

**COMMENTS ON TRAI'S CONSULTATION PAPER ON**  
**DIFFERENTIAL PRICING**

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## **Question 1: Should TSPs be allowed to have differential pricing for data usage for accessing different websites, applications or platforms?**

It is necessary to assess this question by looking at the rationale and reasoning behind Differential Pricing, as well as the purported impact on various stakeholders.

### **Basis for the Demand of Differential Pricing**

This is rooted in the argument that there is limited internet penetration in India, as a result of which, investments are required to be made to establish the infrastructure.<sup>1</sup>

### **Justification of the Differential Pricing Model**

A platform that is stipulated to be non-discriminatory, open and non-exclusive imbibes the essential principles of Net Neutrality. Basic access to healthcare, education and knowledge allows for a broadened outreach,<sup>2</sup> which is crucial in a developing nation like India.

Another justification that arises is that the by proffering tiered services, consumers are enabled to receive higher speeds of data connectivity, especially in intensive services such as that of cloud computing and multimedia streaming.<sup>3</sup>

The explanations that have been offered by Facebook indicate that their platform aims at Zero Rating in the absence of any commercial consideration. This would belie the concern regarding the motivation for a cost free platform to indulge in anticompetitive conduct.<sup>4</sup>

### **Concerns of Net Neutrality**

The Department of Telecommunications Committee in its Report on Net Neutrality has opined that the application providers and the content providers should not be allowed to act as gatekeepers, and that the core principles of Net Neutrality need to be adhered to.<sup>5</sup> The

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<sup>1</sup> *Consultation Paper on Differential Pricing for Data Services*, TELECOM REGULATORY AUTHORITY OF INDIA, 4 (2015).

<sup>2</sup> *Facebook's Response to TRAI Paper: Free Basics Non Exclusive, Open for All*, THE INDIAN EXPRESS (December 25, 2015), (December 10, 2015), available at <http://indianexpress.com/article/technology/tech-news-technology/facebooks-response-to-trai-paper-free-basics-non-exclusive-open-to-all/> (Last visited on 29 December, 2015).

<sup>3</sup> S. Crets, *A Neutral Guide to Net Neutrality*, OCCUPY WALL STREET, available at <http://occupywallstreet.net/story/neutral-guide-net-neutrality> (Last visited on 29 December, 2015); B. Howell, *The Net Neutrality Debate: Why Price Discrimination can be a Good Thing*, available at <http://www.techpolicydaily.com/communications/net-neutrality-debate-price-discrimination/> (Last visited on 29 December, 2015).

<sup>4</sup> N. Rajan, THE INDIAN EXPRESS, available at <http://indianexpress.com/article/technology/tech-news-technology/facebooks-changes-seem-to-align-it-closer-to-net-neutrality-rajeev-chandrasekhar-after-meeting-zuckerberg/> (Last visited on 29 December, 2015).

<sup>5</sup> *Net Neutrality DoT Committee Report*, DEPARTMENT OF TELECOMMUNICATIONS, 15 (2015).

ramifications of the Differential Pricing Model at present, could lead to a paradigm where it is possible that all of the regulatory principles stand violated.

### **Impact on Different Stakeholders**

#### **Consumer Welfare**

In general, the above policy can lead to imposing limits on user choice. A consumer is provided with greater inducement to use a particular platform as opposed to another, thereby curtailing the available options to those only as provided by the TSP. Each TSP will have free reign to prioritise one set of services over others (and thereby include it within their data pack, while excluding a same or similar service), giving consumers incomplete knowledge of the available tools and resources, which are at their disposal. There is a possibility that the impact on the content providers with a niche market may be greater, since they cater to a limited outreach. This is problematic, since the consumers whose needs were earlier catered to by the TSPs, may now be denied the service, or be charged a higher amount for the same, which is an indication of an unfair distinction being drawn.<sup>6</sup>

The psychological impact of providing another layer of confirmation when a consumer attempts to choose a service not included in the pack is that of an added decision to access the open web, which will disincentivise the user from paying for the addition. This can be a violation of controlling the preference of the consumer.

#### **Entrepreneurs and Innovators**

Differential Pricing leads to the restriction or tiering of access to information. When viewing the Internet as a competitive field for innovation, the open access to the same is vital. If the access to open source and tools is restricted, this can stifle the capacity to innovate.<sup>7</sup>

The possibility of competition between different companies can be reduced if the competitors are able to collude with the TSPs. The collusion can result in financially able entities paying the carriers to ensure that the opponent's website loads slowly, or is inaccessible altogether, or the use to it is more cost intensive. This is additionally detrimental from the perspective of promoting anti-competitive acts, with the consumer not having any say in the quality<sup>8</sup> and

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<sup>6</sup> M. Murthy, *Facebook is Misleading Indians With its Full Page Ads About Free Basics*, THE WIRE (December 26, 2015), available at <http://thewire.in/2015/12/26/facebook-is-misleading-indians-with-its-full-page-ads-about-free-basics-17971/>

<sup>7</sup> K. Fiedler, *Net Neutrality*, 10 (EDRI Paper Series No. 8, European Digital Rights).

cost of the service provided. This problem of paid prioritisation is detrimental to entrepreneurs.

These businesses may be affected by the acts of TSPs promoting their own applications and services, and restricting access to their services. With instances of TSPs such as Airtel having launched OTT services in games, music and movies, to add to their content portfolio,<sup>9</sup> this is not an unlikely conception.

### **General Issues Regarding Differential Pricing**

#### **Lack of Autonomy in a Permission Based Internet**

TSPs will have the authority to decide the terms and conditions as well as the services that are to be a part of the data package provided.<sup>10</sup> Further, technical guidelines of these TSPs would have to be conformed to, by the entities which request to be a part of any Zero Rating Model. This can hinder the very nature of the Open Web.

#### **Effect of Shift in Revenue**

The emphasis of the Differential Pricing Model is on providing individuals of a lower economic stratum the opportunity to access at the very least, certain websites, applications and platforms free of cost. This implies that there has been a shift in the source of the revenue, from the consumers, to the content providers being included as well.<sup>11</sup> This would in essence mean that TSPs can be incentivised to allow content of those providers who possess deeper pockets.

#### **Anti-competitive effects**

This can be directed towards the customers or against other TSPs. It can manifest itself in the form of increasing the market entry costs for entities, thereby effectively increasing the entry barriers, using the dominance in the market to abuse the same through service tie ups and predatory pricing.<sup>12</sup> Further, another instance is that of the use of an opaque traffic

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<sup>9</sup> *Bharti Airtel announces the Launch of Wynk Games*, THE INDIAN EXPRESS (December 29, 2015), available at <http://indianexpress.com/article/technology/tech-news-technology/bharti-airtel-announces-launch-of-wynk-games/> (Last visited on 29 December, 2015).

<sup>10</sup> K. Bhasin, *Why we need Net Neutrality*, THE INDIAN EXPRESS (April 18, 2015), available at <http://indianexpress.com/article/opinion/columns/why-we-need-net-neutrality/99/> (Last visited on 28 December, 2015).

<sup>11</sup> N. Economides and J. Tag, *Network Neutrality on the Internet: a Two Sided Market Analysis*, 24(1) INFORMATION ECONOMICS AND POLICY 91, 92 (2012).

<sup>12</sup> B. Mohanty, *Net Neutrality and Antitrust: Options for India*, 99(1) OBSERVER RESEARCH FOUNDATION ISSUE BRIEF 2 (2015).

management policy, which may throttle speeds of certain services and provide high speed for others.

### Privacy Concerns

The mode of network management that can be employed by the TSPs can affect privacy of the consumers. Deep Packet Inspection allows the TSP to analyse all of the user data at run time.<sup>13</sup> This has already become a rising concern, with the information provided by the consumers to applications such as Free Basics raises apprehensions regarding the usage of the same.

### Distortion in the Market

There exists the danger of identity based discrimination that can arise. This can be seen in the form of one particular search engine being prioritised in delivering its search results to the consumers. This can render the search engine market skewed.<sup>14</sup>

### **Allaying Concerns Raised**

In order to assuage the clamour that has arisen with respect to the allegations of gatekeeping, Facebook has stated that it would permit a third party audit to assess the reasons behind the acceptance and rejection of different applications. It further indicated that it had not removed any content provider as long as it complied with the technical guidelines.<sup>15</sup>

### **An International Perspective on Differential Pricing ban**

Zero Rating, as a model has been banned in countries such as Norway, Chile, Netherlands, Iceland, Finland, Latvia, Japan, Estonia and Malta. Salient instances include that of Vodaphone and KPN being fined by the Dutch telecommunications regulator for the internet services which were zero rated, and of the Slovenian regulator fining the Telekom Slovenia and Telekom Austria for zero rating their cloud and music applications. However, several other countries, such as Israel, Belgium, South Korea, EU and France have not imposed sanctions on Zero Rating yet, with several questions regarding its impact on Net Neutrality

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<sup>13</sup> *Net Neutrality and Privacy*, THE CENTRE FOR INTERNET AND SOCIETY, available at <http://cis-india.org/internet-governance/blog/net-neutrality-and-privacy> (Last visited on 29 December, 2015).

<sup>14</sup> H.K. Cheng *et al*, THE DEBATE ON NET NEUTRALITY: A POLICY PERSPECTIVE 3, available at <http://ssrn.com/abstract=959944> (2011).

<sup>15</sup> *Ready for Free Basics scrutiny, open to adding Twitter and Google: Facebook*, THE INDIAN EXPRESS (29 December, 2015), available at <http://indianexpress.com/article/technology/tech-news-technology/ready-for-free-basics-scrutiny-open-to-adding-twitter-and-google-facebook/> (Last visited on 29 December, 2015).

being posed.<sup>16</sup> It is clear that the Differential Pricing paradigm is being contested throughout the world, with proponents and nay sayers debating the issues that have been raised above.

### **Unanswered Question Regarding Differential Pricing**

The crux of the debate remains centred on the idea of access to the internet, and if limiting the services can be justified by a broader outreach. Thus, on the basis of the above arguments, it becomes evident that though on paper, there may be reasons for the inception of a Differential Pricing regime, there remain several valid concerns that remain unanswered by the Zero Rating Platforms at present, making it deleterious to adopt this regime at such a nascent stage.

**Question 2: If differential pricing for data usage is permitted, what measures should be adopted to ensure that the principles of non-discrimination, transparency, affordable internet access, competition and market entry and innovation are addressed?**

Differential pricing, well known as “price differentiation” in Economics, is a widely accepted and standard practice of charging different consumers different prices for the same product. While the practice of price discrimination raises few objections and is considered acceptable across a number of industries (the most notable being the airlines and hotel industry), the idea of imposition of price discrimination insofar as the world of internet is concerned, raises eyebrows and is perceived as antithetical to the fundamental rationale of openness and equality of internet. One of the reasons which have most substantially contributed to the explosive and exponential growth of Internet is the fundamental principle which has been equal treatment of all packets of data.<sup>17</sup>

However the biggest concern with respect to the proposed differential price policy for data usage is the power of telecom operators to select the kind, quality and speed of the data to be provided to consumers. This is a breach of consumers’ fundamental right to choose provided by the Constitution itself. Hence there is a need to address the issue of differential pricing with caution and to prevent the telecom operators from being the gatekeepers of content on the internet. It is further submitted that if this gatekeeping is not prevented then non-

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<sup>16</sup> R. Guha and G. Aulakh, *Zero Rating: What Countries are Doing About it*, THE TIMES OF INDIA (April 21, 2015), available at <http://timesofindia.indiatimes.com/tech/tech-news/Zero-rating-What-are-countries-doing-about-it/articleshow/47001571.cms> (Last visited on 29 December, 2015).

<sup>17</sup> This implies that no discrimination between the price of transmitting packets based on the identity of either the transmitter or the identity of the receiver, based on the application, or the type of content the packet contains.

discrimination, transparency, affordable internet access, competition and market would not be achieved.

The main argument for implementing differential pricing is to make internet more accessible especially to the poor. *First*, it is strongly suggested not to implement the differential price policy as there are other ways available to make the internet more accessible and affordable. *Secondly* it is submitted that the measure of transparency would not be effective in the present scenario since transparency can only help in revealing the true picture of game in order to develop an action plan. Hence transparency is only a means to solution rather than the solution itself. In other words transparency is necessary but not sufficient. Also transparency would be of little help in affecting the discretionary power of the operators in deciding the content or in availing entry to the small start-ups. *Finally* it is submitted that differential pricing may lead to vague non-discrimination standards leaving small companies with very less bargaining power. Further it would be very cumbersome to assess the cases singularly.

In spite of the aforesaid arguments, if the differential pricing is permitted then the following measures can be adopted in order to make the problematic situation less problematic-

- The easiest way that the Telecom Service Providers can execute price discrimination is by evolving a form of reverse secondary price discrimination wherein they charge lower prices from the end user for lesser usage and progressively higher charges for enormous data consumption. This ensures that services such as VoIP, video streaming which consume huge amount of data are priced higher as compared to services requiring nominal data consumption such as text messages. This technique can still be considered neutral in some sense that differential rates are being applied based on quantity and not on type of service. Another proxy for price differentiation can be speed which is highly valued by consumers. High speed data services ensure that consumer can use a wide array of application. With the development of advanced applications, the demand for faster internet connection has increased. Speed is a metric that consumers that allowed them to effectively sort themselves since slow tiers reduced the chance of someone being priced out of connectivity altogether and faster tiers gave high-value users a reason to pay more.<sup>18</sup>

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<sup>18</sup> Diana Carew, *Zero-Rating: Kick-Starting Internet Ecosystems in Developing Countries*, available at [http://www.progressivepolicy.org/wp-content/uploads/2015/03/2015.03-Carew\\_Zero-Rating\\_Kick-Starting-Internet-Ecosystems-in-Developing-Countries.pdf](http://www.progressivepolicy.org/wp-content/uploads/2015/03/2015.03-Carew_Zero-Rating_Kick-Starting-Internet-Ecosystems-in-Developing-Countries.pdf).

- Additionally, the differential pricing of data services should be permitted only after certain riders are attached to it by the regulating authorities. The regulator must explicitly prohibit
  - a) zero-rating in exchange for edge-provider payment: TSPs should be prohibited from charging application providers for any form of preferential treatment, including zero-rating. Fees in exchange for zero-rating pose the same threat to innovation and free speech as fees in exchange for technical forms of preferential treatment. As the record shows, start-ups, small businesses and low-cost speakers will often be unable to pay to be in the fast lane; they won't be able to pay for zero-rating, either and thus, losing out on a chance to compete.<sup>19</sup> The regulator should categorically ban all forms of zero-rating for a fee, regardless of how they are being offered.
  - b) Ban zero-rating of selected applications within a class of similar applications without charging edge providers: ISPs should be prohibited from zero-rating selected applications within a class of similar applications without charging the providers of the zero-rated application. This rule will prohibit the TSPs from zero rating Youtube and not Vimeo, for an instance. Like technical discrimination that singles out specific applications for special treatment, zero-rating certain applications artificially makes these applications more attractive than others.<sup>20</sup> Just like technical discrimination, zero-rating selected applications, but not other, competing applications allows ISPs to tilt the market in favor of specific applications and to “pick winners and losers” on the Internet.<sup>21</sup>
- Small start-ups can be allotted some specified deadline before which they have to attain certain level of popularity (to be determined by a panel of specialists). During this entire period the fee charged from them would be minimal and if they are successful in attaining the given level of popularity then the government would mandatorily provide them subsidy and other financial/non financial support to help them flourish. And if the given level is not attained then the start-up can either exit (without any kind of charge/fine) or can continue after paying the specified fee (to be decided by the panel of specialists after considering various factors such as future

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<sup>19</sup> Barbara van Schewick, Analysis of Proposed Network Neutrality Rules, *available at* <https://cyberlaw.stanford.edu/downloads/vanSchewick2015AnalysisofProposedNetworkNeutralityRules.pdf>.

<sup>20</sup> *Supra* note 6.

<sup>21</sup> *Ibid.*



scope/possibility, market condition, need of the consumer etc.). The government can draft a policy in the light of the idea, however, with great care and caution and after taking into account all the factors involved in it. The government can even create a fund for it. Moreover the telecom operators can be asked to provide certain percentage of their profits for the fund, as has been done under Corporate Social Responsibility. Hence through this idea the start-ups would have a free entry in the market and the consumer would be able to enjoy its services without paying any additional charges at least for a certain period of time.

- Another tool to undermine the burden of additional cost because of differential pricing is the measure of group discounts. Instead of a single individual paying the bill, there can be a collective action of a group negotiating for group discounts. The bigger the group, the higher the bargaining power and better the discounts. The telecom operators may provide packages of unlimited services at certain price to be enjoyed by the group. This group can even be a locality or a neighbourhood. Such data schemes to be designed in the light of principle of transparency.
- An impartial regulatory body can be set up to prevent the operators from becoming gatekeepers. All the telecom authorities would be required to submit a quarterly report of their transactions to this body. Such body may seek clarification or explanation regarding the operator/service provider's decision in case any doubt arises on their intention. This body would be covered under the Right to Information Act.
- It goes without mentioning the measures of (a) prescribing data limit and (b) reimbursement as suggested in the consultation paper can also be very effective in tackling the problem.

Thus, if price discrimination is permitted, the regulator has to monitor that the market performs in a manner which is conducive to all the parties having a stake, be the consumer or a new entrant to a market. With adequate regulation, there would be no substantial conflict between differential treatment and net neutrality.

**Q. 3 Are there alternative methods/technologies/business models, other than differentiated tariff plans, available to achieve the objective of providing free internet access to the consumers? If yes, please suggest/describe these methods/technologies/business models. Also, describe the potential benefits and disadvantages associated with such methods/technologies/business models?**

### **Providing free data for limited periods of time**

A viable alternative is for ISPs to provide data packs for a certain limited time every day, thus incentivizing users to purchase data packs for longer time durations. This is similar to the way free WiFi is offered in airports for limited amounts of time, after which WiFi services have to be purchased. In India, Aircel has begun providing full internet access for free at 64 kbps download speed for the first three months. Schemes such as Gigato offer data for free for surfing some sites. The Mozilla Foundation runs two programmes for free and neutral Internet access.

### **Providing a certain fixed quantity of free data**

ISPs can choose to provide a certain quantity (eg. 50 MB) of free 2G data free per day. While this will lead to increased traffic for 2G services (hence leading to slower internet), it can actually prove to be an incentive to consumers to upgrade to faster internet services, such as 3G or 4G. In Bangladesh, Mozilla (in partnership with Telenor) allows users to receive 20 MB of data usage for free each day, in exchange for viewing an advertisement. In Africa, consumers can buy \$40 Firefox OS smartphones (in partnership with Orange) that come packaged with 6 months of free voice, text, and up to 500 MB per month of data. According to Mozilla, scaling up arrangements like these could represent a long-term solution to the key underlying problems of digital inclusion and equality.

### **Government Initiatives like NOFN**

The Government intends to construct a National Optical Fiber Network to provide internet access to Gram Panchayats in India. This is efficient as it utilizes the existing fiber optic utilities of BSNL, RailTel and Power GridAn. initiative like this will provide internet access to remote areas of the country.

### **Offering Free Data as Reward**

Free data can be offered in exchange for watching advertisements. Mozilla has been exploring this model in a partnership with Grameenphone (owned by Telenor) in Bangladesh, where users can receive 20MB of unrestricted data per day after watching a short ad in the phone's marketplace.

### **Offering free data by an ISP alongwith purchase of associated products**

ISPs can offer free data for, say, 6 months on purchase of a certain company's handset. Orange and Mozilla are experimenting with this sort of model in multiple African and Middle

Eastern markets, where users purchasing a \$40 (USD) Klif phone receive unlimited talk, text, and 500 MB a month for 6 months. The Orange users also get 500 MB of free access on buying a \$37 handset in Africa.

### **CSR initiatives by Companies**

A viable alternative is linked to CSR norms in the Companies Act, 2013, where some portion of a company's earnings have to be earmarked for this purpose. The corporates could be encouraged to provide free and open internet services to employees as part of their CSR.

### **Subsidized Plans for Certain Groups**

Providers could offer subsidized plans that are only available to low income customers. For example, most German providers offer mobile data plans for students that include more monthly data than regular plans at lower costs. These alternatives would come at no extra cost to providers, but they would provide enormous benefit to low-income communities.

### **Q4. Is there any other issue that should be considered in the present consultation on differential pricing for data services?**

Several telecom operators have launched products and services that violate net neutrality, undermining the consultation process. TRAI should put a ban on such services till a decision is arrived at. TRAI should work with Government of India towards creating comprehensive provisions on net neutrality in India. The submissions on Questions 14 of the Consultation of OTT services (April) shall also be considered for the consultation on Pricing Discrimination and further a time frame must be set within which the consultations be concluded and some action be taken.