Escaping walled gardens: is the grass greener on the other side?

Last week, India's Telecom Regulatory Authority (TRAI) issued regulations that prohibit service providers from charging discriminatory tariffs for online data services. While the regulations have been hailed as a victory for net neutrality, some have also argued that TRAI's steps signify a lamentable loss for those not connected to the Internet. LSE alumna Anri van der Spuy provides a brief overview of some of the arguments involved and assesses how it might impact other developing countries in their attempts to improve (meaningful) Internet access.

On 8 February, India's Telecom Regulatory Authority (TRAI) issued the *Prohibition of Discriminatory Tariffs for Data Services Regulations 2016* that, broadly speaking and as per its press release, intends to make data tariffs for access to the Internet in the country 'content agnostic'. Telecommunications service providers are now prohibited from offering different tariffs based on the content, service, application or other data that a user is accessing or transmitting online (unless emergency services or 'times of public emergency' are concerned). As TRAI explains in an explanatory memorandum:

'a consumer cannot be charged differently based on whether she is browsing social media site A or B, or on whether she is watching streaming videos or shopping on the internet.'

TRAI's regulations follow months of heated debate and lobbying in India that, while of broader application, have become somewhat synonymous with Facebook's controversial Free Basics as the apparent antagonist.

The Free Basics argument: limited Internet is better than none

Free Basics forms part of Facebook's purported desire to connect the unconnected (or, as cynics would say, to get a stronghold in as yet unsaturated markets) under the auspices of its Internet.org programme. In partnership with a local mobile operator, Free Basics provides users with access to services like Facebook and its Messenger service, and to country-specific websites/applications related to finance, health, news and weather. As a zero-rated service, Free Basics requires Facebook's mobile operator partner(s) in the country concerned to provide free access to Facebook-vetted 'basic' services by exempting them from the charged-for data caps. As of 16 February, the product is reportedly already available in 37 countries in Africa, Latin America and Asia Pacific.

The argument in favour of zero-rated services is simple: it brings more people online, and surely even limited Internet access is better than none? These practices, proponents argue, are neither harmful to consumers nor exclusive of other content providers: according to Facebook's own researchers, 50% of people who use Free Basics will start paying for data within 30 days of going online for the first time (questions around where the target audience, which is generally poor, gets the funding for technology and these data upgrades remain unaddressed).

While Free Basics has clear commercial interests at stake for the company, Facebook somewhat unfortunately clad its product in a cloak of altruism. As its CEO Mark Zuckerberg wrote in an opinion piece in the *Times of India* in December:

"This isn't about Facebook's commercial interests – there aren't even any ads in the version of Facebook in Free Basics."

Beyond ostensible altruism, other arguments supporting differential tariff treatment include the notion that forms of differentiation are common in various industries (you can choose to hail an UberX or UberBLACK, for example); that it helps to spur innovation and competition (enabling non-dominant operators to compete better by differentiating their services); and that it could help encourage broader investment in infrastructure and networks (an important drawing card for developing nations).

The net neutrality argument

Despite this, net neutrality pundits (and a vocal portion of the Indian public) feel that zero-rating and differential pricing harm the net neutrality maxim that all are and should remain equal on the Internet (see, for instance, Save the Internet and its popular videos produced in response to TRAI's various consultations).

Initiatives like Free Basics, they argue, are discriminatory, non-transparent, anti-competitive, and deter innovation; creating, as TRAI puts it, an 'unequal playing field among content providers and service providers'. From a consumer's perspective, such services limit users' freedom of expression, introduce privacy concerns, and also risk restraining users to a 'walled garden' that restricts user choice rather paternalistically.

More broadly speaking, they also point out that arguments like 'limited Internet is better than none' neglect the broader issue of how zero-rating will affect our ability to enable meaningful Internet access. As TRAI also points out in its explanatory memorandum, allowing such services may enable service providers to define the nature of users' Internet experience:

'This can be 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.'

TRAI and beyond: finding a middle ground

Among other critiques and commentaries (of which there have been plenty in the past week), some have lauded TRAI's regulations for safeguarding the Internet as being not merely a market good, but first and foremost an "egalitarian social artifact, providing a social and economic level playing field for all". Others have criticised the regulations for being an overreaction that not only signals technological imperialism but also fails India's poor.

India is not the first country to take a tough stance where net neutrality is concerned. In the Netherlands last month, Vodafone was fined for violating the country's Net Neutrality Guidelines by allowing customers zero-rated access to HBO. In general, however, most regulators seem to prefer *ex post* regulation as opposed to TRAI's *ex ante* regulatory approach. The European Union (EU), for instance, has regulated certain aspects of net neutrality whilst not directly addressing zero-rating. In the US, the Federal Communications Commission (FCC)'s open Internet rules similarly prohibit practices like throttling and blocking, but it assumes a case-by-case approach for issues like zero-rating.

TRAI's approach no doubt provides more certainty and is far less cumbersome than case-by-case adjudication, which is inaccessible to many due to the (legal) costs and time delays typical of an adjudication procedure. But it also risks ruining companies' appetites for devising innovative ways to help to get more people online.

Considering the fact that there is no evidence of harm caused by zero-rated practices in India (TRAI's explanatory memorandum only mentions the possibility of future harm) one has to wonder whether this is a proportional regulatory response. To this extent, as Research ICT Africa's Alison Gillwald and Ariel Futter argue in a recent paper on zero-rating in South Africa, more evidence is needed to determine the impact and potential harm of differential pricing on Internet Service Providers (ISPs) and mobile operators, users, and content providers.

Lessons for developing countries

India's approach is important not only because of how it will affect its local unconnected population, but also for the lessons other developing countries, companies and governments might glean from it.

This is especially relevant at a time when there appears to be a heightened interest in issues like differential pricing and over-the-top (OTT) services, as events in Africa have already illustrated in this young year. In Morocco, the National Agency for Telecommunications Regulation admitted to blocking applications like Viber and Whatsapp in January; while in South Africa a government parliamentary meeting heard submissions from various stakeholders on the potential regulation of OTT services after complaints about Whatsapp from some (dominant) telecoms operators in the country. (It is noteworthy that only the established operators in South Africa called for regulation, while a newer market entrant, Cell C, which is also the only operator in the country to provide zero-rated access to Facebook, is opposed to such measures.)

While questions about net neutrality in general and differential pricing and zero-rating in particular are bound to become increasingly important in countries that are grappling with the challenge of improving Internet access, regulators in these countries would do well to learn from India's conundrum. TRAI's approach is perhaps laudable for aiming to provide clarity and certainty whilst protecting its citizens from potential walled gardens (and standing up to the strong-arm 'altruistic' framing approaches donned by the likes of Facebook), but it may also end up letting down the very citizens and other stakeholders it is meaning to protect.

A safer approach, at least until there is more evidence of the impact and potential harm such practices will have on users, content providers, and ISPs and mobile operators respectively, would be for countries to adapt a more flexible, case-by-case approach. Even though such an approach would mean more hard work for regulators and perhaps less short-term certainty, it would be more conducive to enabling stakeholders to experiment and find innovative solutions to promoting meaningful Internet access. It is an uncertain world after all.

This blog gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

February 22nd, 2016 | Featured, Net Neutrality | 1 Comment