

Clearing misconceptions: what the DoT panel report on net neutrality says (and doesn't)

Centre for Internet and Society | 2015-07-21

Pranesh Prakash

There have been many misconceptions about what the DoT Panel Report on Net Neutrality says: the most popular ones being that they have recommended higher charges for services like WhatsApp and Viber, and that the report is an anti-Net neutrality report masquerading as a pro-Net neutrality report. Pranesh Prakash clears up these and other incorrect notions about the report in this brief analysis.

Background of the DoT panel

In January 2015, the Department of Telecommunication (DoT) formed a panel to look into "net neutrality from public policy objective, its advantages and limitations," as well the impact of a "regulated telecom services sector and unregulated content and applications sector". After spending a few months collecting both oral and written testimony from a number of players in this debate, and analysing it, on July 16 that panel submitted its report to the DoT and released it to the public for comments (till August 15, 2015). At the same time, independently, the Telecom Regulatory Authority of India (TRAI) is also considering the same set of issues. TRAI received more than a million responses in response to its consultation paper — the most TRAI has ever received on any topic — the vast majority of of them thanks in part to the great work of the Save the Internet campaign. TRAI is yet to submit its recommendations to the DoT. Once those recommendations are in, the DoT will have to take its call on how to go ahead with these two sets of issues: regulation of certain Internet-based communications services, and net neutrality.

Summary of the DoT panel report

The DoT panel had the tough job of synthesising the feedback from dozens of people and organizations. In this, they have done an acceptable job. Although, in multiple places, the panel has wrongly summarised the opinions of the "civil society" deponents: I was one of the deponents on the day that civil society actors presented their oral submissions, so I know. For instance, the panel report notes in 4.2.9.c that "According to civil society, competing applications like voice OTT services were eroding revenues of the government and the TSPs, creating

security and privacy concerns, causing direct as well as indirect losses." I do not recall that being the main thrust of any civil society participant's submission before the panel. That having been said, one might still legitimately claim that none of these or other mistakes (which include errors like "emergency" instead of "emergence", "Tim Burners Lee" instead of "Tim Berners-Lee", etc.) are such that they have radically altered the report's analysis or recommendations.

The report makes some very important points that are worth noting, which can be broken into two broad headings:

On governmental regulation of OTTs

1. Internet-based (i.e., over-the-top, or "OTT") communications services (like WhatsApp, Viber, and the like) are currently taking advantage of "regulatory arbitrage": meaning that the regulations that apply to non-IP communications services and IP communications services are different. Under the current "unified licence" regime, WhatsApp, Viber, and other such services don't have to get a licence from the government, don't have to abide by anti-spam Do-Not-Disturb regulations, do not have to share any part of their revenue with the government, do not have to abide by national security terms in the licence, and in general are treated differently from other telecom services. The report wishes to bring these within a licensing regime.
2. The report distinguishes between Internet-based voice calls (voice over IP, or VoIP) and messaging services, and doesn't wish to interfere with the latter. It also distinguishes between domestic and international VoIP calls, and believes only the former need regulation. It is unclear on what bases these distinctions are made.
3. OTT "application services" do not need special telecom-oriented regulation.
4. There should a separation in regulatory terms between the network layer and the service layer. While this doesn't mean much in the short-term for Net neutrality, it will be very important in the long-term for ICT regulation, and is very welcome.

On Net neutrality

1. The core principles of Net neutrality — which are undefined in the report, though definitions proposed in submissions they've received are quoted — should be adhered to. In the long-run, these should find place in a new law, but for the time being they can be enforced through the licence agreement between the DoT and telecom providers.
2. On the contentious issue of zero-rating, a process that involves both ex-ante and ex-post regulation is envisaged to prevent harmful zero-rating, while allowing beneficial zero-rating. Further, the report notes that the supposed altruistic or "public interest" motives of the zero-rating scheme do not matter if they result in harm to competition, distort consumer markets, violate the core tenets of Net neutrality, or unduly benefit an Internet "gatekeeper".

Where does the DoT panel report go wrong?

1. The proposal by the DoT panel of a licensing regime for VoIP services is a terrible idea. It would presumptively hold all licence non-holders to be unlawful, and that should not be the case. While it is in India's national interest to want to hold VoIP services to account if they do not follow legitimate regulations, it is far better to do this through ex-post regulations rather than an ex-ante licensing scheme. A licensing scheme would benefit Indian VoIP companies (including services like Hike, which Airtel has invested in) over foreign companies like Viber. The report also doesn't say how one would distinguish between OTT communication services and OTT application services, when many apps such as food ordering apps, including text chat facilities. Further, VoIP need not be provided by a company: I run my own XMPP servers, which is a protocol used for both text and video/voice. Will a licensing regime force me to become a licence-holder or will it set a high bar? The DoT panel report doesn't say. Will there be a revenue-sharing mechanism, as is currently the case under the Unified Licence? If so, how will it be calculated in case of services like WhatsApp? These questions too find no answer in the report. All in all, this part of the report's analysis is found to be sadly wanting.
2. Many important terms are left undefined, and many distinctions that the report draws are left unexplained. For instance, it is unclear on what regulatory basis the report distinguishes between domestic and international VoIP calls — which is an unenforceable (not to mention regulatorily unimportant) distinction — or between regulation of messaging services and VoIP services, or what precisely they mean by "application-agnostic" and "application-specific" network management (since different scholars on this issue mean different things when they say "application").

What does the DoT panel report mean for consumers?

1. Not too much currently, since the DoT panel report is still just a set of recommendations by an expert body based on (invited) public consultations.
2. Does it uphold Net neutrality? The DoT panel report is clear that they strongly endorse the "core principles of Net neutrality". On the issue of "zero-rating", the panel proposes some sound measures, saying that there should be a two-part mechanism for ensuring that harmful zero-rating doesn't go through: First, telecom services need to submit zero-rating tariff proposals to an expert body constituted by DoT; and second consumers will be able to complain about the harmful usage of zero-rating by any service provider, which may result in a fine. What constitutes harm / violation of Net neutrality? The panel suggests that any tariff scheme that may harm competition, distorts the consumer market, or violates the core principles of Net neutrality is harmful. This makes sense.

3. Will it increase cost of access to WhatsApp and Viber? Well, on the one hand, zero-rating of those services could decrease the cost of access to WhatsApp and Viber, but that might not be allowed if the DoT panel recommendations are accepted, since that would possibly be judged to harm competition and distort the consumer markets. The DoT panel has also recommended bringing such services within a licensing framework to bridge the "regulatory arbitrage" that they are able to benefit from (meaning that these services don't have to abide by many regulations that a telecom provider has to follow). Whether this will lead to WhatsApp and similar services charging depends on what kinds of regulations are placed on them, and if any costs are imposed on them. If the government decides to take the approach they took to ISPs in the late 90s (essentially, charging them Re. 1 as the licence fee), doesn't impose any revenue sharing (as they currently require of all telecom services), etc., then there needn't be any overly burdensome costs that WhatsApp-like services will need to pass on to consumers.

What misunderstandings do people have?

1. There are multiple news reports that the DoT panel has recommended increased charges for domestic VoIP calls, or that ISPs will now be able to double-charge. Both of these are untrue. The DoT panel's recommendations are about "regulatory arbitrage" and licensing, which need not be related to cost.
2. There is a fear that the exception from net neutrality of "managed services and enterprise services" is a "loophole", or that exceptions for "emergency services" and "desirable public or government services" are too vague and carry the potential of misuse. If one goes by the examples that the panel cites of managed services (e.g., services an ISP provides for a private company separately from the rest of the Internet, etc.), these fears seem largely misplaced. We must also realize that the panel report is a report, and not legislation, and the rationale for wanting exemptions from Net neutrality are clear.
3. The DoT panel has given the go-ahead for zero-rating. Once again, this is untrue. The panel cites instances of zero-rating that aren't discriminatory, violative of Net neutrality and don't harm competition or distort consumer markets (such as zero-rating of all Internet traffic for a limited time period). Then it goes on to state that the regulator should not allow zero-rating that violates the core principles of Net neutrality.

What's missing in the Net neutrality debate is nuance. It's become a debate in which you are either for Net neutrality or against it. However, none of the underlying components of Net neutrality — a complex mix of competition policy, innovation policy, the right to freedom of expression, etc. — are absolutes; therefore, it is clear that Net neutrality cannot be an absolute either.