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Zero-Rating: Digital Rights Challenges in the Developing World

Lessons for international decision-makers and development cooperation

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Zero-Rating: Digital Rights Challenges in the Developing World - Lessons for international decision-makers and development cooperation[1]

When Mark Zuckerberg's Facebook announced in 2013 that millions of smartphone users in the developing world would have free access to the mobile Internet, it was a headline-grabbing event. The service is a simple one. Facebook has arranged with a number of mobile phone companies to offer a limited set of websites and services (including Facebook, of course) for free to all subscribers. This type of service -- known as "zero-rating" because the data usage over the mobile network is billed to the content provider and incurs 'zero' charges to the end-user -- was not the first of its kind, but it was by far the most ambitious in scope.

Facebook's Internet.org (later renamed Free Basics in 2015) looked to some like a godsend and to others like a disaster. On the one hand, it is free access to a few dozen websites that people did not have before. In many developing countries, bridging the digital divide is a monumental challenge and any progress is a step in the right direction. On the other hand, Free Basics is not full Internet access. The company, not the user, decides what is accessible on the service, and it carries a clear commercial benefit for Facebook of expanding its user-base in developing markets. Moreover, Free Basics is a form of price discrimination in the Internet marketplace (services offered for free versus those that require payment). It has the potential to set a potent precedent for how control is exercised over content flowing over the Internet, in many cases for people who have never experienced the full Internet prior to sampling this service.[2]

A heated debate emerged to challenge Facebook -- particularly in India[3] -- raising critical questions about the future of the Internet and the protection of digital rights. Facebook shifted quickly to adjust the service to respond to critique -- not least by rebranding it as Free Basics to differentiate it from Internet access. The company also stressed the argument that a country that lacks significant Internet penetration in the population can benefit from a zero-rated solution that provides some access. Meanwhile, a grassroots campaign in India pressured government regulators to block Free Basics and outlaw zero-rating. In early February 2016, the Indian regulator laid down a surprise ruling that sided with the opponents and banned Free Basics and all other

1 We owe a big thank you to Mignon Hardie, Juan Carlos Lara, Renata Avila, Nanjira Sambuli, Thomas Lohninger and the wonderful snv team for all their input and support.

2 Interestingly, even the providing access to first-time users argument can and has been challenged by data-driven analyses on the actual figures of how many new users were generated via Free Basics, cf. https://medium.com/@sumanthr/a-data-driven-argument-on-why-marc-andreessen-is-wrong-about-free-basics-c472184b9682#.vOnpzgyhi

3 For more insights into the campaign and counterstrategies employed by Facebook, read e.g. http://indianexpress.com/article/technology/tech-news-technology/facebook-free-basics-ban-net-neutrality-all-you-need-to-know/

zero-rated services from the market.[4]

The global debate over zero-rating and digital rights does not end with the Indian decision. The problem is a complex and challenging one, and there are good arguments on both sides. At stake is more than just the question of whether Zuckerberg's project will succeed or not. This is much bigger than Facebook.

At the core, it is about the question of who decides what "Internet access" means and whether any limitations imposed on the free and open Internet are violations of pro-competitive market regulations like network neutrality. More fundamentally, it requires a critical inquiry in the digital rights of citizens, and how to evaluate costs and benefits of zero-rating against the standard of protecting rights and promoting opportunities for the world's next billion Internet users in the developing world.

Understanding Zero-Rating as a Development Issue

For policymakers and practitioners in the development community (in both the Global North and South) looking for a rights-based framework to unite business interests, governments, and citizens to bridge the digital divide, the conclusion of the Indian debate does not mark the end of the problem. It is too easy to close the book on the fairy tale ending of citizens victorious against a global corporation in India. The reality of the situation is more complex. In addition, it seems likely that while some governments may follow India's lead, others will not. A sustainable solution that can be applied as a global standard will require much more work and collaborative deliberation among stakeholders.

In this policy impulse, we offer an analysis of this debate from a development policy perspective that engages its complexity and highlights the digital rights problems that lie in the centre of the controversy. We explain the logic behind the economics of zero-rating and why they raise serious concerns about digital rights. We offer examples of zero-rated services that offer great appeal for development work, and we demonstrate how zero-rating can also be applied in ways that are profoundly troubling. Finally, we conclude with a proposal for how stakeholders can work together to develop a policy on zero-rating that is centered on the rights of people rather than a particular business model.

Background

Facebook's Free Basics became the gravitational centre of the global debate over zero-rating for two reasons: 1) because it is the most expansive application of zero-

4 Telecom Regulatory Authority of India ruling, cf. http://inbministry.blogspot.fr/2016/02/telecom-regulatory-authority-of-india.html

rating ever attempted; and 2) because it explicitly linked a commercial enterprise in zero-rating with the noble goals of economic development and social mobility. However, the practice of zero-rating has been around for a few years, and it has been hotly debated since it first appeared in the market. It is a simple idea. Mobile phone companies make deals with Internet companies so that their online content and services will not count on a customer's mobile data bill (or will not count against a monthly data cap). It has a natural appeal to consumers because it is Internet content for free. In developed markets, zero-rated products (e.g. Spotify) were offered as perks to lure subscribers from one network operator to another. In most cases the zero-rated service was offered on top of an existing mobile data service that provided full Internet access, the only benefit being that the zero-rated service did not count against a monthly data cap. In the developing world, the idea arose to offer zero-rated content as a stand-alone option for subscribers that had no other access to the Internet on the device.

Zero-rated public interest products – what's in it for development?

Set aside Facebook for the moment and consider the case of FunDza and its use of zero-rating to raise literacy rates in South Africa. Few would disagree that literacy is essential for personal and human development. It enhances critical and creative thinking; it helps people to experience new perspectives on life; and it is a primary basis for knowledge exchange. Here, we observe a zero-rating scheme developed purely for public interest purposes.

Based on these beliefs, the South African non-profit FunDza Literacy Trust makes books and reading material available to South African youth. Founded in 2011, it is their vision to create an environment that encourages young people in Africa to connect and learn. In a reality where 51% of the population in Africa does not have access to books in their homes, it takes significant effort to change the environment on the demand side in order to increase literacy levels and educational achievements. To spark interest, FunDza not only distributes physical books to beneficiary groups in under-resourced areas countrywide, they also utilise mobile phones to share information as well as reading impressions. In line with their main intention to provide access to information and encouraging people to read, it is a logical choice to offer their services for free whenever and wherever possible.

FunDza currently engages two approaches to achieve this goal of free content. Their service is zero-rated on one of the main network operators in South Africa through Facebook's "Internet.org". In addition, they participate in a free Wi-Fi hotspot scheme that is offered by non-profit Project Isizwe in partnership with local governments and other partners. In general, this scheme grants each user a certain amount of data to use freely for any service they wish with no requirement to register a device.

Once a user exceeds their daily limit, normal data fees apply. Any reading on FunDza via these Wi-Fi hotspots does, however, not count towards their daily limit. In addition, FunDza tries to develop its services in a way that significantly downscales the amount of data that is needed so that all people connecting to its services consume as little data as possible.

The FunDza zero-rating practices are designed to solve an access problem -- the target group for improving literacy has limited access to books (either paper or digital), and they have limited resources to buy this access. Zero-rating allows FunDza to bring books directly to users without cost and without needing devices beyond the phones they already own. Considered in a rights-based framework, FunDza promotes the public right to access knowledge. The zero-rating scheme is rooted in the belief that educational and social services should be free and accessible to empower people, not least because, according to FunDza, the challenge in Africa is less about bridging a digital divide than an information divide. The more people try out new things, the more likely it is that this increases digital literacy and also helps to build overall social confidence.

Viewed through the lens of a development project, the model FunDza applies seems to avoid many of the concerns about zero-rating because its mission is public service, non-profit, and educational. The problems FunDza confronts are common across the developing world. According to statistics of the International Telecommunication Union (ITU), 60% of people in developing countries (90% in the least developed countries) are still without access to the Internet.[5] Moreover, relative access costs in relation to average income remain a challenge, both with regard to fixed and mobile-broadband subscriptions[6] which raise rather than lower the barrier for first time users in the development context. In order to improve living standards and contribute to sustainable development goals,[7] it is crucial that people have access to information, social services and education – all of these could be immensely facilitated with the help of Information and Communication Technologies (ICTs).

From a development/donor perspective, an initial review of the FunDza project suggests it is perfectly reasonable to promote zero-rated public interest products if they serve the overall development of a region or country. If access to government and social services, such as registering addresses, looking for the nearest hospital, checking for water supplies, or simply verifying information about local news are accessible free of charge this may not only increase overall well-being but also people's trust in the stability of the services offered.

5 ITU statistics: http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2015.pdf, p.3.

6 ibid, p.4.

7 UN Sustainable Development Goals, 9 targets, https://www.un.org/sustainabledevelopment/infrastructure-industrialization/

The same logic explains the widespread celebration of a much better known case of non-profit, public service zero-rating -- Wikipedia Zero. Wikipedia is a free, open-content online encyclopaedia that allows its users to contribute and edit articles themselves, thus creating the biggest voluntary database of knowledge ever assembled. It is symbolic to the idea of the Internet as a global public resource offering a common base and a tool to facilitate knowledge sharing, education and learning. Wikipedia is a project of the Wikimedia Foundation which also launched the Wikipedia Zero initiative in 2012. Wikipedia Zero aims to "provide Wikipedia free of charge on mobile phones, particularly in developing markets."[8] The focus on mobile phones is linked to the disproportionally high access costs for mobile users in the developing world.[9] In other words, it is actively trying to decrease costs, provide access and share knowledge – very similar to FunDza Literacy Trust, if at a different scale.

However, even as these public interest zero-rating services began to roll out, many critics decried them as a dangerous precedent. Yes -- they address very significant problems of access, cost, and knowledge exchange in the development world. But -- they also set a precedent that network operators and content companies can decide what is available over the Internet to certain users and what is not. If the zero-rated services are offered for free on top of Internet access service (i.e. they do not count against data rate billing), then it is a case of price discrimination versus other services. If the zero-rated service is offered as a standalone -- without access to the broader Internet -- there is a risk that first-time users are locked into siloed services and do not get access to the full online market of speech, content, and services. These concerns raise fundamental issues of digital rights -- the power over who controls access to content and information and risk of systemic discrimination. While most worried observers did not challenge the motives of Wikipedia Zero, they warned that it would inevitably lead a commercial service provider to enter the zero-rating space with different motives.[10]

The evolution of Internet.org and the threat to digital rights

When Facebook announced its intention to roll out Internet.org in the developing world, the model appeared to match exactly the spectre of a commercial gatekeeper for the Internet that critics of zero-rating feared most. Starting in 2013, the Internet.org initiative launched with the official mission of bringing affordable access to the unconnected in less developed countries worldwide. Of course, Facebook did not act alone in this enterprise -- without the partnership of mobile network operators, zero-

8 https://wikimediafoundation.org/wiki/Wikipedia_Zero

9 Cf. ITU Statistics.

10 Cf. https://www.accessnow.org/wikipedia-zero-and-net-neutrality-wikimedia-turns-its-back-on-the-open/

rating doesn't work. Facebook partners with access providers such as Tigo (Senegal, Guatemala) and Airtel (Ghana, Malawi). The latest partner to join was Entel in Peru in September 2015.[11] The size and reputation of the social networking giant and the branding of a few dozen zero-rated sites as "Internet.org" have heightened fears among activists and human rights organisations.

In response to sharp criticism about cultural imperialism, false advertising, and gatekeeping, Facebook responded with some reforms, modifying its service in ways that steered it closer to the public service model of Wikipedia Zero. In September 2015, Mark Zuckerberg announced that the initiative would be renamed "Free Basics". He pointed out that this would mean that "more than 60 new services are available across the 19 countries where free basic services are available. Not only does this expand the range of resources available to people, it gives them more choice and control over the services they can use in the app and website."[12] Free Basics had the virtue of clear identification as something more limited than Internet access and gave consumers more control over the services in the bundle. These changes do not alter the fundamental premise of the service: positioning Facebook as the magnanimous provider of free access to content bundled around the flagship social network. But they did convince many observers that the benefits outweighed the risks. Facebook is spending millions to provide its services via Free Basics and delivering a clear incentive to bring people online. Moreover, many of the services in the Free Basics bundle have a clear public interest benefit. According to Facebook: "The program is making an impact on people's lives by providing free health, education, and economic information."[13] This is a very appealing message for many stakeholders, including many consumers, governments, network operators, and development organisations.

The debate over Free Basics is not about the value of these services or even the sincerity of Facebook. The debate is about the downsides of permitting a company to operate as the gatekeeper for which services are available for people over a communications service that may be their only aperture to online content. Facebook and their network partners will set the rules, even if they are open to consultation with consumers and governments.

The imposition of a corporate gatekeeper managing content -- regardless of who it is and what the purpose may be -- represents a very significant shift in the political economy of Internet access. Up to now, Internet access has been a transformative change in modern information systems because -- unlike newspaper, broadcasting, cable, and satellite -- the Internet is a decentralized platform of speech and commer-

11 http://www.clasesdeperiodismo.com/2015/09/24/facebook-renombra-internet-org-como-free-basics-y-llega-al-peru/

12 https://newsroom.fb.com/news/2015/09/update-to-internet-org-free-basic-services/

13 ibid.

ce with no intermediary governing the availability or distribution of content to any user connected to the network. The framework of digital rights that has emerged with the Internet -- as well as regulations such as network neutrality -- have been designed to protect and promote this fundamental aspect of the technology. For this reason, irrespective of Facebook's motives and modifications, Free Basics in particular and zero-rating in general represent a threat to freedom on the Internet. This is the reason the critics have warned about the imposition of cultural bias, commercial self-dealing, and the chilling effect on indigenous innovation and content production. These concerns are exacerbated in the developing world because Facebook carries the burden of its American roots, traditions, and interests.

The major objections to Free Basics as a trend-setting mega-model of zero-rating fall into two categories that are related in important ways: 1) regulatory violations of network neutrality; and 2) principled threats to basic digital rights. The common thread of these critiques is simple -- power. The debate over Free Basics is about power -- both actual and symbolic -- over who will control access to content on the Internet for the next billion people to connect.

Network Neutrality. *Net neutrality,* as technical as the term may sound, has been dominating the political debate in the telecommunications sector for years. The basic idea is simple. It means non-discriminatory treatment of all data, services, and content on the Internet by Internet service providers (ISPs). In the last year, the US regulator -- the Federal Communications Commission (FCC)[14] -- as well as the European Union, have passed strong network neutrality rules.[15] These rules explicitly bar discriminatory treatment of data on the Internet. The rules are designed to prevent any kind of online gatekeeping and explicitly seek to protect the fundamental nature of the Internet as a decentralized communications platform. However, neither Washington nor Brussels have explicit prohibitions on zero-rating in the net neutrality rules. The FCC's rule reserves judgment on zero-rating for another day, but it does indicate that zero-rating may not be used to circumvent the spirit of non-discrimination at the centre of the rule. The EU law does not address zero-rating explicitly. The take-away here is that network neutrality rules *may* be read to prohibit content gatekeeping through zero-rating (even banning public service projects like Wikipedia Zero), but they may also be interpreted as flexible and open to permitting types of zero-rating that do not violate the principle of non-discrimination.

14 https://www.fcc.gov/general/open-internet, as well as the more in depth comment on legal aspects: https://www.fas.org/sgp/crs/misc/R43971.pdf

15 https://ec.europa.eu/digital-agenda/en/node/67489/#open%20internet, as well as the press explanation for more details: https://ec.europa.eu/digital-agenda/en/net-neutrality-challenges#Article

There is ambiguity even in the strongest of network neutrality rules, for example, in Chile. The Chilean law was the first net neutrality rule passed by any nation and states that ISPs must "ensure access to all types of content, services or applications available on the network and offer a service that does not distinguish content, applications or services, based on the source of it or their property." However, there has been strong criticism for the Chilean regulator's handling of their enforcement duties, especially of the non-interference obligations.

Interestingly, Chile considered the introduction of zero-rated services, especially of social networks and applications, such as Facebook, Twitter and WhatsApp, on a couple of big ISPs as an infringement to its net neutrality regulation. This is why the Chilean regulator issued resolution Circular No 40 which banned zero-rated services effective June 2014. However, to this day, the zero-rated services continue to be offered to the public, albeit with adjusted language to avoid infringement of the regulation. The regulator directly stated that it would allow Wikipedia Zero to be offered in Chile under a zero-rating arrangement, even though it has not been implemented yet.

To sum up, the rules protecting network neutrality in many countries directly ban discrimination and gatekeeping on the Internet -- but they do not have clear rules applied to zero-rating at this time. In other words, on the question of wielding power -- the rules are clear. Control over choice of content must be in the hands of Internet users. However, on the operational question of enforcing standards on zero-rated services, there remains work to be done. Critics of Free Basics (including the Indian regulator) have accurately raised a red flag against the imposition of Facebook (or any other company) as a gatekeeper for a service that is even partially substitutable for Internet access. But the company is correct that there is space in existing laws to design a programme that may be zero-rated but also judged as serving the public interest.

Human Rights. Parallel to the arguments over regulatory policy in the context of network neutrality is a broader discussion about power on the Internet. This debate centers on the appropriate application of human rights principles to zero-rated services. The starting points are clearly articulated. "The same rights that people have offline must also be protected online." (A/RES/68/167) This affirmation was first issued in 2012 by the UN Human Rights Council (A/HRC/20/L.13) and has since then been repeated and acknowledged by all 192 UN member states in several overarching resolutions. Since its first unanimous codification in 2013, this ideal has also been included and further elaborated on in a range of treaties, guidelines, principles, and other official documents, internationally as well as regionally.[16]

16 Cf. an overview on legal and political instruments: http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549034/EXPO_STU(2015)549034_EN.pdf

Ultimately, this shared belief establishes a common ground which implies that in the digital age, Internet access is a fundamental human right in itself. Although this understanding is disputed, as some argue the Internet is merely an enabler to other human rights, the idea was first stipulated in 2011 by former Special Rapporteur for freedom of expression of the United Nations, Frank La Rue, who declared that any restriction or blockage of Internet access should be considered a violation of article 19, International Covenant on Civil and Political Rights (ICCPR).[17]

In 2013, the German Federal Court of Justice added to this understanding by ruling that the Internet is an essential part of people's lives.[18] Thus, it is a fair and logical conclusion that providing access to the Internet is an obligation nationally as well as internationally.

Article 19, paragraph 2 ICCPR states that: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The relationship between freedom of expression in the digital sphere and zero-rated services is once more a complex and ambiguous one. The most conventional interpretation of digital rights is a prohibition on censorship. Facebook has content restrictions on its own social media platform and it is unclear, if Free Basics intends to exert any influence over the content or services offered by others in the Free Basics bundle. Either way, there is a risk to embracing a new model of content access that is governed by a single company (especially if it is not subject to clear regulations beyond its own terms of service). But that is unlikely to be the central issue, as Facebook would invite intense and immediate criticism should it choose to censor content on Free Basics. The concerns about direct censorship by a content gatekeeper are a clear articulation of protecting the "negative" rights of citizens from infringements of free speech by any external power (private or public).

The more interesting claim to connecting human rights and zero-rating comes with the "affirmative" rights of freedom of expression. This is the principle that human rights to free expression protect not only the right to free speech, but also the right to hear all voices. That is, if all voices have the protection of free expression, then it can be argued that every listener has the right to hear all voices.

This argument applies in the zero-rating debate in a narrow but important way. It does *not* apply to a single service, narrow stream of content -- such as Wikipedia

17 http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

18 cf. Urteil des III. Zivilsenats vom 24.1.2013 - III ZR 98/12, Punkt 17.

Zero. But it does have resonance against a service that is perceived or functions as a substitute for wider Internet access. Free Basics hedged against this problem with its re-branding away from Internet.org. However, the argument is valid insofar as people are concerned about the imposition of a commercial business model that supplants the free and open Internet as the baseline expectation of modern communications and the embodiment of the affirmative human right to free speech. The burden to refute this concern lies with the provider of the zero-rated service, and that is a hard argument to win because Facebook will have to demonstrate to critics not only that it would never use its service to functionally restrict open access to content, but also that no future providers replicating this model will do so.

Conclusion

How should development organizations position themselves in the debate on Internet access and zero-rating? As we have argued before, zero-rating offers opportunities to bring viable services to underserved communities. But development organizations cannot ignore the broader implications of zero-rating. This means that in every zero-rating project they design, they need to consider the impact these projects might have on human rights online as well as the potential for economic discrimination through net neutrality violations. Ideally, they should seek input from all stakeholders concerned, not least because they are often in the ideal position to convene all affected parties for discussions: governments, private sector, and civil society. Their strategic initiatives should also be informed by more research, such as country-specific case studies and analyses of economic and political implications of zero-rated services.

The responsibility to employ meaningful and inclusive processes rests on two pillars: 1) regulatory questions must be tackled in a comprehensive, overarching, and forward-looking manner and 2) Internet services that are developed for particular purposes, such as education, transparency, or health issues, must be designed with heightened awareness of different needs and the net neutrality requirements and human rights considerations discussed above. There is also a need to differentiate between single, specific services and services offering broader access to a wider range of applications and services. Zero-rated single-service applications will need to be assessed closely on a case-by-case basis, ensuring that they are effectively embedded in the local community and address very important local needs that would otherwise not be served. Zero-rated applications that provide broader access raise important questions about the power to discriminate between different services.

Under the conditions laid out in this paper, we see hardly any ground on which a zero-rated bundled service like Free Basics could be justified as being sufficiently in line with human rights standards and net neutrality principles.

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The stiftung neue verantwortung is a non-profit think tank in Berlin that brings together expertise from government, research institutions, NGOs and companies to develop, discuss, and disseminate proposals on current political issues. The goal of stiftung neue verantwortung is to assist stakeholders, both in and outside of politics, in making effective decisions that benefit the common good by using a combination of content-based expertise, practical political experience and cross-sectoral cooperation.

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