

Annexure – I

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1) What is Net Neutrality?

All content on the Internet travels in the form of data packets across the telecommunication networks around the world.

This however, means that service providers / carriers who own and control the pipes through which data packets flow (or the telecom network) have the ability to speed up or slow down the speed of packets in a network.

Network neutrality is the principle that ensures that service providers should treat all data packets on the Internet without discrimination or in an equitable manner.¹ Simply stated, the principle prevents Internet providers from speeding up or slowing down content based on its source, ownership, or destination.

Our current Internet is, generally speaking, built on this principle of paying Internet service providers a subscription fee for freedom to go wherever you want on the Internet. Users do not pay more for accessing one website / service / application in preference to another, and all content is equally accessible.

The principle ensures a diversity of online content, applications and services i.e. it

ensures the presence of competition in the online world, protects emerging and smaller players in the online market place and ensures improvement of Internet infrastructure as well as equitable access to technical development.

The term ‘net neutrality’ was coined by Columbia professor Tim Wu in 2003 who stated: “Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites and platforms equally. This allows the network to carry every form of information and support every kind of application.”ⁱⁱ

The concept of network neutrality relates in some ways to but is not a direct synonym of the term ‘open Internet’ – which may depending on context be used to refer to whether particular services are open to public access or not, the issue of interoperability of technical standards (used to create and service the Internet), transparency and inclusiveness of governance processes, lack of censorship and respect for civil liberties in the online context, low barriers to entry to the Internet or shared global ownership of the Internet. The scope for misunderstanding occurs as the principle of net neutrality ensures that the Internet is kept ‘open’ to all sorts of applications and services, by virtue of non-discrimination (by service providers). The principle of network neutrality could therefore be seen as a subset of the broader term ‘Open Internet’.

2) Why does the principle need to be protected in India?

At the root of the net neutrality issue is the question of how the Internet and its role in society is viewed – is it seen as a public utility (much like say, electricity) or as a club good (like say cable television). Given the numerous benefits of the Internet – towards development, promoting social and economic justice, information dispersal and transparency, it could be argued that the Internet must be treated as a public utility and therefore regulated as such. It could be seen as being essential for a full exercise of one’s citizenship rights – in particular given the plans of the Government of India to ensure multiple channels of service delivery over the Internet, creation of smart cities etc.

The Internet economy is highly prone to monopolization due to its nature / inherent characteristics – for instance due to the existence of network effects and large economies of scale. The effects of agreements that violate net neutrality can be disastrous, particularly for small players and can therefore curtail innovation and competition in the market. Creation of monopolies in the online space affects customer choice, increases prices for users, and is a security threat (due to the centralization of services and data collection). Even today, the huge monopolies enjoyed in the Internet economy (largely by foreign based players) are cause for concern both from a cultural and commercial perspective as well as from a security and strategic perspective.

Protecting smaller / local players and ensuring an equal platform is provided to local content/applications is essential particularly given what we now do about the relationships between dominant Internet players and foreign security / intelligence agencies.

Further,

- The principle helps protect the plurality of media – as it prevents users from being restricted to specific content based on service provider or cost. This also prevents increase in the cost of content to a user. The issue therefore directly impacts on the issue of freedom of speech and expression in so far as failing to protect this principle could ensure that certain types of content (that are not able to pay service providers to ensure high quality connections to users) would be wiped out.
- Net neutrality laws prevent users from being restricted to certain specific content determined by commercial agreements between content providers and access providers. Such agreements restrict consumer choice, competition and plurality in the online space. Failure to protect the principle robs a consumer of the choice that the public Internet currently provides – in terms of access to content, services and applications.
- The possibility of unrestricted implementation of traffic management practicesⁱⁱⁱ by an access provider acts as a disincentive towards expansion of infrastructure and creation of more bandwidth for users. It is in the access provider's interest to limit the total bandwidth available so as to create an artificial scarcity of bandwidth thereby increasing the price of the product/service. Not only does this affect the customer – who may end up paying higher rates for lower speeds and lower quality of service, but it can also result in anti-competitive practices in the market.^{iv}

The US is a prime example of how limited investment in infrastructure has led to low bandwidth speeds and high costs to users.^v In fact, research demonstrates that it is actually more efficient to upscale capacity than put in place traffic management measures (which are often backed by software companies and access providers).

- Packages for specific content are sold as “Internet packages” – which is clearly a case of misleading consumers. Lack of regulation leads to a lack of transparency in the practices of service providers leading to poor quality of service to the user.
- Without net neutrality, those who pay control what the general public sees and shares online. The principle protects smaller content providers who will not be able to pay access providers to have their content delivered on high-speed lanes, which are used by content providers who have the ability to pay. As an example think of what happens to say a local pizza delivery business (which takes online orders) versus a million dollar conglomerate, which can afford to pay an ISP for higher speeds for its website. The effects of agreements that violate net neutrality can be disastrous, particularly for small players and can therefore curtail innovation and competition in the market. This is particularly important in

the case of a developing country like India – where the amount of content created domestically is still very low, and must compete with content provided by more established foreign players.

- The principle prevents the emergence and consolidation of vertical monopolies in the Internet economy.
- Traffic management practices are a violation of privacy rights. “In particular, the use of DPI seems to generate prima facie privacy concerns, as data about a users' behavior on the Internet (which will often include sensitive data) is monitored and used for various purposes, such as traffic management or advertising.”^{vi}
- Convergence may lead to a drop in profits for service providers of traditional services (for instance voice services) as they are over taken by VoIP based services. There is therefore an incentive for service providers to discriminate against such new services (particularly where the same service provider provides both voice and internet services).
- The principle ensures competition in the online space and therefore prevents centralization of services – which is a security and network architecture issue
- In the Indian context it must also be kept in mind that most users, including in urban areas, have no or limited choice of ISP. This also means that should net neutrality not be implemented, users are likely to severely suffer if their ISP decides to charge at differential rates for different content.
- Protection of this principle is essential in working towards Internet as a right.

3) Examples of violations of the principle in India.

As in other jurisdictions, in general violations of the principle in India are of three types:

- (i) agreements between content providers and access providers for preferential access to specific content (cheaper access, exemption from data caps etc): there are numerous examples of tie-ups between content providers and access providers whereby certain content is provided at reduced rates or is not counted towards data cap limits by the access provider to the user.

The most commonly seen violation appears to be of ISPs seeking payments from content providers for:

- (a) providing higher speeds to specific services / throttling other services;

- (b) permitting differentiated data plans for users (for instance company x may offer an ISP a certain sum of money to ensure that data caps do not apply to its content);
- (c) provision of over the top services (such as free sms and VOIP)

In India, often ISPs also enter into agreements with content providers to ensure that customers get limited Internet access i.e. they get access to only the specific content provided by a specific content provider. For instance, Facebook may enter into an agreement with a service provider to sell packages to consumers that permit only use of Facebook and no other Internet services or applications.

- (ii) throttling: traffic management practices are commonly used by access providers in India, though often these are discriminatory, arbitrary and at any rate lack transparency.
- (iii) a general lack of transparency in so far as services of access providers are concerned, as illustrated by the numerous instances of service providers offering specific content / service as ‘Internet’ access.

A list of some instances of violations of net neutrality as reported in the media are annexed as *Annexure – II*.

4) What are the most common arguments made against any regulation, and how should these affect any regulatory structure?

Arguments posed (generally by service providers) in order to avoid any regulation on the issue are usually a variation of the following:

(a) Free access:

The argument is that it is better to have free/cheap access to a limited selection of content than no access at all. As an example, are the now fairly common zero-rating deals (which have been held illegal in many jurisdictions such as Chile, Norway^{vii}, Slovenia, the Netherlands^{viii} and Canada^{ix}) under which a content provider pays a service provider to ensure that the user is not charged for access to specific content.

However, it must be kept in mind that free access so provided is not to the Internet per se but to a limited array of services and content – leading to problems therefore with monopolization and its effects. Such deals also raise the critical issue of ensuring plurality of media and what happens to smaller players who cannot afford to enter into similar agreements. It is largely for this reason – i.e. the uncompetitive effect of such agreements and their effect on plurality of content that various jurisdictions have held such agreements to be unlawful.

(b) Traffic Management / Network Functionality Arguments:

- (i) It is argued that it is inefficient to build capacity, instead traffic management practices are required to be put in place to enable a smooth flow of data and to deal with increased usage.

In this respect, it must be kept in mind that while there are contradictory claims on the efficiency of building capacity v. implementing traffic management practices, there is no doubt that (a) it is in the ISPs interest to restrict bandwidth and create less infrastructure (as this cuts into profits), (b) ensuring no tiering acts as an incentive to increase the size of the pipe so that more and more content can be accessed / more users attracted.

Further, it must be kept in mind that in India a significant part of the telecom network is built using tax payer funds / by or through government enterprises. In the circumstances, permitting carriers to piggyback on this 'public' infrastructure to make super profits is unwarranted.

- (ii) It is also argued that traffic management is required to prevent a small number of customers from clogging up access to the Internet by using a disproportionate share of the available bandwidth. Service providers are therefore justified in controlling the flow of data because it is necessary to maintain the quality of service to all users.

However, a user pays his content provider for using the Internet – he or she should therefore be free to do what they want on the Internet (within the limitations of law). As more content move to video and other heavy bandwidth applications there is no option but to increase the size of the pipes.

Most ISPs in India already have some traffic management practices in place – such as limiting download speeds after a certain pre specified limit. However, these practices should be applied equitably and without differentiating between content / service / application. Failure to do so privileges certain content / services / applications thereby skewing the online marketplace and reducing plurality in online content.

- (iii) Network Neutrality regulation may prevent service providers from engaging in legitimate practices that are required to deal with spam, denial of service attacks, and preventing computer viruses.

As long as genuine attempts at preventing spam etc. may be permitted. However, these exceptions must be strictly defined.

- (iv) Permitting differentiated access enables service providers to charge more from customers who are able to pay, and they can use this revenue to expand the capacity of the networks. There is no incentive for service providers to invest in infrastructure if they cannot charge for preferential services.

There is generally an incentive for an ISP to create an artificial scarcity by not investing in infrastructure. Differentiated access ensures that you limit the content which poorer users will have access to – which is inequitable.

In conclusion certain traffic management practice it would appear are required for efficient running of the network and in general public interest. However these must take the form of carefully worded exceptions to the general rule – that must be reasonable in nature, and importantly must not be used to discriminate between types of content / service / applications but must be applied uniformly across the board. There must also be a requirement of transparency in implementing such practices.

5) How have other countries dealt with the issue?

The types of laws used to deal with the issue of net neutrality may be grouped into three broad categories:

- (i) generic competition laws – which most jurisdictions have in place, that prohibit activities that prevent competition in a particular market;
- (ii) regulation of traffic management practices – certain countries such as Canada and Japan have in place regulations/guidelines that relate primarily to traffic management practices by service providers, without specifically dealing with the term network neutrality;
- (iii) Specific laws dealing in a ‘holistic manner’ with network neutrality are currently in place in countries such as Chile^x, Peru^{xi}, the Netherlands^{xii}, Brazil^{xiii} and Slovenia^{xiv}, and are being discussed in many more jurisdictions such as the EU, the US^{xv} etc.

There are many regulatory models used across the world when it comes to the issue of network neutrality. Chile, the Netherlands, Brazil, Slovenia etc. use statute to enshrine the principle. Canada and the US use sector specific regulation (till struck down by the Courts in the US in 2014) while Norway uses a co-regulatory model (non-binding guidelines formulated by a regulator and adopted voluntarily by market players). Self-regulation is followed in countries such as the UK and Japan.

6) How can India protect the principle of network neutrality and recommendations for regulation.

In India the primary authorities / regulators in India (who could take up the issue of net neutrality) are:

- (1) Parliament – in the form of statute – either through amendment to an existing statute such as the IT Act or through a new enactment. This could possibly provide the greatest protection to the principle and would enable an overarching framework under which specific regulations could be passed to deal with individual issues by the relevant executive agencies.
- (2) The Department of Telecommunications, Government of India: Can issue orders, notifications, guidelines, policies and can also affect the telecom sector through the licenses signed with ISPs. DoT can also issue a request for a non-binding reference from the TRAI.
- (3) The Telecom Regulatory Authority of India is of course the statutory regulator of the telecom sector in India and is empowered under Section 11 of the Telecom Regulatory Authority of India Act, 2007 to *inter alia*:
 - (a) Make (non-binding) recommendations to the government on amongst other issues - measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services.
 - (b) Lay down standards for Quality of Service and ensure maintenance thereof (so as to protect consumer interest) and
 - (c) make regulations to give effect to the TRAI Act and carry out its purposes.

It may be noted that one of TRAI's key functions is ensuring orderly development of the telecom sector through the promotion of competition and facilitating efficiency.

Regulating net neutrality issues is squarely within the competence of the TRAI.^{xvi}

- (4) The Competition Commission of India, the statutory authority charged with enforcing the provisions of the Competition Act, 2002, which aims to prevent practices that have an appreciable adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.
- (5) Dispute Resolution Forums such as TDSAT (which is empowered to adjudicate disputes between licensors/licensees, between different service providers and between a group of consumers/service providers as well as hear appeals from orders or directions of the TRAI), Consumer fora and Civil Courts. Subject to

statutory exclusions of jurisdiction as seen for instance in the case of the TRAI Act in Section 15 and Section 27 and the Competition Act in Section 61.

The Internet is a vital tool from a commercial, economic, cultural, social and strategic perspective and it is essential that urgent steps are taken to ensure the maintenance of an 'Open' Internet through putting in place an appropriate regulatory framework.

While extant competition and consumer law may cover some aspects of net neutrality, it is essential that the variety of content and the possibility of innovation by smaller players be protected on this now ubiquitous medium of communication.

In light of the aforesaid discussion and concerns highlighted previously with the development of the online ecosystem in India, we believe it is essential that any regulation in this respect should:

- (a) mandate the maintenance of the Internet as an open platform and ensure that all service providers treat all content, applications and services equally, without discrimination;
- (b) Prohibit deep packet inspection for the purpose of applying discriminatory traffic management practices;
- (c) Prohibit throttling of specific services / content / applications;
- (d) Prohibit anti-competitive deals such as zero rating agreements;
- (e) Mandate greater transparency in the provision of Internet services to a user and prevent false advertising.

As mentioned previously, TRAI has the authority to pass directions / orders on the matter within the framework of existing legislation^{xvii}. However, the Law Commission may wish to consider the possible benefits of ensuring statutory protection to this extremely important principle (as has been done in countries such as Brazil, Chile, the Netherlands etc.), particularly given the increasing importance of the Internet in our lives as well as its cross-sectoral impact (i.e. its impact on the media, e-commerce, etc.)

Annexure – II

Indicative list of violations of the principle of network neutrality in India.

1) Provision of faster speeds for specific services / exemptions from data caps or fair usage policies / throttling of certain services and content:

- (i) Bharti Airtel offered preferential (fast) Internet access for people watching the Indian Premier League on Youtube in early 2010. Airtel's customers could use an upgraded speed of 2 Mbps to view the cricket tournament on Youtube's IPL channel. This offer of faster speeds was not applicable to any other content accessed by the customer.^{xviii} Google however denies any agreement with Airtel for provision of such preferential services.

It appears that various other service providers have also made similar offers. BSNL is reported to have offered to double the bandwidth speed to facilitate watching the IPL on youtube. It is however unclear if the increased speed would apply solely to youtube or to other websites as well.^{xix}

In June 2013, RCOM partnered with STAR Sports to offer unlimited live streaming of the ongoing ICC Champions Trophy 2013 tournament on STAR Sports mobile site to its subscribers.^{xx}

- (ii) Reports indicate that some ISPs (such as Airtel and BSNL) throttle certain P2P applications during peak usage times.^{xxi} It is reported that in the first quarter of 2011, Bharti Airtel throttled 8 per cent of the BitTorrent traffic on its network. The percentage slowly increased throughout the year, increasing to 33 percent in early 2012. BSNL has reportedly blocked 9 percent of its Bittorrent traffic in 2011 and YouBroadband blocked over 50 per cent in 2009.^{xxii}
- (iii) Numerous service providers, notably Airtel, have instituted Fair Use Policies that throttle Internet speeds (by significant amounts) once a predetermined data cap is reached. It is argued that by controlling access speeds, they will limit the amount of data that users have access to (and consequently the type of services or websites the users can access).^{xxiii} Further, these Fair Usage policies may not apply to specific services or websites – as in the case of Airtel's Fair Use Policy – which does not apply to BigFlix powered Airtel Movies (where a user will

therefore have access to unlimited movies on this one service). Similarly, Vodafone offers a music streaming service which offers unlimited music downloads, once subscribed^{xxiv} and it appears MTS India offers a similar package for its movie services.^{xxv} Hathway Cable has started a movie service called Broadband Movies which is exempted from its Fair Usage Policy.^{xxvi} Certain ISPs are also reported to have entered agreements to exempt specific Internet TV sites from their Fair Use Policies.^{xxvii}

- (iv) Tata Docomo entered into agreements to have special Youtube, Apalya Mobile TV (live TV streaming services) and Saavn (an online music streaming service) plans^{xxviii} as well as agreements with WhatsApp for unlimited use of its services.^{xxix}
- (v) Similarly Times Internet's video on demand service BoxTV has tied up with Spectranet Broadband to offer free subscriptions, operator billing and improved data limits for Spectranet's fibre customers. "Spectranet is essentially encouraging customers to use BoxTV by providing free dedicated Internet usage data to stream movies on the service."^{xxx}
- (vi) Airtel charging pre paid mobile users more for access to VoIP services such as Skype and Viber.^{xxxi}

(b) Agreements that allow users access only to specific content:

There are numerous instances of service providers providing specific packages that enable access to only limited parts of the Internet – for instance only Facebook or Youtube or that enable cheaper access to specific content.

- (i) Tata Docomo has put in place pay per site plans that charge customers depending on which websites they visit.^{xxxii}
- (ii) MTS has reportedly offered packages where its customers can browse certain selected websites for free (such as Yahoo India, Yahoo Mail, Wikipedia, Makemytrip, shopping.indiatimes.com and Cricinfo.com).^{xxxiii}
- (iii) Content providers (such as Whatsapp^{xxxiv}, Google^{xxxv}, Facebook^{xxxvi}, Twitter^{xxxvii} and Wikipedia^{xxxviii}), trying to push for acquiring mobile usage of their services, are tying up with telecom operators, where, sometimes, users get unlimited bandwidth for that service^{xxxix} or are given access only to those specific services / websites.

- (iv) Google has reportedly entered into a deal with Airtel wherein all Google services were available for free to Airtel's Internet subscribers.^{xi} Facebook has a similar deal with Reliance Communications^{xli} as does WhatsApp.^{xlii}

- (v) Airtel has also entered into deals with Facebook to allow its services for free in 9 regional languages.^{xliii} Uninor has announced deals with Facebook and WhatsApp to offer these services at specially discounted rates.^{xliv} Vodafone has an agreement with Twitter where its users get free access to the site.^{xlv} Twitter has similar agreements with Reliance and Airtel.^{xlvi} Wikipedia has partnered with Aircel to offer free access.^{xlvii}

- (vi) In April 2013, RCOM and Twitter entered into an agreement^{xlviii} where Reliance's customers could get free Twitter access for 90 days.

- (vii) In June 2013, Airtel partnered with Google to launch Free Zone service that will offer Airtel subscribers with free access to Google services such as Google Search, feature phone friendly version of Gmail and Google Plus.^{xlix}

- (viii) Airtel has announced plans to provide free Internet services to consumers for a limited period, which will allow users access to specific websites / content / services such as Facebook, Youtube, Snapdeal, Makemytrip and Twitter. Airtel will then offer specific content based plans once the free period expires (for instance, per day usage of Facebook at INR 1).ⁱ

- (ix) Uninor, the Indian wing of Norway's Telenor, charges 50 paise for an hour of usage of Facebook, while pricing a day's Whatsapp use for Re 1.ⁱⁱ

i This is an explanation also used by the ITU – notably in its 2012 discussion paper on the issue available at http://www.itu.int/ITU-D/treg/Events/Seminars/GSR/GSR12/documents/GSR12_Webb_NetNeutrality_1.pdf

ii Wu, T (2003) ‘Network Neutrality, broadband discrimination’, 2 Journal on Telecommunications and High-Tech Law 141.

iii Traffic management can be broadly defined as a collection of techniques that may be used by an ISP to plan and allocate available resources to attain optimum performance for diverse classes of users across a network. These techniques will often include the use of performance measures to define optional service levels tailored to different user needs, and to assure appropriate quality of service. Traffic management is said to be critical for the proper functioning of the Internet, but it can also be misused by an ISP to create unfair access or use of the Internet. See IEEE, ‘Network Traffic Management and the Evolving Internet (White Paper)’ (2 November 2010), 4, cf. http://www.itu.int/ITU-D/treg/Events/Seminars/GSR/GSR12/documents/GSR12_Webb_NetNeutrality_1.pdf

iv The ITU notes that the internet service provider industry in this sense does not function as a normal industry would – which would be very happy at an increased demand for a good or service. “ISPs are suppliers in a market where prices have dropped over time even as demand and quality has improved; leaving ISPs in the somewhat unique position of facing strong growth forecasts, not with anticipation but with an apparent air of trepidation.” http://www.itu.int/ITU-D/treg/Events/Seminars/GSR/GSR12/documents/GSR12_Webb_NetNeutrality_1.pdf

v It may be noted that even the Canadian traffic management practice regulations specify that such practices cannot be at the cost of investment in infrastructure and capacity building.

vi Angela Daly, ‘The Legality of Deep Packet Inspection’ (June 2010), 8 cf http://www.itu.int/ITU-D/treg/Events/Seminars/GSR/GSR12/documents/GSR12_Webb_NetNeutrality_1.pdf

vii Norway’s regulator has issued an advisory to carriers not to enter into zero rating deals.

<https://gigaom.com/2014/11/18/pro-net-neutrality-norway-advises-carriers-to-avoid-zero-rating/>

viii Slovenian and Dutch regulators have fined KPN and Vodafone as well as Telekom Slovenjije and Si.mobil for zero rating deals. <https://gigaom.com/2015/01/27/dutch-and-slovenian-regulators-nail-carriers-over-net-neutrality/>

ix The Canadian Radio Telecommunication Commission has directed the elimination of zero rating deals entered into between Bell Mobility and Videotron under which Bell’s content was not counted towards a customers data cap. <http://news.gc.ca/web/article-en.do?nid=926529>

x Chile was the first country in the world to legislate on the issue of network neutrality when it amended its General Telecommunications Law in 2010 to state: “*No [ISP] can block, interfere with, discriminate, hinder, nor restrict the right of any Internet user of using, send, receive, or offer any content, application, or legitimate service through the Internet, as well as any activity or legitimate use conducted through the Internet*”. (<https://openmedia.ca/plan/international-comparisons/chile>. For the Official Notification in Spanish see <http://www.doe.cl/fsuamarios/2010-08-26/z2601001.pdf>)

The law also has articles that force ISPs to provide parental control tools, clarify contracts, guarantee users’ privacy and safety when surfing, and forbids them to restrict any liberty whatsoever. (<https://openmedia.ca/plan/international-comparisons/chile> and <http://blogs.oii.ox.ac.uk/cobo/?p=1>)

The Chilean regulators have issued various rulings to ensure ISP transparency, to forbid companies from entering into discriminatory agreements (such as for zero rating services) and to reinforce the

non-discriminatory traffic management principle. (Chile Bans Free Delivery Of Social Media Services To Uphold Net Neutrality <https://www.techdirt.com/articles/20140603/05442127439/chile-bans-free-delivery-social-media-services-to-uphold-net-neutrality.shtml>)

Interestingly Chile has been cited as an example of a regulatory regime that has not hurt or stalled the growth / development of the telecommunications industry, but has in fact promoted competition in the market. (https://www.derechosdigitales.org/wp-content/uploads/igf_2014.pdf)

xi Article 6 of Law No. 29904, titled "Law for the Promotion of Broadband and the Construction of Fiber Optic Backbone" or "Ley de Promoción de la Banda Ancha y Construcción de la Red Dorsal Nacional de Fibra Óptica" ([http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/ECC8807B858DE05F05257C3D00620E04/\\$FILE/Ley_29904.pdf](http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/ECC8807B858DE05F05257C3D00620E04/$FILE/Ley_29904.pdf)) states that Internet service providers are to respect network neutrality and can not arbitrarily block, interfere with, discriminate against or restrict the right of any user to use an application or protocol, regardless of origin, destination, nature or property.

The Supervisory Agency for Private Investment in Telecommunications - OSIPTEL is the regulatory agency charged with determining what activities constitute a breach of the principle. (https://wiki.laquadrature.net/Overview_of_Net_Neutrality_Regulations#Peru . Though it must be noted that some commentators indicate that "the law leaves it to the ISPs to determine what constitutes "arbitrary" practices when it comes to the respect of the Net Neutrality principle." See <http://www.intgovforum.org/cms/documents/dynamic-coalitions/dynamic-coalition-on-network-neutrality/309-dc-network-neutrality-report-of-the-igf-2014-meeting/file>)

xii The Netherlands enacted a law dealing with net neutrality in June 2012, becoming the second country in the world to do so. The law, known as the 'Telecommunicatiewet' or the Telecommunication Act, is in general an attempt to ensure the protection of civil liberties in the context of the Internet (the Act contains provisions regulating internet disconnection, protecting users against surveillance etc.) and also contains a provision on net neutrality.

Article 7.4a(1) requires "Providers of public electronic communication networks which deliver Internet access services and providers of Internet access services" to not "hinder or slow down" applications and services on the Internet unless one of the following conditions is satisfied:

- (a) it is an attempt to minimize the effects of congestion, but even in such situations, equal types of traffic should be treated equally;
- (b) it is necessary to preserve the integrity and security of the network and service of the provider or the terminal of the end user;
- (c) it is done so as to restrict the transmission to an end user of an unsolicited communication, (provided that the end user has given prior consent);
- (d) it is done to give effect to a legislative provision or court order.

The legislation further requires the service provider to give a user notice in the event any network/security breach is emanating from the users computer before taking any measures to hinder or slow the traffic to or from that user (so as to permit the user to stop the infraction). In emergency situations (or where the user is not a customer of the relevant service provider), notice must be given as soon as possible.

Crucially, Article 7.4(3) specifies that access providers cannot make the rates of accessing the Internet dependent on the services and applications which are offered or used via these services. The executive is empowered to frame regulations in this regard (though any regulations must first be placed before Parliament).

The Act also states that service providers may be regulated with respect to quality of service parameters with a view to prevent “degradation of service and the hindering or slowing down of traffic” on public electronic communication networks (by mandating minimum requirements).

The explanatory memorandum to the Act *inter alia* clarifies that service providers are not allowed to offer a service consisting of access to (certain) web pages, services or applications, where the use of certain applications or services are blocked or priced differently. This means that providers may not offer packages to access a part of the Internet. Service providers may however differentiate their subscriptions for Internet access in other ways - such as bandwidth and data limits.

See <https://www.bof.nl/2011/06/27/translations-of-key-dutch-internet-freedom-provisions/> and http://wetten.overheid.nl/BWBR0009950/Hoofdstuk7/Artikel74a/geldigheidsdatum_10-02-2014 (in dutch) as well as <https://www.eff.org/deeplinks/2012/05/netherlands-passes-net-neutrality-legislation>, and http://en.wikipedia.org/wiki/Net_neutrality_in_the_Netherlands

xiii Brazil has enacted legislation in 2014 known as the Marco Civil da Internet that *inter alia* covers the issue of net neutrality.

The legislation, which takes the form of a rights-based framework attempts to ensure “free enterprise, free competition and consumer protection” while ensuring “pluralism and diversity” in the online economy.

The legislation specifically notes the need to preserve and safeguard network neutrality (Article 3) and ensure free business models promoted on the Internet (as long as they do not conflict with other legal principles).

In the context of net neutrality, all Internet users in Brazil have a right:

- To the maintenance of the hired quality of Internet connection;
- To clear and complete information contained in the services contracts, with details on the arrangements for protecting the connection logs and access records to Internet applications, as well as network management practices that can affect its quality;
- To the application of consumer protection regulations in transactions conducted on the Internet.

Chapter III, Article 9 of the legislation deals specifically with network neutrality and requires all Internet / telecom service providers (‘agent in charge of transmission’) to treat all data packets equally (‘with isonomy’) regardless of content, origin and destination, service, terminal or application. Service providers are also barred from blocking, monitoring, filtering or analysing the contents of data packets in a way that would result in a breach of the principle of network neutrality.

Exceptions to this general rule are permitted (i.e. discrimination between packets and / or degradation of certain services is permitted) only in the following circumstances:

- (a) Technical requirements to ensure adequate provision of services
- (b) For prioritization of emergency services

The executive is empowered to make rules in this regard (and in the context of the limited exceptions mentioned).

Even in such exceptional circumstances however, the service provider is required to:

- (a) Act proportionately, with transparency and without unreasonable discrimination against specific services ('isonomia')
- (b) To inform its customers in advance of the practices followed for management and traffic mitigation purposes, including those related to network security
- (c) To provide services on non-discriminatory commercial conditions and refrain from practicing anticompetitive behaviors
- (d) Refrain from causing damage to consumers within the parameters of the strict liability provision of the general civil law statute in Brazil.

xiv Slovenia enacted a new Electronics Communications Act in 2012, and as per Article 203 of this legislation, the regulatory authority is required to promote and preserve an open and neutral Internet and the possibility of access to information / applications per the free choice of end users. The Article also requires network operators and access service providers to strive for the preservation of an open and neutral Internet – specifically they should not limit, hold or slow down traffic at the level of individual service or application or execute any measures for its depreciation, except when required in the case of:

- (a) necessary technical measures to secure undisturbed activity of networks and services (e.g.: avoiding the traffic congestion),
- (b) necessary measures to secure integrity and security of the networks and services (e.g.: an elimination of unauthorized excessive seizure of transmission medium – channel),
- (c) necessary measures for limiting unsolicited communications.

All measures must be proportionate, non-discriminatory, limited in time and to the necessary extent.

http://www.uradni-list.si/_pdf/2012/Ur/u2012109.pdf#!/u2012109-pdf

xv Note that President Obama has made the stance of the US Government very clear on the issue when he called on the FCC to implement “the strongest possible rules to protect net neutrality”. His proposal involves four simple rules – no blocking of legal content, no throttling of content, no paid prioritization or agreements that have similar effect, and increased transparency in ISP interconnection. The FCC has thereafter indicated that ISPs will be reclassified under Title II of the Communications Act (which will permit the FCC to regulate telecommunication providers as common carriers). See

<http://www.whitehouse.gov/net-neutrality> and <http://arstechnica.com/business/2015/01/title-ii-for-internet-providers-is-all-but-confirmed-by-fcc-chairman/>

xvi To be noted that TRAI has twice mentioned the issue of net neutrality in its consultation papers. In TRAI Consultation Paper dated December 2006, on “Review of Internet Services”, the regulator deals specifically with the issue of Net Neutrality in paragraph 3.6. where it recognises the importance of the principle of net neutrality (to preserve competition in the online marketplace). The authority notes the various violations of this principle reported in the context of the United States and therefore concludes that anti-competitive practices as seen in the US market may also be seen in India “as Internet access providers may use their market power to discriminate against competing applications and/or contents”. TRAI notes that network neutrality is an issue that is likely to

be of importance in the future given the slew of new applications and services on the Internet and therefore recommends soliciting the views of relevant stakeholders before any policy decisions are made in this regard. TRAI therefore suggests conducting consultations on whether regulatory intervention is required to ensure net neutrality or if the same can be left to market forces.

The issue has also briefly been mentioned in its recommendations on Application Services dated May 14, 2012, where TRAI notes the development of the net neutrality debate and in this context briefly examines the regulatory regime in the United States of America and concludes that issues “*of net neutrality for ASPs providing services on OTT model will be dealt as and when required.*”

- xvii It is also relevant to point out that the National Telecom Policy 2012 *inter alia*:
- (a) envisions the creation of a national broadband network including through utilizing the Universal Service Obligation Fund to lay fiber optic cables to remote areas. Accordingly, the Government of India notes the importance of formulating policies “to promote competition by encouraging service providers, whether large or small, to provide value added services under equitable and non-discriminatory conditions.”
 - (b) Notes that access to the Optical Fibre Network will be “open, non-discriminatory, and technology neutral.”
 - (c) Creates a Unified Licensing Regime to enable the provision of converged services. The Policy notes, “this new licensing regime will address the requirements of level playing field, rollout obligations, policy on merger & acquisition, non-discriminatory interconnection including interconnection at IP level etc. while ensuring adequate competition.”
 - (d) Envisages the implementation of a framework “to regulate the carriage charges, which are content neutral and based on the bandwidth utilization.”
 - (e) Mandates the framing of a system to ensure setting up of a common platform for interconnection of various networks for providing non-exclusive and non-discriminatory access.
 - (f) Aims to protect consumer interest by promoting informed consent, transparency and accountability in quality of service, tariff, usage etc.

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xix <http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/article743519.ece>

xx <http://www.medianama.com/2013/07/223-wikipedia-partners-aircel-to-offer-free-access/> and <http://www.medianama.com/2013/06/223-rcom-star-sports-live-streaming/>

xxi <https://broadbandforum.co/threads/airtel-violates-net-neutrality-again-with-its-broadband-tv.48700/> and <https://campusdiaries.com/stories/how-indian-isps-are-already-fighting-net-neutrality>

xxii <http://www.thehindu.com/sci-tech/technology/internet/isps-slam-brakes-on-bittorrent-speeds/article3751310.ece>

xxiii <http://www.medianama.com/2009/03/223-airtel-to-moderate-user-broadband-speeds-what-of-net-neutrality/>

xxiv <http://www.medianama.com/2014/06/223-india-net-neutrality/>

xxv <http://www.medianama.com/2014/08/223-mts-movies/>

xxvi <http://www.medianama.com/2014/07/223-hathaway-eros-now/>

xxvii <https://broadbandforum.co/threads/airtel-violates-net-neutrality-again-with-its-broadband-tv.48700/>

xxviii <http://www.medianama.com/2014/07/223-tata-docomo-youtube/> and
http://articles.economicstimes.indiatimes.com/2014-07-07/news/51133653_1_tata-docomo-gurinder-singh-sandhu-online-video-consumption

xxix <http://www.medianama.com/2013/12/223-tata-docomo-whatsapp/>

xxx <http://www.medianama.com/2014/01/223-boxtv-carrier-billing-for-spectranet-fiber/>

xxxi <http://blogs.economicstimes.indiatimes.com/et-citings/airtel-shouldnt-charge-for-voip-help-keep-the-net-neutral/>

xxxii <http://www.medianama.com/2013/12/223-tata-docomo-whatsapp/> and
<http://www.tatadocomo.com/pps-tariff-plans.aspx>

xxxiii <http://www.medianama.com/2010/04/223-mts-mblaze-net-neutrality-mobile-internet/>

xxxiv <http://www.medianama.com/2014/05/223-whatsapp-airtel-50m-india/>

xxxv <http://www.medianama.com/2013/06/223-airtel-partners-google-to-offer-free-google-search-gmail-google/>

xxxvi <http://www.medianama.com/2012/10/223-facebook-starts-offering-free-talktime-with-new-mobile-sign-ups-in-india/>

xxxvii <http://www.medianama.com/2013/07/223-twitter-vodafone-india/>

xxxviii <http://www.medianama.com/2011/10/223-size-zero-wikipedia-looks-to-telcos-handset-cos-for-free-mobile-access/>

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xli <http://www.medianama.com/2014/01/223-airtel-facebook-free-hindi/>

xlii <http://www.medianama.com/2013/12/223-tata-docomo-whatsapp/>

xliii <http://www.medianama.com/2014/01/223-airtel-facebook-free-hindi/>

xliv <http://www.medianama.com/2014/03/223-uninor-facebook-whatsapp/>

xlv <http://www.medianama.com/2013/07/223-twitter-vodafone-india/>

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xlviii <http://www.medianama.com/2013/04/223-reliance-free-twitter-access>

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<http://www.medianama.com/2013/06/223-airtel-partners-google-to-offer-free-google-search-gmail-google/>

l <http://timesofindia.indiatimes.com/tech/tech-news/Airtel-to-woo-data-users-through-free-internet/articleshow/45063462.cms>

li <http://timesofindia.indiatimes.com/tech/tech-news/Airtel-to-woo-data-users-through-free-internet/articleshow/45063462.cms>