data traffic could increase. We are avoiding this gatekeeping role and the agreement business."

1.4.1 On Reimbursement of data consumption related to access:

Reimbursement as a model is different from the idea of making pricing access to content differentially, or making it free. In particular, care needs to be taken so that it doesn't have the same impact as differential pricing, and this isn't a loophole used by telecom operators or platforms to evade the regulation.

For this submission, Zero rating refers to the act of making access to a particular website or application free. Henceforth, the act of making access to all websites and applications free, without discrimination, is referred to as Equal Rating.

As explained earlier, zero rating is a type of reimbursement, in the sense that when data is being consumed by a user for accessing a particular website or application, the data usage is not counted; alternatively, this can be viewed as data usage being reimbursed immediately after consumption, so that the consumer is not charged for usage, or it doesn't impact her data limit. In some situations, only a part of data consumption may be subsidised, while in others more data might be reimbursed, upon consumption. In each case, it has the same effect as pricing of access differentially, and should not be allowed, since this would be a model set up for the purpose of evading the regulation. While the TRAI may not have jurisdiction over platforms, it does have jurisdiction over telecom operators, and may prevent them from providing information on which sites user has visited, and how much data has been consumed, thereby also protecting user privacy.

² <http://economictimes.indiatimes.com/articleshow/52528968.cms>

1.4.2 Rewards of data based on activities: Telecom operators may provide their API to platforms which reimburse data for activities not related to access: such as participating in a contest, watching advertising (video or otherwise), inviting new users to a particular service, it does not amount to differential pricing, and would come under equal rating. This is because it is not explicitly linked with access services. This is the same as purchasing a data recharge as a reward, and does not amount to an evasion of TRAI's differential pricing regulation.

At the same time, care must be taken that:

- Data as a reward model is only allowed to provide data in a manner compliant with equal rating.
- **No continuous or “trickle” rewards:** If the data as a reward model for activities is allowed, there is a chance that some websites may abuse this system too: for example, a music service can calibrate data rewards to be the same as the bandwidth consumed for listening to a song. Thus, even such models may be scrutinized by the TRAI upon complaints.

1.4.3 Pricing of Free data: According to the terms of the Unified License³:

The LICENSEE shall register demand/request for telephone connection and or any other Telecom Service without any discrimination from any applicant, at any place in the service area for the service(s) authorized and provide the Service, unless otherwise directed by the Licensor. **The LICENSEE shall not in any manner discriminate between subscribers and provide service on the same commercial principle** and shall be required to maintain a transparent, open to inspection, waiting list.

The TRAI should also mandate telecom operators should not discriminate between subscribers of their data services, whether they are end users or platforms which purchase data recharges from them for rewarding customers. To that effect, individual recharges which are made available to platforms should also be made available to individual customers. This will ensure that the provisioning of rewards is not the function of a single partner of a telecom operator, and anyone can purchase rewards at the same price for gifting to users.

Further telecom operators should not be allowed to discount the bulk purchase of data plans which will inevitably happen when a website receives high traffic. This will ensure that there is no discrimination between customers as the website bears

³ http://dot.gov.in/sites/default/files/Unified%20Licence_0.pdf

a cost that is identical to the cost of data that would have ordinarily have been borne by the visitor.

As we had mentioned in our submission on discriminatory pricing, it is imperative that telecom operators treat all users as equal, since all users are also creators.

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

Ans 2. Caution about potential regulatory arbitrage: We'd like to point out to the TRAI that allowing platforms to tie-up with telecom operators to buy minutes in bulk from telecom operators is now a licensed activity, which VNO's are allowed to do, along with other functions and activities. Also, while VNO's are restricted to a single telecom operator or ISP for a particular type of service, the act of allowing unlicensed players to buy data in bulk, and across telecom operators, to provision an access service for users, may be seen as regulatory arbitrage.

Question 3: Whether free data or suitable reimbursement to users should be limited to mobile data users only or could it be extended through technical means to subscribers of fixed line broadband or leased line?

Ans 3. Gifting data as a reward (for watching advertisements) should not be restricted to mobile data users, and may be extended to fixed line subscribers as well. Identical rules must be applied to both cases as they provide access to the same network.

Reimbursing data consumed on a specific site or bouquet of sites should specifically **not** be permitted either on fixed line or on mobile.

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

4.1 Privacy: It is important to ensure that any arrangement looking to re-imburse data as a reward, ensure that the privacy of the user is protected. Specifically, during the re-imbursement the telecom operator does not provide any more information than that provided by the internet protocol, data consumed by an IP address and the ISP/TSP of the end user which is billing to the website. In particular the user's data or service consumption patterns or telephone number must not be made available to the website.

4.2: Regarding CECN: In the letter by Bharti Airtel to the TRAI, it had sought clarification on whether tying up with a big global content provider, which wants to offer their video content exclusively “over the Closed Electronic Communications Network (CECN) of Airtel, in compliance with the definition given in para 2 (c) of the above referred regulation. Such exclusive content would be offered in India to Airtel’s customers only.”

In its letter by COAI, it has sought clarification regarding allowing three things:

- a. Firstly, whether Telecom Operators are allowed to subsidise/discount content, for exclusivity and advertising revenue shares.
- b. Secondly, whether the content provider offering subsidized subscription of its content to select / all subscribers of all / some telecom operators would constitute a CECN, since data charges would apply.
- c. Thirdly, a request for allowing differential data tariffs whether such content is provided through the closed network or the open Internet.

Our comments: Rather than clarify issues, this is a deliberate and desperate attempt by Bharti Airtel and the COAI to create confusion around what are very clear regulations from the TRAI. Either that or they haven’t read the regulation, and have missed key points made by the regulator, as we illustrate below:

1. In its order dated 8th February 2016⁴, the TRAI has clearly stated in section 3 that

“(2) No service provider shall enter into any arrangement, agreement or contract, by whatever name called, with any person, natural or legal, that has the effect of discriminatory tariffs for data services being offered or charged to the consumer on the basis of content:

Provided that this regulation shall not apply to tariffs for data services over closed electronic communications networks, unless such tariffs are offered or charged by the service provider for the purpose of evading the prohibition in this regulation.”

In addition, in point 32: “Differential tariffs being offered for data transmitted over closed electronic communications networks, such as intranets are not

⁴ http://traigov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf

prohibited by these Regulations. Though the prohibition on discriminatory pricing of data services does not apply to such networks, which are not accessing the internet, if such a closed network is used for the purpose of evading these regulations, the prohibition will nonetheless apply.”

We would submit that the request from Bharti Airtel (point 1 above) and COAI (point a and c above) should be denied for the following reasons:

- a. Further to 3(2), Point 17 of the Explanatory Memorandum articulates clearly TRAI’s intention in bringing this regulation, that allowing price discrimination for content which the TSP does not alone possess on the Internet is in violation of this regulation:

Point 17: “A particular TSP which is offering data services to the consumer does not control the internet infrastructure in its entirety. It is dependent on several other networks to facilitate this task. Thus, allowing a TSP which is at one edge of the internet to **charge differentially for data that it does not alone process, could compromise the entire architecture of the internet itself.** Were other TSPs across multiple tiers allowed to do this, then the openness of internet as we know, would be altered. **Allowing price differentiation based on the type of content being accessed on the internet, would militate against the very basis on which the internet has developed and transformed the way we connect with one another.**

This is also indicated in a statement made by the TRAI Chairman at the time the regulations were announced, where he said⁵:

"All content that is available on the internet falls under the new regulation, but any content that isn't on the web, won't be governed by the rule"

In order to comply with this regulation, the content provider would have to make the content available exclusively to the telecom operator worldwide, ensure that it has not routed the content on any other closed network and

simultaneously remove it from the Internet, globally, and not just India. Otherwise merely providing the same content via an intranet or multiple intranets, would amount to circumventing the regulation.

- b. We submit that if the TRAI were to allow this, it will result in telecom operators inking exclusive tie-ups with different content providers for differential pricing, and therefore, end up allowing services like Airtel Zero and Facebook's Free Basics, which the regulation itself sought to disallow. This will also amount to shaping the users Internet experience, by providing an alternative to services already on the Internet, but at a lower cost, via their own deals. The TRAI has warned against this in its regulation:

Point 19: "In India, given that a majority of the population are yet to be connected to the internet, **allowing service providers to define the nature of access would be equivalent of letting TSPs shape the users' internet experience.** This can prove to be risky in the medium to long term as the knowledge and outlook of those users would be shaped only by the information made available through those select offerings."

- c. As we had mentioned in our filing in January 2016⁶, **such differential pricing would create pressure on other content providers to ink similar tie-ups with telecom operators.** This would give telecom operators **disproportionate gatekeeping powers** and go against the spirit in which the TRAI had drafted its regulation, which has been clearly articulated by the TRAI Chairman⁷ in stating that "pipes should be agnostic of the data packets they carry" as well as in point 17 in the Explanatory Memorandum of the TRAI Order (above).
- d. In addition, it will result in different content experiences of content for users on different telecom operators, which goes against the principle of Net Neutrality and the open Internet.
- e. Such a tie-up will create a regime where the content provider and/or the telecom operators become gatekeepers of content, though this collusion which allows this partnership a competitive advantage via differential pricing. The Department of Telecommunications Committee, in its report on Net Neutrality⁸, had warned against this:

⁶ <http://www.savetheinternet.in/files/diffpricing-cc-all.zip>

⁷ TRAI Press Conference, 8 Feb 2016

⁸ http://www.dot.gov.in/sites/default/files/u68/Net_Neutrality_Committee_report.pdf

The committee was conscious that market for content provision indicates that clear market leaders emerge in a short while, and if such market leaders are able to dictate the path to specific content, then the principles of non-discriminatory access from the user viewpoint can be compromised leading to distortions emerging in the content provision market and consequent implications for the larger Internet economy and emergence of new innovations.

The committee therefore is of the firm opinion that **content and application providers cannot be permitted to act as gatekeepers and use network operations to extract value even if it is for an ostensible public purpose.** Collaborations between TSPs and content providers that enable such gatekeeping role to be played by any entity should be actively discouraged. If need be government and the regulator may step in to restore balance to ensure that the internet continues to remain an open and neutral platform for expression and innovation with no TSP/ISP or for that matter any content or application provider, having the potential or exercising the ability to determine user choice distort consumer markets or significantly controlling preferences based on either market dominance or gatekeeping roles.

- f. Further clause 10 of The Telecom Tariff order 1999 requires that service providers do not discriminate between subscribers. The same has been noted in point 24.2 of the explanatory memorandum.

24.2 As per Clause 10 of the Telecommunication Tariff Order, 1999 (TTO), service providers are prohibited from discriminating between subscribers of the same class, and any classification of subscribers should not be arbitrary.

While all differential tariffs for telecommunication services are not prohibited, certain differential tariffs have been held to be discriminatory. A subscriber accessing content that is differentially priced, at reduced or nil rates, would

be paying lesser or no charges for such content while another subscriber (or the same subscriber) would be paying regular charges for accessing similar content that is not offered at a reduced or nil rate. This kind of differentiation in tariff amounts to discrimination.

Providing content of through CECN clearly discriminates between data subscribers who are on the CECN through the CENC “data pack” and those with open internet “data packs”.

2. In response to the second question raised by COAI in point 2 of their letter (point 2(b)), we would like to submit that a TSPs network does not become a closed, just because subscribers are offered exclusive or subscribed content on it from a content provider. In fact, such a practice is just another form of discrimination between consumers of the same class. Since it is not possible for a content provider to discriminate between traffic originating from different networks without colluding with the TSP/ISP, such a practice will still violate Clause 10 of Telecommunication Tariff Order, 1999 (TTO). In fact, this will lead to TSPs floating content companies which will sign exclusive contracts with the parent TSP to re-introduce discriminatory pricing using content providers that fall outside TRAI’s jurisdiction
3. Finally, to address the request made by COAI as described in point 2(c), TRAI has not only disallowed differential pricing on the internet but also very specifically sought to disallow the use CECN as a means to subvert discriminatory pricing. In our opinion, COAI and Bharti Airtel are deliberately attempting to at misinterpret the CECN exemption to introduce discriminatory pricing for consumers by evading the regulation. The TRAI to stand by its order and reject such attempts.

Lastly, we are providing as an annexure, our submission regarding Facebook’s Free Basics program, which should address any submission made by them to this consultation. In our opinion, if Free Basics is made available across telecom operators, it only lends itself the increase in prevalence of discriminatory pricing, and allows Facebook to play a gatekeeping role.

Annexure: MediaNama's submission on Free Basics

First and foremost, we would like to assert that FreeBasics is not the Internet, but is marketed by Reliance Communications as FreeNet, Free Internet Services, leading customers to believe that it is Free Internet. Facebook changing the name of the service from Internet.org to FreeBasics does not address the issue of potentially misleading communication from its partner Reliance Communications.v v v



Our comments:

1. Net Neutrality ensures that consumers can be creators

Net Neutrality is a fundamental, foundational principle of access to the Internet: that the access service provider cannot influence consumer choice by speeding up or slowing down, enabling or disabling access to certain websites or apps, nor can it make access to certain websites cheaper or more expensive.

In some submissions or in articles, you might find comparisons with the Internet with services such as television, aviation or roads. All these comparisons are fallacious, because Internet access is unique:

- It does not distinguish between a service provider/creator and a consumer: every consumer can be a creator, and every creator is a consumer.
- It is interactive, and often (such as in case of gaming, or comments in case of content being read) what is being consumed gets modified based on user interaction.

Thus, Net Neutrality means that the access service provider doesn't distinguish between creator and consumer. It ensures that the user remains a user, and not merely an audience, and the access service provider remains an access service provider, and not a distributor. This principle ensures that billions of blogs, code repositories and sources of knowledge can be created by contributions from not just businesses, but also consumers themselves, and that the Internet remains a global public commons.

2. FreeBasics and differential pricing justifies fragmentation of the Internet:

When asked about Internet.org (FreeBasics), Tim Berners-Lee, the inventor of the World Wide Web and the founder of the WWW foundation, said⁹ people should "just say no" to the project, saying that "In the particular case of somebody who's offering ... something which is branded internet, it's not internet, then you just say no. No it isn't free, no it isn't in the public domain, there are other ways of reducing the price of internet connectivity and giving something ... [only] giving people data connectivity to part of the network deliberately, I think is a step backwards."

Thus, differential pricing and services like Free Basics create different rules of access for different parts of the network (sites or apps) of this public commons, thereby impacting and influencing both contribution and consumption alike. For example, if someone had access to only Facebook and its partners, it would only contribute content (photos, text, videos) to that platform, instead of having the freedom or ability to explore the rest of the world wide web. This would enrich Facebook and its partners, to the detriment of other players. This means that content that would otherwise also possibly been contributed to the public commons will end up being contributed to Facebook. Instead of bringing more

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<http://www.theguardian.com/technology/2015/may/29/tim-berners-lee-urges-britain-to-fight-snoopers-charter>

contribution to a public commons, FreeBasics and differential pricing actually fragments it.

3. Free Basics leads to a distortion of markets:

A World Bank “World Development” report, on digital dividends, on Price Discrimination, states (Page 227)¹⁰:

“As with other resources where capacity is scarce, as on mobile networks, carriers attempt to use price discrimination to manage traffic. Network providers argue that regulators should grant them more flexibility to manage their traffic flows. But others argue that traffic management should not become an excuse to block certain traffic streams, content, or expression, to give preference to others, or to impede competition. The recent trend to develop services in which some basic content can be accessed free of data charges (such as Facebook’s Free Basics or Internet.org), while other content is subject to data charges, would appear to be the antithesis of net neutrality and a distortion of markets.”

“Access to information is not solely a “developed” or “developing” country preoccupation.

Not only is it a fundamental human right, inherent in Article 19 of the International Covenant on Civil and Political Rights, it is also an essential element in the online innovation ecosystem, and therefore an economic development issue. In whatever form a country would wish to use the internet for development purposes, its public policies should ensure that technical management of internet traffic is not used to suppress a tool of innovation.”

4. FreeBasics performs a gatekeeping role: The fact that FreeBasics performs a gatekeeping role is not immediately evident, but it exists: Sites have to work without javascript and https, are less secure, and have to conform to Facebook’s guidelines in order to be made available to consumers, apart from approval from telecom operator partners.

- **Facebook sets FreeBasics terms:** Websites on FreeBasics have to abide by terms and conditions set by Facebook for FreeBasics. These are technical guidelines, but they include ensuring that any access is delivered to customers via Facebook’s proxy servers, thereby giving it access to usage patterns, and information that the user is accessing even on other websites on FreeBasics.

¹⁰ <https://openknowledge.worldbank.org/bitstream/handle/10986/23347/9781464806711.pdf?sequence=10>

- **FreeBasics users have to abide by Facebook's terms as well:** In additional terms specific to FreeBasics, developers are forced to abide by Facebook's own terms and conditions. Given that Facebook is able to set the terms under which services are allowed on FreeBasics, it performs a gatekeeping function. Services that do not abide by these terms will not be allowed to be a part of FreeBasics.
- **Facebook and the telecom operator both reserve the right to reject services that compete with their own services:** Notwithstanding their claims of being open and transparent, the fact is they have entered into secret agreements and till date have not released them publicly. Their public terms for developers have an application based process in which Facebook acts as a judge on whether to allow the application or web service to be a part of Free Basics.
- **Contradictory position from Facebook regarding permissionless innovation:** FreeBasics terms and conditions specify that it may take 8 to 10 weeks to receive a response from a member of the Internet.org team, indicating that availability of a service to FreeBasics users will be dependent on Facebook's team, and require their permission. However, it has also signed [the Internet Association's amicus curiae brief supporting the FCC](#), stating *"The open architecture of the Internet creates an innovation-without-permission ecosystem. Consumers (and consumers alone) decide the winners and losers on the open Internet."*

5. Users prefer more neutral options: Research¹¹ by Amba Kak for the Oxford Internet Institute shows that:

1. Less experienced, low-income users prefer an open, unlimited Internet with data limits. This preference is strong enough for most to have rejected zero-rated plans in favour of all-access plans – even when the latter are costlier.
2. Other existing innovations in data pricing had been more successful in responding to the needs of these financially constrained users compared to limited access/zero-rated bundles and
3. Those with low clarity on mobile data pricing complained that zero-rated plans would imply heightened risk of unexpected charges, a risk they were unwilling to take.

¹¹ A. Kak, "THE INTERNET UN-BUNDLED: Locating the user's voice in the debate on zero-rating," Oxford University, August 2015 <http://www.savetheinternet.in/files/amba-kak-thesis.pdf>

Given that most telecom operators are supporting zero rating plans and differential pricing, allowing such plans would lead to a reduction in user choice, with the open Internet not available.

At best, they will negatively influence user choice: Users are given a warning, prompting them that if they access websites that are not on FreeBasics, they will be charged money. This forces them to choose between those sites that are and aren't on FreeBasics, potentially benefiting FreeBasics partners if users choose to avoid the expense.

6. Facebook retains the right to change terms and conditions, and run

FreeBasics as a business: Facebook has a history of changing its terms to its benefit. For example, when Facebook first launched its Pages, partners were encouraged to add fans. This helped Facebook increase its user base, and increased engagement on its platform, because partners could reach 100% of their page fans. However, as explained by Social@Oglivy¹² reach was reduced by Facebook¹³, and this is believed to have been followed by an increase in their stock price, because now those who ran pages had to pay to reach their fans. Therefore, we should look at FreeBasics in terms of not what it is today, but in terms of the potential future business model for Facebook.

- Facebook has not ruled out Advertising as a business model. In an AMA (ask me anything) interaction on Reddit India, Facebook's Chris Daniels said¹⁴ that the company could look at advertising as a business model.

7. Once a website is on FreeBasics, it is difficult for them to exit: Services on FreeBasics are unable to leave the platform, owing to the competitive advantage that would give services which choose to remain.¹⁵ Thus, given a Prisoners Dilemma situation, Facebook stands to benefit, having gained access to usage data and patterns of other services. This is evidenced in the Times Group statement when it chose to withdraw some of its services from Internet.org (now FreeBasics): it was forced to keep some services on Internet.org because its competitors were on the

¹² <http://www.slideshare.net/socialogilvy/facebook-zero-white-paper-31934430>

¹³

<http://www.convinceandconvert.com/social-media-tools/this-chart-explains-the-reachpocalypse-and-why-facebook-is-laughing-all-the-way-to-the-bank/>

¹⁴

<http://timesofindia.indiatimes.com/tech/tech-news/Open-to-advertising-for-revenue-Internet-org-VP/articleshow/50336613.cms>

¹⁵

<http://timesofindia.indiatimes.com/tech/tech-news/Times-Group-commits-to-withdraw-from-internet-org-appeals-to-fellow-publishers-to-follow-suit-and-support-net-neutrality/articleshow/46935507.cms>

platform. Once an entity joins FreeBasics, because of high dependency, competitive pressure ensures that others also join. This is similar to when Flipkart joined Airtel Zero: its competitors began examining that option. This means that with all competitors on board, this becomes a necessary partnership (or in case of Airtel Zero, expense) for all startups, and no one except the telecom operator or platform operator benefits.

8. Not an on-ramp to the Internet: Facebook's claim that FreeBasics is an on-ramp to the Internet is false because the service remains available to those users who buy data packs. In addition, it was made available to those users who already had data packs. It is thus creating two tiers for the Internet: one for itself and its partners, and one for everyone else.

9. FreeBasics is about making Facebook free, permanently: to quote Chris Daniels from Facebook, during the Reddit AMA¹⁶:

"We're open to many models for connecting people to the Internet, and all of the ones that you list above may be valid ways to bring more people online. The difference with Free Basics is that we wanted to offer a program that gave people permanent access to a set of free basic services - so that the services were there for them when they were ready to come online - rather than something that was promotional or where they might use their MB allotment, and then the services weren't there when a person needed them."

Please note that Facebook is a part of FreeBasics, and we contend that the idea was to ensure that Facebook is available to those whose data pack runs out. **Facebook, via FreeBasics, remains free to even those users who have existing data packs.**

This gives Facebook a competitive advantage over potential competitors like G+ or Snapchat, or any other new social network or messaging service. Please note that Facebook is losing market to Snapchat in the US¹⁷, and is trying to ensure that it captures the Indian market, and doesn't lose out to potential local competition like Hike Messenger.

¹⁶ https://www.reddit.com/r/india/comments/3ya52q/vp_internetorg/cybr6hr

¹⁷

<https://www.washingtonpost.com/news/the-intersect/wp/2015/02/21/why-teens-are-leaving-facebook-its-meaningless/>

Even Airtel founder Sunil Mittal¹⁸, who we disagree with on differential pricing, had said last year: "He (Zuckerberg) is saying that make Internet.org lite version of Facebook free of data charge, so that people will upgrade. People will come to internet for the first time. The point is that it is self-serving for them"

10. Please disregard any data provided by Facebook:

- This survey¹⁹ was sponsored by Facebook
 - Only 3000 people were surveyed
 - Vague phrases, without adequate information, were used to create support for FreeBasics. For example: "A connected India is a stronger India and connecting more people makes India stronger, more informed, and more competitive in the world" and "the Internet "Is a human right and that Free Basics can help to bring Internet to all of India."
 - The arguments against FreeBasics are not accurately represented, and hence the participants were misled. The arguments against Free Basics as indicated below, are **not representative** of the criticism of FreeBasics:
 - When the Internet is restricted, it means India is weaker. To be strong, the Internet should be free and open to everyone.
 - Free Basics is just a scam by Facebook to try to get more people to use their site. The only reason they care about people without Internet is because they want to make more money.
 - Free Basics creates a world with two types of Internet: one for rich people and one for poor people. It's important that everyone has access to the same Internet.
 - Free Basics has given Reliance a monopoly by partnering with them and no one else.
 - Free Basics does not protect its users, many of whom are new to the Internet and will be exploited by the service.
 - The only source of data for the claim that people convert 50% faster to full data usage is unsubstantiated, since it fails to establish a baseline figure for pace of Internet adoption. Also, it is impossible to verify

¹⁸

<http://www.medianama.com/2015/03/223-sunil-mittal-calls-it-right-what-zuck-is-doing-with-internet-org-isnt-p-hilanthropy/>

¹⁹

<http://www.prnewswire.co.in/news-releases/survey-suggests-widespread-support-for-free-basics-across-india-563227551.html>

whether users “coming online through Free Basics” are new users or simply those buying new connections to just take advantage of it, to surf content for free. It is also unclear if these statistics apply to adoption in India, as research seems to indicate otherwise.

11. Potential for exploitation of customers: To quote Malav Parekh of SNL.com²⁰: “Moreover, if a Free Basics user clicks on a link that directs him to a website that is outside the Internet.org hosted sites, or clicks on pictures or videos, he incurs additional charges. To avoid this, RCom data subscribers can sign up for unlimited 2G data by paying about 37 Indian rupees more each month. In my local area of Ahmedabad, Gujarat, some RCom stores have stopped marketing and promoting the service of late following customer complaints. One RCom store manager said that while Free Basics, or Freenet, was quite popular at launch, the store soon started hearing from angry customers who said the “free” part of the marketing and branding of Free Basics was misleading.”

Telecom in India has a history of wrongful charging, as evidenced in case of Mobile VAS²¹:

The TRAI has received around 12,292 complaints against telecom operators relating to billing tariff, wrong charging and value added services (VAS) from 2010-2014. Then IT and telecom minister Milind Deora said in a written reply to Lok Sabha that a total of 8,756 complaints were received in TRAI during 2010-11, 2011-12 and 2012-13 whereas 3,566 complaints were received for the current year 2013-14 up to February 7, 2014.

The TRAI has recognized some of these issues with differential pricing apps in its consultation paper on Differential Pricing for data services²², where the platform remains free, and the consumer might end of paying high charges if information is not conveyed to consumers in a transparent manner:

Analysis of the terms and conditions of certain offers launched in the market claiming free access to certain services shows that though there is no charge in accessing the platform itself, the moment a consumer clicks on any other link which directs him to a different website or clicks on the pictures or videos,

²⁰ https://www2.snl.com/Cache/snlpdf_39b33c77-8cd7-4d7c-8745-2d5e67c3a130.pdf

²¹

<http://timesofindia.indiatimes.com/tech/tech-news/Bharti-Airtel-leads-telcos-in-user-complaints/articleshow/30290071.cms>

²² <http://traf.gov.in/WriteReaddata/ConsultationPaper/Document/CP-Differential-Pricing-09122015.pdf>

applicable data usage charges is payable. In addition, if the smart phone has some application running in the background utilizing data, charges would be payable irrespective of the fact that the customer is using a free facility at the relevant time. Therefore, there is every chance of such consumers ending up paying for data usage. Since such 'free' facility is availed primarily by non-users of data, they would not have availed any data packs providing lesser effective usage charges. Tariffs for wireless data as per default tariffs are considerably higher (up to even 100 times higher) than the effective tariffs in data packs. The magnitude of price differential is huge and can have dangerous implications for users of such facilities which are claimed to be free, if not conveyed to the consumer transparently and effectively.

12. Not an open platform: selection is being done without a transparent judicial process which cannot be expected of any private operator like Facebook. If it were an open platform, why would Facebook be needed to do the approvals?

13. User data is not secure: HTTPS is allowed only with a "dual certificate", better known as a Man-In-The-Middle attack, where Facebook can read and tamper with Data Passing through the Free Basics platform.

14. Gives Facebook a competitive advantage with more data: Facebook's claim that FreeBasics is non commercial (In an op-ed Facebook founder Mark Zuckerberg says " This isn't about Facebook's commercial interests – there aren't even any ads in the version of Facebook in Free Basics." However, it is important to note that:

- Facebook has said that it can monetize the platform through advertising later.
- This program is not being run by a non-profit or an NGO. It is a venture from a commercial, publicly listed entity, whose fiduciary responsibility is to generate income for its shareholders.
- Networks like Facebook become more valuable with more content, interactions, engagement and usage, and this increases the commercial value for Facebook. User data is the currency of the Internet, and this gives Facebook more user data.

15. Facebook has a history of violating privacy:

- Facebook tracks a significant amount of user information, often without regard for user privacy:
 - In 2010 researchers discover that Facebook is transmitting data about users on 3rd party sites using its like Button. WSJ and NYT reported it

and Facebook said don't worry "it doesn't use data from Like buttons and other widgets to track users or target advertising".

-
- For now they say they don't store personally identifiable information but they don't say will never do it. (ref [ProPublica](#))
 - Facebook retains user information even after accounts are deleted, though it says won't be linked to user identification. However, it continues to retain information about users posted by their friends²³.
 - A Belgian court recently ordered Facebook to stop tracking non-members.²⁴
 - Facebook was once sued by users for using their profiles in advertisements, without their consent²⁵.
 - Facebook had launched Beacon, a tool which tracked logged out users on other websites, without their consent, and published their activity on other websites, without their consent. This was eventually shut down²⁶.
- This becomes even more worrying since Facebook is believed to be one of the companies that gives "backdoor" access to user information to the US National Security Agency, without user consent²⁷. This is potentially a National Security issue.

All of this becomes all the more significant, if Facebook gets a competitive advantage given to it by telecom operators like Reliance Communications and other telecom operators it partners with. With FreeBasics, programs like Free Facebook Fridays²⁸ and Facebook Packs²⁹, it is in a position to get a significant competitive advantage over potential competitors, which don't get such advantages.

Users may mistake the FreeBasics service for the Internet, or worse, remain on the platform that is Zero Rated. To quote a Quartz survey ("Millions of Facebook users have no idea they're using the Internet")³⁰:

²³ <https://www.facebook.com/help/125338004213029>

²⁴

<http://www.theguardian.com/technology/2015/nov/10/belgian-court-orders-facebook-to-stop-tracking-non-members>

²⁵ <http://www.telegraph.co.uk/technology/facebook/9284486/Facebook-settles-lawsuit-with-angry-users.html>

²⁶ http://www.theregister.co.uk/2009/09/23/facebook_beacon_dies/

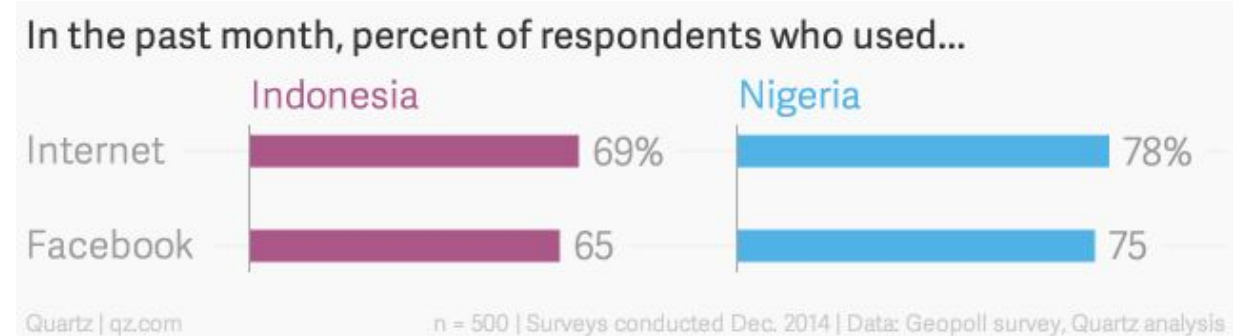
²⁷ <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>

²⁸ <http://www.digit.in/telecom/rcom-launches-free-facebook-fridays-24718.html>

²⁹ <http://www.airtel.in/forme/whats-new/facebook-pack>

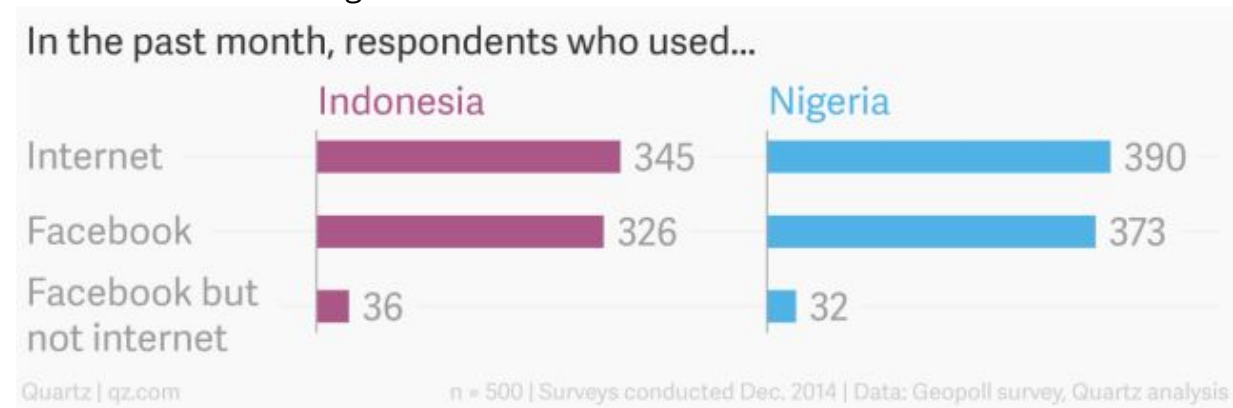
³⁰ <http://qz.com/333313/millions-of-facebook-users-have-no-idea-theyre-using-the-internet/>

Quartz commissioned surveys in Indonesia and Nigeria from Geopoll, a company that contacts respondents across the world using mobile phones. We asked people whether they had used the internet in the prior 30 days. We also asked them if they had used Facebook. Both surveys had 500 respondents each.



It would appear, on the surface, that more people use the Internet than use Facebook, a perfectly sensible outcome.

But a closer look at the data (available in full here) shows that 11% of Indonesians who said they used Facebook also said they did not use the internet. In Nigeria, 9% of Facebook users said they do not use the internet. These are largely young people; the median age of respondents with this combination of answers is 25 in Indonesia and 22 in Nigeria.



It would be silly to extrapolate this to the entire population of Nigeria or Indonesia.

In principle, such an advantage given to any application can create or sustain a monopoly, which won't be either in user or national interest.

16. Facebook ran a highly misleading³¹ campaign for FreeBasics, abusing India's regulatory process:

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<http://thewire.in/2015/12/26/facebook-is-misleading-indians-with-its-full-page-ads-about-free-basics-17971/>

- They got unsuspecting Indian users to send emails to TRAI that do not answer any of the four questions asked by the regulator³².
- They got users in even foreign countries to sign up for the same form, “by mistake”³³.
- There were reports that even inactive accounts (of people who had passed away) were shown as supporting FreeBasics³⁴
- Users who merely scrolled down on the SaveFreeBasics page were shown to others as having supported it³⁵.

While the company spent close to Rs 300 crore on FreeBasics³⁶ across print and television advertising alone, to garner support for a supposedly philanthropic service. While it is well within its rights to do so, it's campaign was seeking support for vague phrases like 'Digital Equality', without explaining the merits of FreeBasics. Facebook's ability to influence the masses must be taken into account, especially given its history of running experiments on its users:

- In 2014, it ran experiments on 689000 users, attempting to influence their mood³⁷.
- This article lists more user experiments conducted by Facebook:
<http://www.forbes.com/sites/kashmirhill/2014/07/10/facebook-experiments-on-users/#2715e4857a0b76fbe4ec3695>

This is also worrying, given the propensity for people to continue using Facebook, despite issues. Another user test conducted by Facebook³⁸ was when it purposely crashed its own application for some users, to check whether they would stop using the application.

17. The DOT Committee³⁹ correctly identified issues with Internet.org (now Free Basics):

³²

<http://indianexpress.com/article/technology/social/facebook-free-basics-campaign-backfires-trai-asks-supporters-for-specific-replies/>

³³

<http://tech.economictimes.indiatimes.com/news/internet/facebook-free-basics-user-base-net-neutrality/50280637>

³⁴ <https://twitter.com/grondmaster/status/677797484781957120>

³⁵ <https://twitter.com/singersuchi/status/677734574319767552>

³⁶

<http://www.livemint.com/Consumer/oMmTd2g4CkwErMNRoedVMJ/Facebook-spends-around-Rs300-crore-on-Free-Basics-ad-campaig.html>

³⁷ <http://www.theguardian.com/technology/2014/jun/29/facebook-users-emotions-news-feeds>

³⁸ <http://bgr.com/2016/01/07/facebook-android-app-crashing-experiments/>

³⁹ http://www.dot.gov.in/sites/default/files/u68/Net_Neutrality_Committee_report.pdf

The committee felt the need to discuss the issue of internet.org to determine whether similar mechanisms disturb net neutrality. It has been criticised for favouring Facebook's own services over its rivals. In India, it provides restricted Internet access to subscribers of one TSP. Until April 2015, Internet.org users could have access for only a few websites, and Facebook acted as the gatekeeper. In May 2015, it announced that the platform would be opened to more.

The committee was conscious that market for content provision indicates that clear market leaders emerge in a short while, and if such market leaders are able to dictate the path to specific content, then the principles of non-discriminatory access from the user viewpoint can be compromised leading to distortions emerging in the content provision market and consequent implications for the larger Internet economy and emergence of new innovations. The committee therefore is of the firm opinion that content and application providers cannot be permitted to act as gatekeepers and use network operations to extract value even if it is for an ostensible public purpose.

Collaborations between TSPs and content providers that enable such gatekeeping role to be played by any entity should be actively discouraged. If need be government and the regulator may step in to restore balance to ensure that the internet continues to remain an open and neutral platform for expression and innovation with no TSP/ISP or for that matter any content or application provider, having the potential or exercising the ability to determine user choice distort consumer markets or significantly controlling preferences based on either market dominance or gatekeeping roles.