LESSONS FROM GLOBAL PRACTICES ON
HOW REGULATORS HAVE SOUGHT TO PICK GOOD FROM BAD
LESSONS FROM GLOBAL PRACTICES ON ZERO RATING

How regulators have sought to pick good from bad

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There is a rich source of information on how regulators in Europe, Canada and the United States have assessed zero-rated plans and determined their legality. In this report, I review the legal standards laid down in these regulations and guidelines, examine the factors that featured most prominently in the case-by-case assessments and identify shortcomings in these reviews. This report also analyses how the presence or absence of particular factors in zero rating plans may affect user choice, innovation and a level-playing field for content services. Most importantly, it questions the efficacy of the case-by-case approach as a method to mitigate these concerns, and provides recommendations, to improve the approach in a manner consistent with the objectives of net neutrality.

While standards of openness and application-agnosticism feature prominently in regulatory guidelines, when applied to live cases, it can be seen that there is inadequate and often superficial investigation into the practical impact on content services seeking to be zero rated. Simply requiring contracts to have the “same” terms across content services may not be enough—there needs to be transparency and accountability for those terms. A failure to scrutinize these realities might ensure that larger and well-networked content services would benefit from zero rating plans, often to the exclusion of nascent services. Second, explicit favouring of ISP-affiliated content directly contradicts the “level playing field” objective of any net-neutrality regulation, and it is perhaps necessary to introduce more stringent guidelines that prohibit such practices altogether. Third, there needs to be more granular analysis of the user groups that are privileged by particular zero-rated plans, and those that may be disadvantaged, in order to meaningfully assess impact on user choice. Finally, there is a need for more scrutiny on the level of data caps in a particular market—a very low data cap could strengthen the incentive to use zero-rated content exclusively.

1. Mozilla technology policy fellow. I would like to extend my gratitude to Gigi Sohn, Estelle Masse, Thomas Lohninger, Bram Abramson, Jochai Ben Avie and Chris Riley for their invaluable feedback and inputs. Any errors are my own.
INTRODUCTION

In 2016, the Telecom Regulatory Authority of India, or TRAI, issued a notification prohibiting discriminatory tariffs for data services—the regulatory authority stated, “one bit should not cost differently than another bit.” The regulations prohibit access providers (ISPs) from imposing differential pricing of data plans based on the content, application or services being accessed by an end-user. The proscribed plans include those that discount data charges for a particular content service, or class of services; that provide generous (or no) data limits for specific content; that exclusively provide access to specific content services, at a cheaper price than an all-access regular plan; and others, such as Facebook’s “FreeBasics,” which provides a selection of content entirely for free. In this report, I use the term “zero rating” to cover all such practices.

2. Internet service providers, which refers to both telecom service providers and fixed line providers.

3. Data is used here to refer broadly to mobile and fixed internet access.


5. The term initially described content that had “zero” data charges, but it has now gained currency as a more generic term in this policy debate.
By opting for a ban on all such data plans, TRAI stood apart from its European, American and Canadian telecom regulatory counterparts that adopted a case-by-case approach to zero rating, which TRAI emphatically rejected. In the explanatory memorandum to the regulations, TRAI stated, “Once such practices are allowed, it may not be possible to quantify, measure or remedy the consequences in the short to medium term.” It noted that while the case-by-case approach had “intuitive appeal,” the absence of a clear rule would hamper certainty for consumers, curtail innovative new services and expose ISPs to the continual risk that consumers would construe their practices as discriminatory. TRAI identified a significant financial and administrative burden of a case-by-case approach on both the regulator and the regulated entity.

On the other hand, regulatory authorities in Europe, the United States, and Canada, by opting for a case-by-case approach, have cautiously avoided a pre-emptive ban on differential pricing of data. A relatively new business model, zero-rated plans were considered a deviation from the net-neutrality principle, but one that required further evidence and analysis before any regulatory action could be initiated against them. In contrast, the regulatory bodies in these countries were not hesitant before prohibiting practices such as throttling or blocking of traffic by ISPs, which they considered more straightforward violations of the principles of net neutrality. In the case of zero rating practices, the preference for a case-by-case approach is premised on the assumption that not all forms of zero rating would be harmful to net-neutrality objectives such as user choice and a level playing field. Even the staunchest advocates of net-neutrality supported the proposition that zero rating plans should be assessed based on their impact on these objectives.

In recent times, the respective regulatory authorities of the three regions have published details about the zero rating cases that they have reviewed. An examination of these reviews sheds light on how the case-by-case approach has unfolded in practice.

The supervening telecom authority for regulators across Europe, the Body of European Regulators (BEREC), adopted the case-by-case basis approach through its Telecom Single Market Regulation in 2015. In December 2017, BEREC released a report that, among other things, provided details of public investigations undertaken by various European regulators during the first year of its implementation. The report makes a significant contribution because prior to it, some of the case details were not publicly available, and among those already in the public domain, many were not translated into English. The report reveals that commercial practices such as cases

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6. See generally, Mozilla’s submission to TRAI Pre-Consultation on Net-Neutrality available at https://blog.mozilla.org/netpolicy/traipre-consultationonnetneutralitysubmission-final/, in which Mozilla states that net neutrality is grounded in three principles:

1. The end-to-end principle: All points in the network should be able to connect to all other points in the network;
2. The best efforts principle: TSPs should deliver all Internet traffic from point to point as expeditiously as possible; and
3. The innovation without permission principle: Everyone and anyone should be able to innovate on the Internet without seeking permission from anyone, any entity, or other gatekeeper.


of zero rating, and not more strictly prohibited technical practices such as blocking or throttling traffic, occupied the majority of cases before regulators across Europe.

In the United States, the Federal Communications Commission adopted the Open Internet Order in 2015 that followed a similar case-by-case approach to zero rating—however, under the new administration, the order is facing repeal. In 2016, the FCC’s Wireless Telecommunications Bureau conducted a policy review of the zero-rated plans in the US market, in which they evaluated live cases of zero rating based on their impact on consumer choice and competition. Though there have been no enforcement actions following the report, the Bureau’s report is a valuable resource for understanding the practice of zero rating evaluation in the US—particularly with the Open Internet Order of 2015 set to be repealed.

In Canada, too, the Canadian Radio and Telecommunications Commission, or CRTC, has adopted a case-by-case approach to assess whether zero rating amounts to “unjust discrimination” or “undue or unreasonable preference or disadvantage” by telecommunications common carriers. In April 2017, CRTC introduced a framework called the Telecom Regulatory Policy to assess zero rating plans, based on criteria that the CRTC had applied to live cases.

In other words, there is a rich source of information on how regulators in Europe, Canada and the United States have assessed zero rating plans and determined their validity. In this report, I review the legal standards laid down in these regulations and guidelines, examine the factors that featured most prominently in the case-by-case reviews, and analyse the shortcomings of these reviews. It addresses the potential negative impact of zero rating on user choice, innovation and a level-playing field for content services. Most importantly, it questions the efficacy of the case-by-case approach as a method to mitigate these concerns, and provides recommendations, to improve the approach in a manner consistent with the objectives of net neutrality.

Regulatory authorities in Europe, the United States, and Canada, by opting for a case-by-case approach, have cautiously avoided a pre-emptive ban on differential pricing of data. A relatively new business model, zero-rated plans were considered a deviation from the net-neutrality principle, but one that required further evidence and analysis before any regulatory action could be initiated against them.


11. Section 27(2) of the Telecommunication Act, 1993.

The regulations and guidelines in Europe, the United States and Canada provide criteria for regulatory bodies to take into consideration while determining the legality of a zero rating case. These criteria are not uniform across the countries, but they all go beyond broad principles to specific indicators that assess impact of zero-rated practices on end-user choice and competition among content services.

**LEGAL STANDARDS FOR ASSESSMENT**

**IN EUROPE,** the Telecom Single Market Regulation mandates ISPs to test zero rating cases against their impact on the end users’ right to access and distribute content of their choice, and imposes a corresponding obligation on them to “treat traffic equally.” While the regulation itself is broadly phrased, BEREC has laid down guidelines for case-specific evaluations. The guidelines even isolate some forms of zero rating as straightforward violations of user rights. These include:

- When an ISP contractually restricts access to certain web content, which BEREC identifies as “sub internet offers”;
- When an ISP blocks or throttles non-zero rated content after the user’s data cap is exhausted, following which only zero-rated services are still available;
- When the zero rating amounts to blocking access to any content; and
- When an ISP charges a higher price for the data of any specific content—this would create a stronger disincentive to access such content.


14. BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, August 2016. Recital 7 of the Regulation 2015/2120 also makes an indirect reference to competition law insofar as it applies to such commercial practices (presumably including zero rating): “National regulatory and other competent authorities should be empowered to intervene against agreements or commercial practices ...”
In several other forms of zero rating practices, the guidelines note that the practices may influence the end users’ rights, without necessarily limiting them—and therefore, they may be permissible. For these cases, the guidelines provide factors that regulators should take into account while deciding on their legality:

- The disincentives to use non-zero rated content;
- The market positions of the ISPs and content services involved in the practice—the greater the market power of the parties, the more likely that zero rating is a concern; and
- Whether the zero rating case is application specific or application agnostic—regulators would consider the latter a lesser interference with user choice.

Other factors include the zero rating practice’s effect on the overarching ecosystem, such as:

- “Whether the continued functioning of the internet ecosystem as an engine of innovation is impacted”; and
- Its “effect on freedom of expression and media pluralism.”

IN THE UNITED STATES, the FCC’s 2015 Open Internet Order does not per se prohibit zero rating practices—instead, it draws “bright line rules” against technical practices of blocking, throttling and paid prioritisation. As per the 2015 Order, regulators would evaluate zero rating practices on an ex post basis, as per the Order’s “general conduct rule.” Under this rule, regulators must examine the “unreasonableness” of the interference or disadvantage of a zero rating practice to one, the end users’ right to access content, and two, its effect on the providers’ ability to make content available to end users. The Open Internet Order notes that the general conduct rule seeks to “balance the benefits of innovation against the harm to end users and edge providers.”

The unreasonableness standard is open ended by design, but the 2015 Order provides the following non-exhaustive list of factors to guide its application:

- Whether the practice in question interferes with the “end user’s ability to use the Internet as he or she sees fit.”
- “The extent of the ISPs vertical integration as well as its relationships with affiliated entities”—vertical integration here refers to the ISP owning or having a stake in the particular content services;
- Whether it raises consumer protection issues such as “unfair or deceptive billing practices, as well as practices that fail to protect the confidentiality of end users’ proprietary information”;
- Whether the practices “stifle innovation,
investment, or broadband deployment”;
- Whether the practices “threaten the use of the Internet as a platform for free expression”;
- “The extent to which it is application agnostic”—such practices would likely not violate the standard; and
- “Whether a practice conforms to best practices and technical standards adopted by open, broadly representative, and independent Internet engineering, governance initiatives, or standards-setting organization.”

**IN CANADA** the Telecommunications Act prohibits “unjust discrimination” and “unjust or unreasonable preference or disadvantage” by telecommunications common carriers.\(^{15}\) For making this determination, the CRTC has also adopted an ex post, complaints-based framework, which provides the evaluation criteria to assess whether the zero rating practice is consistent with the law, including:\(^{16}\)
- Whether it relies on market forces to the maximum extent feasible;
- Whether it seeks to remove barriers to entry;
- Whether it is a measure that is “efficient and proportionate” to its purpose of preventing violations of the unjust discrimination standard; and
- Whether it is applied in a competitively neutral manner.

The Canadian communications policy also stands out for its emphasis on equity and the social and cultural context of the country. Some policy objectives have become salient in their zero-rating cases, such as the need to “respond to the economic and social requirements of users of telecommunications services.”\(^{17}\)

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15. Section 27(2) of the Telecommunication Act, 1993.


17. Section 7(h), Telecommunications Act, 1993.
THE STANDARDS IN PRACTICE

After examining the criteria guiding the determination of the validity of zero rating practices, it is necessary to consider the factors that end up being influential in the actual regulatory assessments. A review of the BEREC and FCC enforcement reports and the select cases before the CRTC reveals the following list of factors prominent in regulatory assessment (the specific cases are cited as references):

1. Whether the ISP owns, or is affiliated with the content services being zero rated (United States\(^\text{18}\));

2. Whether the plan discriminates between particular content services in the same class (Europe\(^\text{19}\))

3. Whether the plan discriminates between different classes of content services (Canada\(^\text{20}\));

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\(^{18}\) FCC Bureau review of T-Mobile BingeOn, in which the fact that T-Mobile did not have much affiliated content was viewed favourably by the Bureau.

\(^{19}\) The Dutch regulator ACM’s investigation of T-Mobile’s data-free music services. The regulator held that the “main reason for concluding the service is non-discriminatory is that T-Mobile’s zero rating service is open to all music-streaming services,” BEREC Report, p.9. In the UK, the NRA said the openness of the ISP to adding new messaging applications to the zero-rated package was a reason that they did not choose to launch a formal investigation, BEREC Report, p.8

\(^{20}\) Telecom Decision CRTC 2017-105, Complaints against Quebecor Media Inc., Videotron Ltd and Videotron GP alleging undue and unreasonable preference and disadvantage regarding Unlimited Music Program, 20 April 2017 (hereafter, Videotron case)
4. Whether all terms and conditions on content services are imposed on a non-discriminatory basis, including i) whether being a part of a zero-rating initiative requires the payment of charges (Europe and United States), and ii) whether the charges are imposed on a non-discriminatory basis (United States);

5. The time, search and negotiation costs incurred by a content service to conclude an agreement to join a zero rating plan (Canada);

6. Whether the plan discriminates against those subscribers who do not wish to use the zero-rated content (Canada), including by means of: i) an undue preference to subscriber groups that were eligible to access the zero rating services—for instance, with respect to certain tiers of data plans only, or ii) an undue preference to subscriber groups that consume other non-zero rated content services—for instance, groups such as senior citizens, or persons with physical disabilities that preclude their ability to benefit from a plan;

7. Whether zero-rated content can be accessed even after data caps are exhausted, while non-zero rated data is throttled or blocked (Europe);

8. Whether there is throttling of non-zero rated content (Europe); and

9. Whether the zero rating relies on an opt-in method and whether the practice provides a user any opportunity to demonstrate an affirmative choice (United States).

21. The Dutch regulator ACM’s investigation of T-Mobile’s data-free music services. They found that it was open to all music streaming services to be included without a charge. The ACM noted that the absence of such a financial requirement was a factor that weighed favourably for the service, BEREC Report, p.9; Hungarian regulator NMHH stated that zero rating (and throttling competitor content) based exclusively on commercial considerations was unlawful, BEREC Report, p.13.

22. In the FCC Bureau’s review of T-Mobile BingeOn, the lack of charges for content services to participate was viewed favourably

23. The FCC Bureau review of AT&T’s Sponsored Data program as well as Verizon’s Free Bee plan. The Bureau was concerned that the terms and conditions to affiliated content services were more favourable than those to non-affiliated content.


25. Videotron case, supra note 20. Here, the CRTC found that music-streaming zero rating plans gave “undue preference” to subscribers who are eligible to access the unlimited data plan (a more expensive tier of plan). They also said it disadvantaged younger audiences at the expense of groups who consumer other content services (senior citizens, hearing disabled).


27. Portuguese regulator Anacom in MEO case, 2018, available at https://www.anacom.pt/render.jsp?contentId=1430339&languageId=1; Hungarian regulator NMHH, BEREC report, p.12 (in Hungary, the fact that zero rated content in addition did not need to observe the “maximum 32kbit/s download and upload speed limit” prescribed for non-zero rated content, was another factor that counted towards its illegality.)

28. FCC Bureau review notes in the T-Mobile BingeOn case – “T-Mobile subscribers can easily enable or disable Binge On from their user settings and opt-out or opt-in to zero rating as they choose”
GAPS AND RECOMMENDATIONS

A review of these cases illustrate that certain factors of zero rated plans were red flags to regulatory authorities. For instance, European regulatory bodies found that plans that allowed access to zero-rated content even after the exhaustion of data caps were in violation of the Single Market Regulation, in accordance with the BEREC guidelines. In the United States, on the other hand, the FCC was most strict when reviewing favourable terms granted to affiliated content services. In Canada, after the strict standard set in the Videotron case, a plan that is ostensibly application agnostic could still violate the legal standard.

While a granular analysis of each case is beyond the scope of this report, a study of the factors that are typically prominent in the zero rating cases reveal clear gaps in the regulations guiding these regulatory bodies. A meaningful enquiry into the impact of zero rating on (permission-less) innovation, would require certain factors that ought to be included, or have more weight in the determination of the validity of a zero rating practice.

LOW DATA CAPS

A very low data cap would strengthen the incentive to use zero-rated content exclusively. It could distort competition in favour of zero rated content services—especially so when only users can access only zero-rated content after exhausting the data caps. In addition to the European cases mentioned in the previous section, the FCC Bureau also stated in its zero rating review that this was a factor to be considered, although it was not applied to any specific case.29

The issue does not appear in BERECs enforcement survey, however, in 2018 the Portuguese regulator explored the implications of data caps in some detail. In Portugal, several ISPs offer data plans that would allow users to purchase additional data exclusively to access specific content, within a certain limit. From a survey of data caps over the last decade in Portugal, the regulator found that while general data limits might have been rising over time, they were still several times lower than the separate data cap exclusively for zero-rated content.30 Though the decision gave a clean chit to all zero-rated offers, it is pertinent to note that the regulator issued direction to ISPs to "reduce differences between general data allowances and specific (zero-rated) allowances."

The Portuguese example also highlights the distortionary effect of zero rating. There appears to be

29. FCC Bureau Review.
an incentive for ISPs to track the demand for particular content bundles and then encourage users to consume and pay along those choices. While one could argue that this curation is merely a reflection of consumer demand, it is important to recognize that it might simultaneously both entrench these preferences and discourage exploration. When data caps for "general" internet usage are so low, and for zero-rated content comparatively high, then the disincentive to explore is even higher.

**PROCESS, TIME TAKEN AND NEGOTIATIONS COSTS TO BE ZERO RATED**

The case-by-case reviews also indicate the failure of regulators to investigate the practical steps that a content service must undertake to participate in a zero rating plan. Even when there is no direct cost, there may be transactional costs associated with the processes required for completing a contractual agreement with the telecom provider or other service provider hosting the zero rating initiative. This could potentially result in content services who wish to be a part of a zero rating plan to be dissuaded, disincentivised, or unable to join the plan—effectively defeating the purpose of a plan being application agnostic.

The digital-rights organizations Epicenter.works and the European Digital Rights Initiative (EDRi) have jointly submitted a response to BEREC’s consultation process noting that European telecom providers require content services to “continuously cooperate” with them in order to ensure that their traffic is identifiable, in order for it to be differentiated. In particular, the response suggests that zero rating agreements sometimes require content services to provide an advance notice of 28–30 days to the telecom provider in case of any changes to their service, and even access to beta versions of their service in some cases. A failure to fulfil these terms could expose content services—many of them small or nascent companies—to legal liability.

The Norwegian regulator, while investigating Telenor’s zero rating offer, mandated that the process for zero rating be “simple, prompt, efficient and inclusive.” It is necessary to flesh out what such a model process should look like, and for the regulators to recommend such a process in their guidelines. In this regard, the CRTC’s approach in the Canadian Videotron decision is instructive. In the case, the CRTC recorded the average time taken for content services to reach an agreement with the ISP in question—in this particular case, the regulator estimated it to be five-and-a-half months. Pertinently, the CRTC expressed their concern that such a time frame, “in an environment that moves as quickly as the Internet,” could disadvantage content services.

**TRANSPARENCY AND NEGOTIATION OF TERMS**

A concern related to the process of concluding zero rating agreements is the lack of scrutiny over the terms of the agreements. At the first instance itself, there needs to be greater transparency of the terms and conditions on which a zero rating is permitted,

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32. Ibid; see StreamOn Terms of Service: https://www.telekom.de/hilfe/downloads/allgemeine-geschaeftsbedingungen.pdf; Point 3.2.2 of the Vodafone Pass Terms of Service.

33. BEREC Report, p.9
and to identify whether there is any room to negotiate. Technical terms, for example, might be overly burdensome, making it impossible for several content services to join (In this regard, the FCC Bureau, in its review of T-Mobile BingeOn, noted favourably that most content services could satisfy the technical criteria laid out by the ISP.) This only underscores the necessity for a detailed analysis of the terms of a zero rating plan, and its impact on content services—particularly on smaller and nascent services.

During an interview with me, Thomas Lohninger, an Austrian digital-rights activist, said that zero rating plans that mandate techniques such as Deep Packet Inspection (DPI) or DNS Spoofing34 might be a deterrent for various content services. These terms could also violate privacy requirements in European law.36 Moreover, certain terms of a zero-rated plan could also discourage some kinds of innovation—for instance, ISPs could block services that use protocols such as RTMP or blockchain technologies if they restrict the ability of traffic to be identified (and differentiated).37

Therefore, simply requiring contracts to have the “same” terms across content services may not be enough—there needs to be transparency and accountability for those terms. A prime example of its importance is the fact that the publicly available terms of Facebook FreeBasics in India gave the content services, the regulator and the advocacy community a basis to critique and engage with the plan.38

### VERTICAL INTEGRATION AND AFFILIATED CONTENT

The FCC Bureau review highlights the critical tension between vertical integration and zero rating. In both the AT&T Sponsored Data and Verizon FreeBee case, the Bureau found that there were terms more favourable for their respective affiliated content services, highlighting the growing incentives for ISPs to use zero-rated initiatives as a vehicle to promote their own content.39

The Bureau noted, however, that it is only an “unreasonable” difference in the terms of a zero rating plan, and not the mere fact of a difference, that would constitute an illegitimate plan under the Open Internet Order. The Bureau interpreted this to mean that if the price charged to non-affiliated content services corresponded to the per gigabyte cost of providing the data, the zero rating might be legitimate. In the cases before them, the Bureau found that non-affiliated content providers had to pay a hefty rate to be zero rated, even though the incremental cost per gigabyte data at peak capacity was close to zero. While the regulators’ concern with zero rating plans and vertical integration is welcome, their attempt to arrive at an empirical assessment of “reasonable” differences appears to be challenging. As the FCC Bureau itself observed, calculating the economic costs of providing zero-rated data at peak capacity is complex and context-dependent.

34. Vodafone Pass offers DNS Spoofing to identify zero-rated content to its partner services. This technique requires Vodafone to capture real DNS queries by its users. The technical and commercial conditions of Vodafone Pass are subject to a non-disclosure agreement: http://www.vodafone.com/content/partner-portal.html

35. Personal interview with Thomas Lohninger (Epicenter works) March 2018.


37. Personal interview with Thomas Lohninger (Epicenter works) March 2018


39. FCC Bureau Review.
In their submission to the Portugese regulator’s consultation, European digital rights organisations found stark differences in the prices of affiliated zero-rated content—the access to the telecom provider’s partner applications was sold at a far lower price compared to the access to all non-partner applications. In other plans, the access to affiliated content had no data cap at all, offering them a clear competitive edge.

Given that explicit favouring of affiliated content directly contradicts the “level playing field” objective of any net-neutrality regulation, it is perhaps necessary to introduce more stringent guidelines that prohibit such practices altogether.

IMPACT ON PARTICULAR SUBSCRIBER GROUPS

During the debate around Facebook’s FreeBasics in India, supporters of the plan had claimed it provided access to a majority of telecom subscribers who were previously unable to afford data plans. Retractors, on the other hand, argued that these groups were in fact being disadvantaged because their choice of access was artificially narrowed down to only select content—some said, rhetorically, that this was akin to “poor internet for poor people.”

Studies have also pointed out that the likelihood of embedding preferences for the zero rated content, at the expense of exploration beyond these services, was far more likely for first-time internet users.

With a significantly higher internet penetration in most parts of Europe, the United States and Canada, this debate does not directly resonate in these regions—in fact, FreeBasics is not available there at all. Yet, the Canadian Videotron decision does explore this issue in a different context. While the Indian debate touched upon disadvantaging certain groups of potential internet subscribers through impoverished access, in Canada, the debate surrounded the fact that the ISPs determination of zero-rated content would invariably privilege the subscriber groups who used such content, and in turn, disadvantage those who did not.

The CRTC found that certain subscriber groups would be favoured by a “music streaming” zero rating plan, and others might be disfavoured.

In fact, the CRTC took note of the arguments of the Senior Citizen’s Organization of British Columbia that a zero rating plan for streaming music benefited younger audiences at the expense of older age groups. They made similar observations about individuals with hearing disabilities, and those who could not afford this tier of data plans. While this is driven by the Canadian legal standard on undue and unfair preference and disadvantage, it demonstrates another facet of the general concern with protecting “user choice.” It is necessary to move beyond a conceptual analysis while approaching the issue, and to disaggregate particular user groups to consider the potential impact.


41. Videotron case, supra note 20.
CONCLUSION

The Indian regulator’s decision to prohibit zero rating practices notes that the social costs of zero rating on innovation may be difficult to quantify in an ex post assessment. This report makes a start at evaluating this claim.

While standards of openness and application-agnosticism feature prominently in regulatory guidelines, when applied to live cases, it can be seen that there is inadequate and often superficial investigation into the practical impact on content services that seek to be zero rated. Questions of the process of inclusion into zero rating plans, and the transparency and negotiating room for these terms appears to be under-scrutinized. A failure to scrutinize these realities might ensure that large content services that are affiliated to ISPs would benefit from zero rating plans, often to the exclusion of nascent services. There needs to be more granular analysis of the user groups that are privileged by particular zero rating plans, and those that may be disadvantaged, in order to meaningfully assess impact on user choice. Similarly, there should be more scrutiny of general data caps in a particular market – a very low data cap could strengthen the incentive to use zero-rated content exclusively.

This discussion is important not just to strengthen the case-by-case review, but also to question whether it is still an appropriate policy response. The European regulator, for example, has an ongoing consultation process on this issue, which may benefit from an assessment of the effectiveness of the case-by-case approach.

Mitchell Baker, the Chairwoman of Mozilla, has noted - unlike “selective zero rating for a few apps and websites,” which would lead to the “exclusion for the rest of the Internet,” what we need is “equal rating.” Equal rating refers to business models that provide subsidized access without discriminating based on content. Eventually, the regulatory approach to zero rating will decide the direction of innovation around creating more affordable access to the internet.

