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Sorry Mark, no “Free Basics” here - says India

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The Telecom Regulatory Authority of India (“TRAI”), the Indian regulator for telecom services has on February 8, 2016 effectively said ‘NO’ to operation of “Free Basics” and similar platforms in India. TRAI has proposed the soon to be notified “Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016” (“**the Regulations**”) along with an Explanatory Memorandum, which without naming, prohibit operation in India of platforms such as “Free Basics”, that may interfere with the principles of “net neutrality”.

“Free Basics”, a platform by Facebook, advocated fervently by its CEO, Mark Zuckerberg has faced vehement opposition by net neutrality supporters in India. The social media backlash earlier forced an Indian e-tailing giant Flipkart, to pull out of its participation in “Airtel Zero”, a platform by Airtel, the leading telecom service provider (“**TSP**”) in India. Zuckerberg also met the Indian Prime Minister in India and abroad, and conducted a Townhall meeting at Facebook Headquarters in San Jose in September 2015. No, there is no official confirmation that they ever discussed “Free Basics”!

Both “Free Basics” and “Airtel Zero” proposed to offer free data to consumers/internet users for accessing partner services and websites. Net neutrality advocates contended that such a platform would obviously have a backend commercial arrangement between the TSP(s) and their partner businesses. This would not only limit consumer choices, but would also be fundamentally against the principles of “net neutrality”.

Facebook claims to provide “Free Basics” in [38 countries](#) across the world, helping in the areas of health, education, jobs and communication. These 38 countries are spread across three continents (12 from Asia, 20 from Africa and 6 from South America) including countries such as Benin, Cape Verde, Gabon, Guinea-Bissau, Malawi, Mauritania, Bangladesh, Cambodia, Iraq, Timor-Leste, Vanuatu, Bolivia, Guatemala in addition to Mexico, South Africa, Pakistan and Peru. There are many developed nations in Europe and North America where internet is not free, and yet platforms such as “Free Basics” are not launched in these jurisdictions.

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Net Neutrality:

While various definitions prevail, “net neutrality” broadly implies that a consumer/internet user shall be provided equal and impartial access to all content on the internet, which is not illegal. The internet service provider can and shall not block any legal content or give preference inter se content from different sources/businesses (say, preference between similar services or products offered by different businesses).

How a hundred flowers blossomed!

In the wake of a raging debate over net neutrality, TRAI in the month of December 2015 released a consultation paper, and invited comments from stakeholders on questions (summarized below) related to differential pricing/tariff for data services:

- A. Whether TSPs should be allowed to have differential pricing for data usage for accessing different websites, applications or platforms? If yes, then 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?
- B. Suggest alternative methods/technologies/business models, if any, other than differentiated tariff plans, available to achieve the objective of providing free internet access to the consumers.

A huge number of responses were received by TRAI following the consultation paper. The millions of standard template responses prompted and pushed through social media not only left TRAI overwhelmed but also compelled TRAI to ask the stakeholders to instead intelligently respond to the specific questions:

“TRAI has so far received more than 20 Lakhs (2 million) responses from the stakeholders, out of which around 5.44 lakh (0.544 million) were received through email with the domain name “facebookmail.com”. Similarly, we have also received around 10.3 lakh (1.03 million) responses through supportfreebasics.in.....In both the above set of responses, the respondents have not given their comments on the specific questions raised in the Consultation Paper but have only submitted their response in a fixed template.” [Refer: TRAI Information Note [here](#).]

Reportedly thereafter, Facebook alleged that TRAI blocked the email domain supportfreebasics.in. Facebook also contended that it has sent 11 million responses, as opposed to the receipt of 1.03 million responses acknowledged by TRAI.

Interestingly, while opposition from internet users and consumers forced Flipkart to withdraw its participation in Airtel Zero, Facebook garnered support from millions of users for “Free Basics”. Broadly the same set of people, who enjoy today’s net neutral internet, ended up giving two contradictory responses within a short time interval.

The fundamental question therefore is whether the public opinions framed over social media are well informed and well thought out, or are based on the innocent zest of common users to support any initiative that claims to be in social good, without a deeper consideration of all merits and demerits.

Finally, after a round of comments and counter comments, open house discussion that followed and a final opportunity to the stakeholders to provide additional comments, TRAI brought out the Regulations. The Explanatory Memorandum states that: "Majority of individual comments received did not address the specific questions that were raised in the consultation paper. Other responses received included 15 service providers, 8 service provider associations and 42 organizations/institutions".

Below is a summary of some of the main arguments and counter on the issues, and TRAI's views:

Arguments in support of differential data tariff:

Differential tariffs: would promote internet access and make it more affordable;
are also allowed in other industries;
would promote competition;
would promote consumer welfare;
would help garner investments to build internet infrastructure.

Arguments against differential data tariff:

Differential tariffs: violate basic principles of net neutrality, creating a "walled off" internet;
classify subscribers based on the content accessed;
would be against the principle of non-discriminatory tariff;
would be detrimental to small content providers and create entry barriers;
would lead to larger players stifling innovation and competition;
TSPs may also start promoting their own apps and service platforms;
would be against the freedom of speech, expression and media pluralism.

TRAI's View:

- "Price differentiation" is different from "differential data pricing";
- Concerning TSPs, the "service" is provision of "data connection" not "specific content";
- Internet users are also content producers (like on social media), and regularly switch places;
- TSPs are only one link in the chain enabling access by users of the content on the internet;
- TSPs' tweaking the basic architecture of internet would compromise the openness of internet;
- Differential data tariff would be against the basic architecture of the internet;

- If users don't have financial resources, how will they migrate to full internet services?
- "Affordable access" to restricted internet is different from "affordability" of full internet access.
- May lead to significant entry barriers and harm competition and innovation;
- Restricted access to certain content may in fact add to "information asymmetry" and disable users from making informed choices;
- "Information asymmetry" problem may also not be fully addressed by disclosures, and the recipients may not understand it;

TRAI observed that the TSP license also requires TSPs to provide access to information on internet without restrictions. TRAI noted that even Indian laws are against provision of selective contents to internet users. In the case of *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* the Hon'ble Supreme Court of India observed that allowing citizens the benefit of plurality of views and a range of options on all public issues is an essential component of the right to free speech. TRAI observed that as held by the Supreme Court in the case of *Indian Express Newspapers (Bombay) Pvt. Ltd. V. Union of India*, a right to express oneself along with the right to receive information are critical elements of the right of free speech, which directly translates into free use of internet.

The Regulations:

On 8th February, 2016, TRAI issued the Regulations, specifying that:

1. TSPs shall not offer or charge discriminatory tariffs for data services on the basis of content; and
2. TSPs shall not 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 (except for CUG networks, subject to conditions);

Violation of the Regulations can attract penalty and direction to the TSP to discontinue such services. Disobedience of such direction may also cost the TSP its license.

The Regulations indicate that the Government is open to review its stance in two years. Interestingly, the Regulations are the first in India to define "internet", taking inspiration from the definition adopted by the Federal Networking Council of the United States of America in 1995.

The Regulations are available [here](#).

Conclusion:

The Explanatory Memorandum has detailed the reasons behind the Regulations, both from Indian and international perspectives. TRAI has also in a subtle and undeterred way preferred “quality” of responses over “quantity” of responses, in millions, generated through Facebook/other support groups. The Regulations, for now, make it unnecessary to debate whether differential data tariff would also have been anti-competitive under Indian laws.

The Regulations have the potential of influencing decisions by other governments dealing with similar issues. While “Free Basics” and similar platforms can expect a review in some countries already enrolled, now enrolments would certainly be more difficult.

Net neutrality advocates, meanwhile, are raising a toast to TRAI.

Feedback

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