

Zero-rating, Positive Net Neutrality, and Understanding the Chilean Regulation

Marco Correa Pérez



May 17, 2018

A Report by the Internet Policy Observatory at the Annenberg School, University of Pennsylvania

ACKNOWLEDGEMENTS

The author would like to thank the Internet Policy Observatory (IPO) for supporting this research, particularly Laura Henderson, Research Project Manager at the IPO, for her editorial and translation assistance, as well as PhD Jan Gerlach for his support and continuous guidance.

ABOUT THE AUTHOR

Marco Correa Pérez is a Chilean lawyer, interested in researching about law and technology, particularly on Copyright regarding digital technologies and human rights. He has worked as guest professor at the Diploma in Digital Communication program of the Institute of Communication and Image at the University of Chile. Marco is also a free culture advocate and member of the Wikimedia movement, currently serving as Chair of Wikimedia Chile. He worked as Spanish Language Coordinator for the 2030 Strategy process at the Wikimedia Foundation. He holds a Bachelor's degree in Legal and Social Sciences from the University of Chile. For questions or comments about this project, please contact Marco at legal.mcorrea@gmail.com.

ABOUT THE IPO



The Internet Policy Observatory (IPO) is a project at the Annenberg School for Communication at the University of Pennsylvania. The overarching goal of the program is to deepen the reservoir of researchers and advocates in regions where Internet freedom is threatened or curtailed and to support the production of innovative, high-quality, and impactful internet policy research. The IPO facilitates collaboration between research and advocacy communities, builds research mentorships between emerging and established scholars, and engages in trainings to build capacity for more impactful digital rights research and advocacy.

Through the IPO's three-pronged approach, the program seeks to educate a network of advocates and researchers, produce high-impact, locally-relevant research in furtherance of Internet freedom objectives, and help connect researchers and mentors to foster collaboration, mobilization, and increase research impact.



ABSTRACT

The Chilean net neutrality regulation is one of the first national legislative efforts to recognize the principle of preventing arbitrary discrimination of Internet traffic. One of the main challenges in interpreting and implementing this law within Chile has been the regular practice of zero-rating, in which certain telecommunications providers prioritize certain applications through free data. Although this practice was initially characterized as a breach of net neutrality by the regulatory body (the Subsecretariat of Telecommunications (Subtel)), zero-rating is still practiced by mobile telephone companies as part of their subscription offers. This white paper summarizes the research and findings of a larger academic project that seeks to analyze both the legal status of zero-rating in Chile and the evolution of the Subtel criteria, which has led to the proliferation of this practice in the country.

KEYWORDS:

Net neutrality – zero-rating – mobile telephony – telecommunications

BACKGROUND: THE DEBATE ABOUT ZERO-RATING

IS ZERO-RATING A VIOLATION OF NET NEUTRALITY?

Zero-rating is a practice carried out by Internet service providers (ISP), in which the consumption of Internet data relative to certain services or specific contents is free of charge. Zero-rating is used, for example, in services with data caps, where ISPs charge users for a limited amount of data used during a certain period. Zero rating has no practical application in the case of unlimited data plans, where users can download as much as they want and the speed of the Internet connection is the only limitation.

This commercial practice has been questioned within academia and advocacy communities as a possible violation of net neutrality, the principle that aims to “to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights” (BEREC, 2016:4). Net neutrality has been classified into two types: “negative” neutrality, which seeks to prevent ISPs from deliberately blocking, interrupting, and interfering with content and services; and “positive” neutrality, whose purpose is to prevent ISPs from selecting or prioritizing contents and services consumed by users.

Positive neutrality is the kind of net neutrality that several academics and net neutrality activists believe is threatened by zero-rating practices, as these experts maintain that the end result of a market with zero rating is price discrimination of services. However, other authors characterize zero-rating as a practice that has little to no effect on the users’ choice of web contents and even consider it as both economically and socially beneficial by “expanding the reach of online content and distribution services.” Experts– such as Arturo Carrillo (2016), Jordan and Ghosh (2010) – advocate for a third option, an intermediate approach to Internet traffic management, which is based on a “reasonability” test to determine whether said practices are violations of net neutrality or not, and how they should be regulated.

The variety of zero-rating models makes it extremely complex, and sometimes reductionist, to characterize the legal status of the practice, particularly in light of statutory variations in laws seeking to achieve net neutrality. The range of practices can be categorized in five models:

1. **Single-site:** ISPs gives users free-of-charge access to one service (website or app). In most cases, the ISP sponsors zero-rating even though there is an agreement with the prioritized content provider.

2. **Sponsored data:** The content provider pays the ISP for the data charges of its own content, which becomes zero-rated for ISP customers.
3. **Compound zero-rating:** A service provider (or a group of them) agrees with an ISP to give their customers zero-rated access to a selected package of web sites and/or apps. Such a contract may or may not involve a payment to the ISP.
4. **Categorical zero-rating:** ISP offers free access to entire categories of applications, e.g. music or video streaming.
5. **“False” zero-rating:** A service provider partners with an ISP to offer limited amounts of free-disposal, zero-rated data to users “in exchange for meeting certain conditions, such as viewing an advertisement or downloading an application.”

Of these five models, the “false” and categorical zero-rating categories most readily can be said not to violate the net neutrality principles. In both cases there is no content discrimination. In the case of false zero-rating, users use their data credits for the content they prefer. Even though the categorical model differentiates between certain categories of content, the specific treatment of data is extended to all sites or applications of the same service category, giving no priority to any specific site, and keeping the user free to decide which app they will use within that category.

That leaves the three remaining types of zero-rating – single site, sponsored, and compound – as models that can compromise the principle of net neutrality, because through these practices the ISPs and/or the content providers directly affect the choice of Internet end users.

ZERO-RATING PRACTICES IN CHILE

ARE ZERO-RATING PRACTICES IN CHILE NET NEUTRALITY VIOLATIONS?

How does one approach the characterization of relevant zero-rating practices in Chile? During the last

decade, zero-rating has evolved into a common mode of marketing for telecommunication companies around the globe, and Chile is not exempt from this trend. Zero-rating has been introduced in mobile network operators’ advertising under the concept of “free social media” (FSM), focusing on the most popular services.



FIGURE 1



FIGURE 2



FIGURE 3

Although these applications are offered in social media packages, FSM can be recategorized away from zero-rating when the promotions offered cover a wide range of app categories, such as social networks (including Facebook, Twitter, Instagram), messaging apps (WhatsApp and, Facebook Messenger and Snapchat) or even music streaming (Spotify, Apple Music). FSM promotions are also not a curated set of different types of applications. This approach contrasts with Facebook’s Free Basics – so that it does not fit the compound zero-rating model either.



A factor in characterizing a practice as violating net neutrality principles might be evidence that the implementation of zero-rating in the Chilean market is tied to agreements between the mobile network operators and prioritized contents providers, i.e. cases of sponsored zero-rating. There is no such evidence. Therefore, FSMs are to be considered a single-service zero-rating model established under ISPs' initiative and sponsorship.

Does this single-service zero-rating model as applied in Chile (which infringes on common understandings of the net neutrality principle), fall afoul of a Chilean law that specifically protects positive neutrality? Additionally, if it does, how can that law be analyzed to better understand how it regulates such zero-rated practices: through absolute prohibition or through an intermediate approach that allows exceptions?

THE CHILEAN NET NEUTRALITY LAW

DO CHILEAN NET NEUTRALITY RULES BAN ZERO-RATING PRACTICES?

In 2010, Chile enacted Law 20.453, which enshrined the principle of net neutrality by adding three new articles (24 H, 24 I & 24 J) to the General Telecommunications Act (Law 18.168).

The first of those articles establishes that ISPs “cannot arbitrarily block, interfere, discriminate, obstruct, or restrict any Internet users’ right to use, send, receive, or offer any content, application or legal service through the Internet, as well as any other type of activity or legal use executed through the network.”

Four of the five verbs used in article 24 H to describe the prohibited activities protect negative net neutrality: “(to) block”, “(to) restrict”, “(to) interfere”, and “(to) obstruct”. However, the remaining verb “discriminate” is more ambiguous and leaves room for different interpretations. One interpretation is that “discriminate” again describes discrimination by blocking or disrupting access to services (i.e. negative neutrality). This interpretation would not define the rate differentiation

for applications that underlie FSM practices, a violation of positive neutrality, as “discrimination”. This interpretation has been raised by the spokespersons of mobile telephony companies to argue that it is legal to offer FSM services despite the net neutrality law.

In contrast, however, it is our argument that “discriminate” refers as well to positive neutrality, as comments related to the protection of positive neutrality and discrimination of services can be found in different parts of the discussion held in the National Congress of Chile that led to the net neutrality law (known as the “History of the Law”). The parliamentary motion from which the bill originated, uses a positive definition of net neutrality, as it posits that Internet traffic should be transmitted without “[establishing a] hierarchy or prioritizing, which ensures that the network is the same for everyone,” and thus prevents the Internet from becoming a walled garden (like subscription television) that is “generally conditioned by multiple economic interests of all kinds, thereby forgoing one of the main advantages and benefits of a free network guided by users’ preferences” (BCN, 2017:5).

Deputy Marcelo Díaz also put forward the definition of net neutrality as the principle that seeks to allow users freely to browse the web, preventing the possibility “that any large provider or supplier would guide them explicitly or implicitly regarding certain content” (BCN, 2017:25). In his explanation, Díaz mentions the effect of practices inhibited by positive neutrality (such as zero-rating), in which the ISP implicitly guides consumers to use a service (e.g. offering zero charge for the data used as an incentive).

During these sessions, Deputy Marcela Sabat also mentioned positive neutrality as the one principle that prevents ISPs from favoring “certain servers, which in turn are willing to pay for it” (BCN, 2017:156). Her speech highlights the fact that discriminatory practices can even be financed by the provider of prioritized services, as it occurs in sponsored data cases.

Díaz and Sabat’s interventions are only two examples of the lawmakers that incorporated these concepts during the Congressional sessions about net neutrality.



Evidence for this interpretation can also be found within the net neutrality statutory regulation (reglamento), contained in the Decree 368 published on March 2011. Article 8, paragraph 1 establishes the prohibition of “any activity that arbitrarily tends to block, interfere, obstruct, restrict and/or hinder the right of any Internet user in any way”, using the same governing verbs of the law defined by us as negative, and adding “hinder” to strengthen that notion.

Positive neutrality is established in Article 8, paragraph §2, which forbids “every activity that arbitrarily tends to prioritize or discriminate between content providers, applications and/or users.” Thus, the statutory regulation clarifies and makes explicit the meaning of the governing verb “discriminate” contained in the law and adds “prioritize” as a synonym.

Summarizing, we conclude that the spirit of the Law 20.453 as well as explicit articles in the regulation provide for the protection of net neutrality in its broader sense, preventing not only negative activities (such as blocking or obstruction) but also those that promote or benefit certain services over others. Therefore, this interpretation would suppose that the zero-rating practices of telecommunication companies in Chile do violate the law.

CRITERIA OF THE CHILEAN REGULATOR

WHAT ARE THE REASONS FOR THE REGULATOR TO TOLERATE ZERO-RATING IN CHILE?

While Chilean law seems to recognize and protect positive net neutrality, zero-rating practices are still conducted by telecom companies as a result of the way in which the law is enforced by the industry regulator. This regulatory body, the Subsecretariat of Telecommunications (Subtel), is authorized by Article 24 I of the Law 20.453 to regulate the industry.

We have identified two phases in the short history of the law’s enforcement: In the early years (2011-2015),

a criterion of relative prohibition of zero-rating, and a later criterion (2015-2017) of acceptance of zero-rating in all cases. This timeline includes two governments: Sebastián Piñera’s first term (2010-2014) and Michelle Bachelet’s second term (2014-2018).

FIRST CRITERION (2011-2015)

This criterion stems from Article 8, paragraph §2 of the regulations on net neutrality (Decree 368 of 2011), issued during the government of Sebastián Piñera, in which the regulator introduced a definition of behaviors that will “always” be considered arbitrary: within this criterion, the question is whether a practice has a certain effect on “content providers, applications and/or users over others of a similar nature.”

A contrario sensu, within this criterion the regulator accepts the discrimination (prioritization) of services if it extends to all applications “of a similar nature.” As applied, this approach would allow as an exception the categorical model of zero rating, one of the two zero-rating models that we have discussed previously as not violating net neutrality principles.

This criterion was maintained by the new government (Michelle Bachelet took office in March 2014) and his appointed Subsecretary of Telecommunications Pedro Huichalaf.

On April 14, 2014 Subtel issued the Circular No. 40, which referred specifically to zero-rating practices for the first time. The circular determined that FSM offers were a violation of net neutrality rules, particularly of article 24 H (a) of the Law, requiring mobile network operators to make this practice compliant by extending it to “the remaining available applications of a similar nature or competence.” The regulator insisted on this request in administrative letters sent to the companies Claro, VTR Wireless, Telefónica Móviles (Movistar), and Virgin Mobile in June 2014.

This regulator’s initial criterion is consistent with the spirit of the law because it identifies positive discriminatory practices as a violation of net neutrality but introduces



a nuance by exceptionally allowing those practices if they give the same treatment (i.e. gratuity) to all services of the same nature.

However, statements made by Pedro Huichalaf (then Subsecretary of Telecommunications) to the press labeling zero-rating as illegal in all cases generated some confusion amongst the public in Chile as well as in the reporting on the law within international media. This contributed to the misconception that zero-rating offers were absolutely prohibited in Chile. This, in turn, came to the Wikimedia Foundation's attention, which contacted Subtel to inquire about the legal status of its Wikipedia Zero program.

SECOND CRITERION (2015-2017)

During a high-level summit of telecom regulators held in June 2015, the Sub-secretariat of Telecommunications of Chile (still led by Huichalaf) introduced a new criterion for zero-rating regulation. Practices would be allowed "insofar as, along with accessing said social networks, users also have access to all other content and other social networks not arbitrarily chosen by the operator and other Internet applications."

In other words, arbitrariness is interpreted as the non-restriction to parallel access of other services of the same nature ("social networks"). This effectively could mean that zero-rating is tacitly accepted in all cases, as mobile network operators would only have to comply with negative neutrality (i.e. not to block access to other providers of similar services).

In addition, the Chilean regulator decided not to exercise its enforcement powers, including enforcement through sanctions to companies that have zero-rating offers that do not comply with the law. The Subsecretariat has stated that practices that affect service providers or the Internet should be reviewed by the Free Competition Defense Court authorities.

This second criterion is flawed because it ignores the definition of arbitrariness established by the regulation – i.e. discrimination (e.g. price) against certain types of

services within the same category – while allowing ISPs to zero-rate "some social networks."

Likewise, the regulator introduces a distinction between the effects that net neutrality has on the three subjects involved (ISPs, users, and content providers) since it focuses its sanctioning power solely on the behaviors that impede users' access to the network, but ignores those that discriminate based on content. This may explain why Subtel has not exercised sanctions against mobile network operators for zero-rating, despite the numerous letters sent since Circular 40 to all telephone companies calling to bring FSM offers in compliance with the law.

RECOMMENDATIONS AND INTERNATIONAL IMPLICATIONS

Over the next decade, the question of how to define net neutrality and apply it in different contexts will be of great significance, and the approach of pioneering states will help inform the debate. Although the Chilean net neutrality law could be interpreted as an absolute prohibition of zero-rating, the regulator adopted a conditional prohibition of this practice by explicitly stating the definition of what constitutes an arbitrary practice in the statutory regulation. This implicitly allowed for zero-rated practices that extend to all services of the same type (i.e. categorical zero-rating).

This first criterion of the Subsecretariat of Telecommunications is consistent with the spirit of the law. Unfortunately, it was replaced by a second criterion in 2015, which considers that zero-rating is prohibited only in cases where similar services are blocked, which in practice constitutes an authorization of all zero-rating models. From our perspective, it is not enough to return to the first criterion for interpretation of the law, as the power to define and enforce prohibited behaviors lies with the regulator while discriminatory behaviors are broadly defined by the law. Thus, interpretations of the net neutrality criteria and enforcement can easily change depending on the inclinations of the incumbent regulator.



Therefore, we propose that the Chilean regulatory agency should establish a clear zero-rating policy that is consistent with the law and its spirit, define which zero-rating models are allowed, and enforce effective sanctions against companies that do not adhere to those models. In addition, it is necessary to amend the net neutrality law in order to overcome the ambiguity of the language by introducing explicit concepts of positive and negative neutrality, analogously to the ways this has been done in the statutory regulation. This will introduce legal certainty into the debate, protecting net neutrality for all stakeholders, including, most importantly, for Internet users.

The conclusions and recommendations (which emanate from our study) will be of interest to all stakeholders involved in the telecommunications market, as actors continue to propose measures that will grant legal certainty to the zero-rating practices in Chile. A bill that proposes reforms to Law 20,453 has been introduced to the National Congress (Bulletin 10999-15) which must be discussed and improved in order to correct the problems exposed by this study. Parliamentary discussions must be fueled by consultation and deliberation with all stakeholders. Given that civil society is always disadvantaged when it comes to resources and lobbying, this article is presented as an easy-to-understand resource to be used to advocate for reforms of the law. Moreover, this study is of relevance, as the recently assumed Presidency of Sebastián Piñera could maintain or change the previous criterion on zero-rating. Stakeholders' scrutiny should be reinforced to allow for the protection of the principle of the net neutrality.

INTERNATIONAL RELEVANCE OF CHILEAN CASE

The Chilean net neutrality case is internationally interesting for several reasons. First, and most obviously, is the fact that the Chilean law is the first legislative attempt in the world to give legal status to the protection of net neutrality. The law has now been in effect for eight years. This allows scholars,

lawyers, and activists to analyze – as we have done in this article – the application of regulation with greater perspective and depth. This opportunity for analysis offers important precedents and insights for legislators and activists in countries debating how to use law to protect net neutrality.

Second, Chile should be of particular special interest to the stakeholders of several countries with common political, legal, and social characteristics. Among them, the countries of Latin America, the majority of which do not have policy advances in this area, except in the cases of Mexico, Colombia and Brazil, although they are still less developed than the Chilean regulation. In addition, countries with similar Human Development or Internet penetration rates from other regions could consider the Chilean case when developing similar net neutrality legislation.

For all of these countries, the Chilean case can be a guide to decide which regulatory model will lead to the protection of the net neutrality principle. The lawmakers can follow the Chilean example, through which the powers of interpretation and enforcement are handed over to the telecommunications regulator, or alternative models can be adopted where these issues are delivered to competition law authorities or supranational/regional bodies (such as BEREC in Europe). Said decision will depend on the feasibility of these options within the institutional framework of each country and the contextualized definitions of the net neutrality.

ANNEX 1

IMAGES OF ZERO-RATING OFFERS MADE BY CHILEAN MOBILE NETWORK OPERATORS

The image shows a table of three prepaid mobile plans from Claro. Each plan includes zero-rated access to social media apps like Facebook, Twitter, Instagram, etc. The plans are: Paquete Claro Música Full (\$2,500), Paquete \$3.500, and Paquete \$7.000.

Paquete Claro Música Full	Paquete \$3.500	Paquete \$7.000
\$ 2.500 Más información >	\$ 3.500 Más información >	\$ 7.000 Más información >
Voz 50 Minutos	Voz 200 Minutos	Voz 350 Minutos
Cuota de internet 1 GB	Cuota de Internet 2 GB	Cuota de Internet 6 GB
Incluye Suscripción Semanal a Claro Música	Vigencia 15 días	Vigencia 30 días
Vigencia 7 días	Cómpralo enviando P3500 al 2020	Cómpralo enviando P7000 al 2020
Cómpralo enviando PCM1 al 2020		

FIGURE 1 - Claro's prepaid mobile plans with zero-rating for Facebook, Twitter, Whatsapp, Instagram, Facebook Messenger, Snapchat and Wase

The image shows a promotional banner for a new mobile plan from Wom. It features the text '10 GIGAS', '\$9.990', and 'ILIMITADAS'. It also lists social media icons for Facebook, Twitter, Instagram, and Snapchat, indicating zero-rated access to these services.

FIGURE 2 - Wom has zero-rating programs in all their postpaid plans, offering "unlimited [access]" to Facebook, Twitter, Instagram and Snapchat

The image shows a promotional banner for Virgin Mobile. It features the text 'CAMBIATE A VIRGIN MOBILE' and 'AHORA TODOS NUESTROS PLANES DESDE \$10.000 INCLUYEN'. It also lists social media icons for Facebook, Messenger, WhatsApp, Instagram, Twitter, Spotify, and iTunes, indicating zero-rated access to these services.

FIGURE 3 - Virgin Mobile's plans include zero-rated access to Facebook, Facebook Messenger, Whatsapp, Instagram, Twitter, Spotify and iTunes (Apple Music)

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