

# Comments on the DoT Panel Report via MyGov

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*On behalf of the Centre for Internet and Society, I must commend the Department of Telecom Panel on its report. Overall, it displays a far better understanding of the underlying issues than the TRAI consultation paper did, and is overall a good effort at balancing the different sides.*

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It is praiseworthy that the panel emphasizes the separation in regulatory terms between the network layer and the service layer. This also means that telecom carriers should be regulated differently from OTT services.

## **Licensing of Communication OTT Services**

The proposal by the DoT panel of a licensing regime for communication OTT services is a terrible idea. It would presumptively hold all licence non-holders to be unlawful, and that should not be the case; as the panel itself notes, apps that lower the cost of communication are a welcome development and should be encouraged by the government and not made presumptively unlawful.

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, or free/open source technologies like WebRTC. The Universal Licence is designed for a world where all the licencees have an operational presence in India. This is not true of communications OTT services. Therefore a licensing regime would unjustly favour some services over others.

Further, VoIP services need not be provided by a company: a person can choose to run XMPP, SIP, or Mumble — all of which are protocols that support VoIP — on their own computers. Will a licensing regime force such individuals' many of whom may not be Indian nationals — to become licence-holders if they facilitate domestic communications within India? The DoT panel report doesn't say. This would also result in a licensing regime unjustly favouring some services over others.

The report also doesn't say how one would distinguish between OTT communication services and OTT application services, when many apps such as personal assistance apps like HelpChat, are centred around communications. It also does

not mention what regulatory distinction exists between text communication services and video/voice communication services, or between purely domestic and international video/voice communications. Stating that certain telecom companies are currently earning most of their revenue from domestic voice traffic will not suffice as a regulatory, just as it did not suffice to say that VSNL's international telephony monopoly earned it a lot of money. Regulatory fairness is the important issue and not protecting specific business models. Thus, there is no rational distinction to be drawn. Even if the panel has some regulatory distinction that it has not stated, this is an impossibility to enforce. Much domestic IP traffic is 'round-tripped', with traffic leaving India and coming back in. How would the regulator propose to regulate that?

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.

Given these numerous objections and unanswered questions, the government would be well-advised not seek to license OTT communications services. Instead, it would be useful for the government to hold public consultations about:

1. What Universal Licence conditions makes sense in the world of IP-based services, and international services?
2. How can we frame ex-post regulations that address legitimate concerns? Is there overlap with provisions of the IT Act such as s.69, s.69B, s.79, and others?
3. How can we ensure that the regulatory burden for telecom players with respect to their being able to provide IP-based services that are equivalent to OTT communication services?

### **Net neutrality**

While the DoT panel reiterates a number of times that the core principles of Net neutrality should be adhered to, it nowhere defines what these core tenets are. We suggest the following definition:

- net neutrality is the principle that we should regulate gatekeepers to ensure they do not use their power to unjustly discriminate between similarly situated persons, content or traffic.

The above definition applies to the way the ISPs treat consumers, treat inter-connecting networks, as well as the way they treat traffic internally. We agree with the panel that in that while Net neutrality should find place in a new law, for the time being Net neutrality principles can be enforced through the licence agreement between the DoT and telecom providers.

### **Traffic Management**

It is unclear what precisely the DoT panel means by "application-agnostic" and "application-specific" network management. Different scholars on this issue — such as Barbara van Schewick and Christopher Yoo — mean different things

when they use the word "application". Without a definition, it is difficult to say whether the panel's recommendation on that front are sound. Instead, we suggest the following tests: Discrimination between classes of traffic for the sake of network management should only be permissible if:

- there is an intelligible differentia between the classes which are to be treated differently, and
- there is a rational nexus between the differential treatment and the aim of such differentiation, and
- the aim sought to be furthered is legitimate, and is related to the security, stability, or efficient functioning of the network, or is a technical limitation outside the control of the ISP, and
- the network management practice is the least harmful manner in which to achieve the aim.

As for the provision of enterprise and managed services, which we more broadly term "specialized services", we would recommend:

- Provision of specialized services is permitted if and only if it is shown that
- The service is available to the user only upon request, and not without their active choice, and
- The service cannot be reasonably provided with "best efforts" delivery guarantee that is available over the Internet, and hence requires discriminatory treatment, or
- The discriminatory treatment does not unduly harm the provision of the rest of the Internet to other customers.

Lastly, we would recommend that the above regulatory guidelines only be applied against ISPs, and not against public providers of Internet connectivity, such as a library, a school, an airport, a hotel, etc.

## **Zero-rating**

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". Much of the discussion around zero-rating has been happening around an assumption of common understanding of the phrase. Unfortunately, that is not true. There is no consensus as to whether a "special Facebook pack of 200MB for Rs.20" offered by a telecom company constitutes zero-rating or not. Without a working definition of zero-rating, not much progress can be made. We propose the following as a definition:

- Zero-rating is the practice of not counting (aka "zero-rating"?) certain traffic towards a subscriber's regular Internet usage.

The zero-rated traffic could be zero-priced or fixed-price; capped or uncapped; subscriber-paid, Internet service-paid, paid for by both, or unpaid; content- or source/destination-based, or agnostic to content or source/destination; automatically provided by the ISP or chosen by the customer.

We believe that zero-rating can be non-discriminatory in nature, and such zero-rating should not be prohibited. Having a system with both ex-ante and ex-post checks is rather heavy-handed regulation, but since the issue is very contentious in India, we believe it might be merited.

We thank you for giving us this opportunity to comment. Pranesh Prakash, Policy Director at the Centre for Internet and Society