



IT *for* CHANGE

NGO in Special Consultative Status with United Nations' Economic and Social Council

IT for Change, Bengaluru's

***Response to Pre-Consultation Paper on Net Neutrality
Issued by Telecom Regulatory Authority of India***

Question 1: What should be regarded as the core principles of net neutrality in the Indian context? What are the key issues that are required to be considered so that the principles of net neutrality are ensured?

Internet is a paradigmatic new phenomenon, whose impact on our societies is such as to fundamentally transform most social systems. In dealing with such a phenomenon, especially at formative times like now, it is important to go back to the basics. It is therefore heartening that TRAI has kicked-off this exercise of framing net neutrality regulation by seeking opinion on what should be the core principles on which such regulation can be based.

In this respect, we need to look at both what is the nature of the Internet in the manner it is impacting the society, and the areas and aspects of society that get impacted. Internet is not just a standalone communication system, as most earlier telecommunication systems were. ***It today provides the digital infrastructure, or the playing field, that increasingly supports and shapes the organisation of emerging social systems***, in their new digital avatar – be it business and work, or education, health and governance. It is therefore important to treat the Internet as a kind of playing field underpinning new social systems; and a playing field must be fully even, allowing no advantage at all to one side over the other. Sides may compete on their other abilities, but must be able to derive no advantage from the nature of the playing field. This is the key principle of any good playing field, and also a tenet of economic, social and political justice. ***Internet must foremost be seen as such an even playing field.***

Next, we must consider the areas or aspects of society that are impacted. Unfortunately, discussions in this regard remain mostly confined to the market space; Internet is supposed to ensure greatest competition and innovation. It is for this purpose, it is claimed, that it should remain neutral, and provide an even playing field. However, the market principles of free choice and need for innovation can get equally quoted to seek business models that allow playing around with the neutrality of the Internet (or the evenness of the playing field it provides), as long as net neutral offerings are also available in the market. ***A non net neutral Internet, even if available in addition to net neutral offerings, does greatly distort competition, and therefore eventually, with oligopolistic domination, possibilities of free choice.*** Internet access therefore cannot be considered as just a normal market good, where free market, with light competition-related regulation, will suffice. ***It has to be seen from a public good, or regulated public utility, perspective even from the economic sector point of view.***

The Internet impacts much more than just the market, or our economy. It has pervasive social, cultural and political impacts, and is transforming social systems in all these sectors. The second perspective that often gets applied to the Internet is of civil and political rights, called as negative rights, because here the state's obligation is to not interfere, and prevent interferences, with individual freedoms (without having the responsibility to pro-actively provide anything). ***A non net neutral Internet interferes with freedom of expression and association, by discriminating against some content/ services over others.*** Although, TSPs argue that as long as net neutral channels are also equally available in addition to non- net neutral ones, this may not be true.

The real argument for complete net neutrality of the Internet thus requires an assertion of positive rights of people, covering all areas, civil, political, economic, social, cultural, and the right of development (all internationally recognised human rights). Such positive rights requires not just forbearance by the state, and restraining possible interfering actors, but also for it to actively assist in providing grounds of fulfilling rights, and ensuring economic, social, cultural and political justice.

It is significant that the regulator seeks responses to their questions “in the Indian context”. ***For a developing country like India, a positive rights approach to net neutrality, which***

included all kinds of above listed rights, is even more important because (1) there is huge internal inequity, ameliorating which, and providing economic and social justice to all, is the constitutional responsibility of the state, (2) India is on the wrong end of immense global inequalities, which get transposed as much if not more to the Internet's content and services space.

It is therefore important that India's regulatory approach to net neutrality proceeds from these two primary premises:

1. Internet is no ordinary communication system. *It increasingly acts as what should be an even playing field for almost all economic, social, cultural and political activities and systems.* Internet must therefore primarily be seen from an “even playing field” angle, whereby it should be stringently rule-bound to provide no kind of advantage to any 'player' over the other.
2. Its playing field nature should be considered not only in the economic space, but also in social, cultural and political contexts, where its role is at least as important. *Net neutrality regulation should take a rights-based approach, and be aimed at protecting and promoting people economic, social, cultural, political rights, as well as the right to development.* It should also play an active role to ensure that these rights are actually obtained, including through positive discrimination in favour of (a) those who remain unconnected, and (b) content and services that have a strong public interest, and markets fail to provide equitably.

Lastly, while regulatory interventions may need to be clearly directed at specific business practices, *the regulator should regulate by social objectives and outcomes.* It is even more true in times like now which are characterised by such rapid change that (1) it is increasingly difficult to preserve boundaries between different technology/ business spaces (like between telcom and Internet), and (2) the nature of social impact is quite new and fast-changing, but evidently very deep and far-reaching. We should therefore first take a fix on the social objective(s) that are being sought to be achieved, and then calibrate specific regulatory interventions and orders as closely as possible towards them.

It is best to therefore define net neutrality in terms of what happens at the user/consumer, and society's, end rather than, as traditionally done, what a TSP can or cannot do. The latter would of course be a subject of the specific necessary action and orders to ensure net neutrality.

We propose that net neutrality is, or its core principles are, defined as:

1. *The user/consumer must receive all content and services on the Internet at the same level with respect to transmission quality and price.* Not receiving some content altogether (blocking), or receiving some with deteriorated quality (throttling) or some other with higher quality than the rest (prioritization) , all qualify as not receiving all content at the same transmission quality. Price discrimination includes zero or discounted cost of access for some content against others.
2. *Not only direct but also any indirect methods of unfavourably affecting the conditions of equality for all content and services, as described in 1 above, at the user/ end is disallowed.* This would, for example, include ongoing or *post facto* compensation of any kind to the user/ consumer for accessing certain content/ services.
3. *Traffic management to improve the overall quality of access is allowed, when done in an application agnostic (traffic class based) manner, where no commercial motive can be discerned, and as per regulatory guidelines issued from time to time.*
4. *Providing public interest content, as defined by the regulator and not left to TSPs' discretion, at cheaper or zero price is acceptable, as a case of “positive discrimination”, and is not a net neutrality violation.* This can be justified by both key principles of net neutrality; such a practices only further evens the “playing field”, and also helps upholding the whole range of human rights that net neutrality aim at defending/ providing.

(In addition to zero-rated public interest content, free data quotas, both for mobile and wired connections, should be provided as an entitlement for every citizen. This can be done through licensing conditions, and/or by direct governmental support using Universal Service Funds and proceedings from spectrum allocation.)

We must explain and justify why the accent should be on what happens at the user/ consumer/ society's end and not on technical and business processes. This also has implications for the consultation on "Free Data" which presented possible options that could allow Internet companies to do what TSPs are being barred from doing, but with exactly the same impact on the user/ society.

We now know that our communication systems are in deep ferment (and converging); what were earlier clearly telecom services, like voice telephony and short messaging, are now equally or even better provided over Internet platforms. The last year's consultation paper on "'Regulatory Framework For Over-the-Top (OTT) Services" and question 6 in the present consultation paper testifies to the vexatious issues faced by the regulator in this regard.

As VoIP and Internet chat services can respectively be considered telephony and short messaging provided in a "virtualised telecom" form, there would increasingly be little distinction between telcom and Internet services, as far as the user/ consumer is concerned. If telecom is unique in being an intermediary providing access to a large number of other services, Internet platforms of various kinds today increasingly play a similar role. The regulator therefore needs to begin looking at society's key communications systems from a unified regulatory angle, as more and more erstwhile telecom services get virtualised. It must begin to regulate by consumer and social outcome, and not the technology or business process that is involved.

Question 2: What are the reasonable traffic management practices that may need to be followed by TSPs while providing Internet access services and in what manner could these be misused? Are there any other current or potential practices in India that may give rise to concerns about net neutrality?

Such “reasonable traffic management” may be allowed as is necessary to improve users' overall quality of experience, is application agnostic but based on class-of-traffic, and has no commercial motive whatsoever (other than improving overall user experience) that can be associated with it. The regulator should provide guidelines from time to time about what can be accepted as “reasonable traffic management”, and TSPs work according to it. Any unexpected or emergency measures must immediately be reported to the regulator and made public, and should be able to be challenged on grounds of what constitutes “reasonable traffic management”, especially from the angle of commercial motives.

In any case, TSPs should publicise their traffic management practices, and these should also be subject to periodic third party audits.

Question 3: What should be India's policy and/or regulatory approach in dealing with issues relating to net neutrality? Please comment with justifications.

Our response to question 1 mostly covers this question as well. We will therefore simply summarize it here.

1. Internet should not be treated as an ordinary market good. It is not even just an ordinary communication system (which, in any case, has always been seen in a public good/ utility framework). Internet underpins and shapes almost all new digital social systems. ***Internet must be considered as an even playing field, giving no advantage whatsoever to any player, on which social activities in various sectors take place.*** This is the first regulatory principle for the Internet.
2. Internet is not important just to the economic sector. It is equally if not more important to social, cultural and political sectors. ***Internet must be regulated employing a rights-based framework, which would include upholding civil, political, economic, social and cultural rights of people, as well as their right to development.*** A right based approach can be considered as the second key regulatory principle.

3. *Regulation should be based on specific user end and social outcomes, and not narrowly focussed on specific technologies or business models.* No distinction should especially be made between whether a service is provided as a telcom service or as an Internet service. Regulation should only depend on the nature of service, as seen from consumer society's end.

Accordingly, it must be ensured that a user/ consumer receives all content and services with the same quality of transmission and cost of accessing, with reasonable traffic management allowed as discussed earlier. Positive discrimination of public interest content, as determined by regulators, is however allowed. Free data quotas should be provided to all citizens as an entitlement.

Question 4: What precautions must be taken with respect to the activities of TSPs and content providers to ensure that national security interests are preserved? Please comment with justification.

We consider this question as not related to the concept of net neutrality, and therefore would not get into a detailed response here. However, all security measures as provided by law may be taken. The correspondingly law however should be developed after extensive consultations, and not violate people's privacy, and in this regard follow principles of being “necessary and proportionate”. (See [this link](#) for a good text on the issue.) All security measures put in place should be subject to judicial oversight.

Question 5: What precautions must be taken with respect to the activities of TSPs and content providers to maintain customer privacy? Please comment with justification.

This again is not an issue directly related to net neutrality, although it must be stated that most *net neutrality violations involve technical means* of distinguishing different kinds of content from the traffic stream, for instance deep packet inspection, *which practices have considerable privacy implications, and are thus to be disallowed on that basis alone.*

There is a need for drafting a comprehensive legislation on privacy in India, which takes into account new, pervasively invasive nature of the Internet, as well as the immense

economic value of data (along with, crucially, the issue of its ownership with respect to entitlement of value that can be obtained from it). Appropriate regulation should then be derived from this legal framework.

As discussed, any such legislation and regulation should be neutral with regard to the communication system involved, and should be oriented to individual/social costs and benefits. Meaning, it should equally apply to data practises of TSPs and of Internet service/app providers.

TRAI should use its existing powers to enforce user privacy equally on TSPs and large-scale communication or OTT (over the top) platform services, as discussed in the next section. Some privacy regulations exist under the IT Act, 2002, which however covers only “sensitive private data” (narrowly defined), and only private companies (and not governmental bodies). Major revisions to our privacy frameworks are required, keeping up with worldwide developments in this area.

Question 6: What further issues should be considered for a comprehensive policy framework for defining the relationship between TSPs and OTT content providers?

As argued earlier, we may need to begin closing the distinction between TSPs and OTT (over the top) services in some important respects, as far as both relate to mass scale, or society wide, communication systems. It does not therefore mean that we just enforce the whole regulatory framework traditionally associated with TSPs as such on all OTT services as well. In the new environment, we need to revisit the whole communication regulation framework, and perhaps start from the start, re-examining the logic and applicability of each of its pieces to the new conditions. As an illustrative example, instead of licensing everything now, this could in fact mean de-licensing some small-scale community level ISPs (or licensing them in a very different manner). This was just meant to be an example to show that moving towards a common regulatory framework does not necessarily mean putting all the burdens of the old framework on the new Internet based communication systems. In many parts, and aspects, it could also mean lightening the regulatory burden all across.

We accept that because of their physical nature (carrier of physical signals), especially being the physical point of contact to the user, and the its need to access some public resources, like spectrum or right-to-way, TSPs retain some important distinguishing features. These would always be kept in mind. These characteristics may make them more important to regulate. (Although, interestingly, in the new environment, they are also relatively so much easier to regulate – being physically locatable, as compared to OTT service providers – which apart from being virtual, the most socially important among them are generally not India based and therefore largely inaccessible to regulation.)

However, we need to be able to directly regulate “all” actors that are capable to causing 'social damage', or can be employed for some important 'public interest' cause, in an area which is recognised as of special and vital significance to the society, i.e. communication (or the society's new digital playing field). This especially when such 'social damage', or inversely, possible 'public interest', is of appreciable society-wide significance.

The new composite regulatory framework that covers TSPs as well OTT providers should therefore

- 1. Judge the need for intervention by social outcomes, and not technology/ business model.***
- 2. Recognise an actor as requiring regulatory oversight and action from the extent and nature of the 'public interest' involved, whereby only large-scale, society-wide activities may need generalised, pre facto, regulation, and not smaller activities.***
(Using such a footprint criterion rather than telecom-Internet distinction.)

First of all, we must recognise the social outcomes/ issues in pursuance of which regulatory watch and intervention is required; for instance, net neutrality, universal access, privacy, openness/ inter-operability practises, easy access to public interest content/ services, and so on.

Next, picking actors that require *pre facto* generalised regulation would depend on key criteria of the size of operation, share of market, etc, which should involve considerable society-wide foot-print. This would cover most communication systems that provide society-

wide services to a considerable section of society. *Two sided markets of Internet platforms constitute a key group among such potential candidates for generalised regulation (if they meet the size of operation/ impact criterion).*

We may need to develop other, or additional, criteria for verticals specific service providers. Movie ticket booking and food home delivery services are not socially as significant (though they may also involve strong market domination and anti-competitive practices) as verticals like health and education. Therefore benchmarks for bringing any Internet service/ applications (or OTT provider) in a regulatory framework should also depend on the nature of the involved sector.

All this requires moving towards a new, composite, but nuanced, regulatory framework for society's communication and informational services. We understand that this present consultation may have a limited scope, but the complex issues that we face, including those discussed in this paper, can only be satisfactorily resolved if we move towards such a converged approach. TRAI can begin thinking about it, and make necessary recommendations to the government, which did at one time envisage some kind of a “Communications Convergence Bill”. Meanwhile, within TRAI's existing remit, such a spirit of convergence must inform its regulations as well as recommendations to the government.