

# Net Neutrality: Equal Rights Between Bytes

THIS DOCUMENT IS PREPARED BY THE OFFICE OF YB WONG CHEN, MEMBER OF PARLIAMENT FOR KELANA JAYA



## **Executive Summary**

- There is little to none legislation on net neutrality or even on the rights of Internet users in Malaysia.
- Net neutrality has gained prominence around the world due to high-profile cases in the United States, where Internet service providers (ISPs) have repeatedly disadvantaged certain media content providers over others and have prevented their end-users from having free and fair access to legal content.
- Net neutrality regulations are needed to curb unfair practices of ISPs and media content providers towards end-users. These regulations should minimally include:
  - No blocking of legal content;
  - No throttling (slowing) of lawful Internet traffic;
  - No paid prioritisation of select content; and
  - Transparency in network traffic management.
- Net neutrality is an issue that has surfaced in Malaysia only recently, due to a sharp increase of content consumption over the Internet, mostly via mobile devices. Regulations need to be in place to protect end-users against potentially unfair treatment from their ISPs.

## 1.0 Introduction

- 1.1 Net neutrality has grown in importance following the rise of over-the-top (OTT) content, i.e. content delivered directly over the Internet to end-users. It involves considerations of Internet access and adoption, innovation, freedom of information, and transparency.
- 1.2 This paper highlights the need for net neutrality regulations in Malaysia. We do so by examining:
  - (a) The concept and importance of net neutrality;
  - (b) Infringements of net neutrality by Internet service providers (ISPs) in Malaysia;
  - (c) Net neutrality regulations implemented across the world, including in the United States (US), the European Union (EU), and Chile; and
  - (d) How these regulations can be applied in Malaysia.
- 1.3 While the issue of net neutrality is fiercely debated in the United States, the focus has largely been on ISPs' segregation of the network traffic of several Internet services into network "slow lanes" and "fast lanes." Zero-rating is another issue that infringes net neutrality principles and is more prevalent among ISPs throughout the world, including Malaysia.
- 1.4 We note that there are scarcely any policies or regulations enforced by the Malaysian Communications and Multimedia Commission (MCMC) that promote and protect the rights of Internet users.

## 2.0 The case for net neutrality

- 2.1 First coined in 2003 by Tim Wu, "net neutrality" is the idea that ISPs should treat all data that travel over their networks fairly, without improper discrimination in favour of particular applications, sites, or services.<sup>1</sup>

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<sup>1</sup> Electronic Frontier Foundation, *Net Neutrality*, <https://www.eff.org/issues/net-neutrality>.

2.2 The main forms of net neutrality violations involve:

(a) Multitiered network access: Network traffic of certain services is segregated to be throttled (slowed) or prioritised over others. ISPs term this as network traffic management to maintain the quality of service (QoS). While this is an accepted practice, it has been abused before.

(b) Zero-rating: ISPs include certain services that do not contribute to the user's data cap.

(c) Blocking and censorship of lawful content and services.

2.3 Network traffic management is used by ISPs to maintain the QoS for all users across their networks. For instance, an ISP might slow down certain video streaming services to reduce congestion on its infrastructure.

2.4 However, in the US and before net neutrality regulations were implemented, ISPs have abused this in order to demand payment for certain network traffic to enjoy the same treatment as others. A prominent example is Netflix having to pay ISPs to not have its network traffic slowed down.<sup>2</sup>

2.5 While network traffic management is generally not frowned upon and is an accepted practice, it should not:<sup>3</sup>

(a) Discriminate against any service or application;

(b) Encourage anticompetitive behaviour, for example, by zero-rating;

(c) Be used as a substitute to upgrading existing infrastructure to alleviate network congestion; or

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<sup>2</sup> David Goldman, 'Slow Comcast speeds were costing Netflix consumers', CNN Tech, 29 August 2014, <http://money.cnn.com/2014/08/29/technology/netflix-comcast/index.html>.

<sup>3</sup> International Telecommunications Union, *Net Neutrality In Asia-Pacific: Trends, challenges, and guidelines for regulators and policymakers*, 2015, [http://www.itu.int/en/ITU-D/Regulatory-Market/Documents/Events2015/Malaysia/Presentations/Ses2\\_Part1\\_1NGuzamn\\_netNeutrality.pdf](http://www.itu.int/en/ITU-D/Regulatory-Market/Documents/Events2015/Malaysia/Presentations/Ses2_Part1_1NGuzamn_netNeutrality.pdf), p. 5.

(d) Be done without any transparency and accountability to end-users.

- 2.6 Zero-rating exempts certain data from counting towards a user's data cap or incurring excess data charges to the user. This is often done by the content providers, such as Facebook, paying fees to the ISPs. This potentially sets a dangerous precedent in which content providers, in partnership with the ISPs, can monopolise the market.
- 2.7 Without net neutrality, there may not be a level playing field for other smaller companies or start-ups to compete, as consumers may find zero-rated services and applications more appealing than other competing alternatives.<sup>4</sup>

### **3.0 What are the supposed net neutrality values that are infringed upon by ISPs in Malaysia?**

3.1 In Malaysia, net neutrality violations largely consist of zero-rating practices amongst ISPs. Zero-rating is popular in Malaysia due to its coverage of popular applications and services such as Facebook and video- and music-streaming services that can consume large amounts of Internet data.

3.2 Celcom

(a) Celcom postpaid subscribers can stream music from Yonder Music without this counting towards their prescribed data caps.

(b) Subscribers of First Gold, First Gold Plus, and First Platinum \_\_ plans can use WhatsApp and WeChat without these counting towards their data caps.<sup>5</sup>

(c) Celcom Xpax Internet Plans offer free 10GB of Facebook access per

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<sup>4</sup> Corynne McSherry, Jeremy Malcolm, and Kit Walsh, 'Zero Rating: What It Is and Why You Should Care', *Electronic Frontier Foundation*, 18 February 2016, <https://www.eff.org/deeplinks/2016/02/zero-rating-what-it-is-why-you-should-care>.

<sup>5</sup> Celcom, *Plans*, 2017, <https://www.celcom.com.my/personal/plans>.

month.<sup>6</sup>

### 3.3 Digi

(a) Digi Postpaid 150 Infinite plan advertises unlimited 4G Internet usage, but limits the speed of peer-to-peer downloads.<sup>7</sup>

(b) Digi customers with an active Internet plan are eligible for Digi Music Freedom Services, which allows subscribers to use selected music services such as Spotify and Apple Music at zero data charges.<sup>8</sup>

### 3.4 Maxis Hotlink

(a) Hotlink subscribers can access chat applications such as WhatsApp, WeChat, KakaoTalk, and Line at zero data charges, but at limited speeds.<sup>9</sup>

(b) Hotlink offers a Monster Pass that includes 1 GB of data usage reserved for selected video-streaming services such as YouTube and is also applicable to several other Google applications.<sup>10</sup>

### 3.5 U Mobile

(a) U Mobile customers with postpaid plans and prepaid monthly data subscriptions can use Waze,<sup>11</sup> access social-networking sites Facebook, Instagram, and Twitter;<sup>12</sup> stream music from 20 music-streaming services;<sup>13</sup> and stream videos from 24 video providers<sup>14</sup> without counting towards their data caps.

3.6 Only allowing select services to be zero-rated can prevent emerging competitors from gaining a fair opportunity to compete in the market.

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<sup>6</sup> Xpax by Celcom, *Internet Plan*, 2017, <https://www.xpax.com.my/internet>.

<sup>7</sup> Digi, *Digi Postpaid Infinite*, 2017, <http://new.digi.com.my/tnc/postpaid-infinite>.

<sup>8</sup> Digi, *Music Freedom*, 2017, <http://new.digi.com.my/apps/music-freedom>.

<sup>9</sup> Hotlink, *#Hotlink: Free Social Chat*, 2017, [https://www.hotlink.com.my/en/internet/monster\\_pass.html](https://www.hotlink.com.my/en/internet/monster_pass.html).

<sup>10</sup> Hotlink, *Enjoy your days with Monster pass*, 2017, [https://www.hotlink.com.my/en/internet/monster\\_pass.html](https://www.hotlink.com.my/en/internet/monster_pass.html).

<sup>11</sup> U Mobile, *Free Data for Waze*, 2017, <http://www.u.com.my/plans/data-services/waze>.

<sup>12</sup> U Mobile, *App-Onz*, 2017, <http://www.u.com.my/plans/data-services/app-onz>.

<sup>13</sup> U Mobile, *Music-Onz*, 2017, <http://www.u.com.my/plans/data-services/music-onz>.

<sup>14</sup> U Mobile, *Video-Onz*, 2017, <http://www.u.com.my/plans/data-services/video-onz>.

Although ISPs in Malaysia cover some of the most popular applications and services typically used by Malaysians, it is still unfair to other services that provide the same type of content but are not zero-rated.

## 4.0 Net neutrality regulations—the United States

- 4.1 The Federal Communications Commission (FCC) reclassified broadband Internet access as a telecommunications service, thus applying Title II of the Communications Act 1934 to ISPs and setting the FCC's Open Internet "bright-line" rules for both fixed and mobile broadband alike.<sup>15</sup>
- 4.2 The FCC's Open Internet rules prohibit:<sup>16</sup>
  - (a) Blocking: Broadband providers may not block access to legal content, applications, services, or non-harmful devices.
  - (b) Throttling: Broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.
  - (c) Paid prioritisation: Broadband providers may not favour some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no "fast lanes." This rule also bans ISPs from prioritising content and services of their affiliates.
- 4.3 Zero-rating practices by several ISPs were under investigation by the FCC for violating net neutrality principles.<sup>17</sup> However, under the leadership of FCC chairman Ajit Pai, who is an anti-net neutrality advocate, zero-rating practices are now being allowed to continue as they have proven to be popular among consumers.<sup>18</sup>

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<sup>15</sup> Federal Communications Commission, *FCC Adopts Strong, Sustainable Rules to Protect the Open Internet*, 26 February 2015, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0226/DOC-332260A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0226/DOC-332260A1.pdf), pp. 1–2.

<sup>16</sup> *Ibid.*, p. 2.

<sup>17</sup> Russell Brandom, 'New FCC report says AT&T and Verizon zero-rating violates net neutrality', *The Verge*, 11 January 2017, <https://www.theverge.com/2017/1/11/14243196/fcc-zero-rating-report-net-neutrality-att-verizon-t-mobile>.

<sup>18</sup> Klint Finley, 'The FCC OKs Streaming for Free—But Net Neutrality Will Pay', *Wired*, 3 February 2017, <https://www.wired.com/2017/02/fcc-oks-streaming-free-net-neutrality-will-pay/>.

## 5.0 Net neutrality regulations—European Union

- 5.1 The European Parliament in 2015 enacted new net neutrality regulations under the Body of European Regulators for Electronic Communications (BEREC) that prohibit ISPs from blocking or slowing down Internet traffic, except where necessary.<sup>19</sup>
- 5.2 BEREC does not specifically ban zero-rating by ISPs unless they prove to be discriminatory towards other competing services, evaluated on a case-by-case basis.<sup>20, 21</sup>
- 5.3 Under BEREC guidelines, ISPs found to infringe on the regulations would face fines, in accordance with the laws of the country in which the supposed infringement took place.<sup>22</sup>
- 5.4 In May 2016, the Dutch Parliament ruled that price discrimination, including zero-rating, is prohibited under the Dutch Telecommunications Act.<sup>23</sup> However, in April 2017, the District Court of Rotterdam ruled that this ban on price discrimination was in violation of European net neutrality regulations, thus zero-rating should be allowed as per BEREC guidelines.<sup>24</sup>

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<sup>19</sup> Aman Toor, 'Europe's net neutrality guidelines seen as a victory for the open web', *The Verge*, 30 August 2016, <https://www.theverge.com/2016/8/30/12707590/eu-net-neutrality-rules-final-guidelines-berec>.

<sup>20</sup> Body of European Regulators for Electronic Communications, *What is zero-rating?*, 2015, [http://berec.europa.eu/eng/netneutrality/zero\\_rating/](http://berec.europa.eu/eng/netneutrality/zero_rating/).

<sup>21</sup> Michael Chaia, 'Net Neutrality Challenges in the World: Zero-Rating in the European Union', *Public Knowledge*, 18 July 2017, <https://www.publicknowledge.org/news-blog/blogs/net-neutrality-challenges-in-the-world-zero-rating-in-the-european-union>.

<sup>22</sup> Body of European Regulators for Electronic Communications, *BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules*, 2016, [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/6160-berec-guidelines-on-the-implementation-b\\_0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/6160-berec-guidelines-on-the-implementation-b_0.pdf).

<sup>23</sup> Rejo Zenger, 'Press release: Dutch government prohibits price discrimination for internet access', *Bits of Freedom*, 17 May 2016, <https://bof.nl/2016/05/17/press-release-dutch-government-prohibits-price-discrimination-for-internet-access/>.

<sup>24</sup> European Digital Rights, *Dutch ban on zero-rating struck down – major blow to net neutrality*, 17 May 2017, <https://edri.org/dutch-ban-on-zero-rating-struck-down-major-blow-to-net-neutrality/>.

## 6.0 Net neutrality regulations—Chile

- 6.1 In 2010, Chile became the world's first country to pass net neutrality laws.<sup>25</sup> This legislation stated that ISPs must not interfere, discriminate, or in any way hinder access to content, applications, or services, except for security measures such as virus protection.<sup>26</sup>
- 6.2 Zero-rating practices have been ruled to violate net neutrality laws and had to be ceased by 1 June 2014.<sup>27</sup>
- 6.3 After the law was implemented, improvements were seen on the local telecommunications market. According to official figures, between 2009 and 2012, the number of mobile connections increased from 600,000 to nearly 5 million, while fixed connections increased from 1.7 to 2.2 millions. In 2012, there were reported decreases of up to 50% in the price of services.<sup>28</sup>

## 7.0 Net neutrality regulations needed in Malaysia

- 7.1 Net neutrality regulations should be enshrined in legislation. These could be placed under the Communications and Multimedia Act 1998. Fundamentally, with reference to FCC's Open Internet rules, they should cover:
  - (a) No blocking: ISPs should not block lawful application or services.
  - (b) No throttling: ISPs should not throttle certain network traffic in favour of others.

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<sup>25</sup> Tim Stevens, 'Chile becomes first country to guarantee net neutrality, we start thinking about moving', *Engadget UK*, 15 July 2010, <https://www.engadget.com/2010/07/15/chile-becomes-first-country-to-guarantee-net-neutrality-we-star/>.

<sup>26</sup> Matthew DeCarlo, 'Chile passes law to enforce net neutrality, more', *Techspot*, 15 July 2010, <https://www.techspot.com/news/39670-chile-passes-law-to-enforce-net-neutrality-more.html>.

<sup>27</sup> Leo Mirani, 'When net neutrality backfires: Chile just killed free access to Wikipedia and Facebook', *Quartz*, 30 May 2014, <https://qz.com/215064/when-net-neutrality-backfires-chile-just-killed-free-access-to-wikipedia-and-facebook/>.

<sup>28</sup> Alberto Cerda, 'An evaluation of the net neutrality law in Chile', *Digital Rights Latin America & the Caribbean*, 17 July 2013, <https://www.digitalrightslac.net/en/una-evaluacion-de-la-ley-de-neutralidad-de-la-red-en-chile/>.

- (c) No paid prioritisation: ISPs should not accept fees to prioritise certain network traffic over other services.
  - (d) No zero-rating: ISPs should not to zero-rate certain application and services unless all other competing services of the same nature are also given the same treatment as well.
  - (e) Transparency: ISPs should be transparent on their network traffic management practices.
- 7.2 Fines should be imposed, either one-off or periodically until ISPs end the infringements.

## 8.0 Conclusion

- 8.1 Net neutrality is still a relatively new issue, and it remains to be seen whether it will benefit consumers in the long run. As aforementioned, Chile has seen positive effects following its adoption of net neutrality regulations, though it is marred by allegations of negligent supervision of the law by public authority.<sup>29</sup>
- 8.2 Most ISPs in Malaysia that offer mobile Internet provide zero-rated content with their offerings, a practice which is against net neutrality values.
- 8.3 Even though zero-rating may be appealing to consumers as it offers popular content to them at no extra cost, it may harm innovation and competitiveness in the market in the long run.
- 8.4 Most importantly, the rights of Internet users in Malaysia still need to be protected and safeguarded by the MCMC before proper discussion on net neutrality can take place.

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<sup>29</sup> Ibid.

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