

# The TRAI's Regulation to protect net neutrality in India

The Telecom Regulatory Authority of India ('TRAI') recently issued a regulation that prohibits internet service providers ('ISPs') from offering data plans to subscribers on the basis of the content accessed. The relevant provision is contained in less than a page, but it has far-reaching ramifications for issues such as net neutrality, access to the internet, innovation and online business models. This new regulation has come in the wake of intense debate on upholding net neutrality and making the internet accessible to all. Since the regulation came into effect, there has been much furore in India and while several stakeholders have voiced their opinion on either side of the debate, the regulator has held firm. In this article, Gowree Gokhale and Rakhi Jindal of Nishith Desai Associates provide impartial analysis of the issues from a legal perspective and examine the potential impact of the regulation.

It is impossible to imagine our lives without the convenience, the affordability, the speed and the magic of the internet. The internet has long ceased being a mere technological gizmo and has become a tool for expression, freedom, emancipation, communication, entertainment and even governance. It is no longer a luxury of a few but a basic necessity meant for all; some have even argued that it should become a fundamental human right. However, there still exists a digital divide where the tools of empowerment that the internet can facilitate are not accessible to all, particularly those marginalised people who may need it most. The TRAI itself recognises that "Against a target of achieving 175 million BB connections by 2017, only 85.74 million have been achieved and that too with the current download speed definition of 512 kbps. At present, the country is nowhere near meeting the target for a service which is considered almost a basic necessity in many developed countries."<sup>1</sup> As such there is a need today to try and bridge the digital gap.

Given this state of affairs, there are vital questions being asked - who owns the internet, should governments and lawmakers regulate the internet, what does net neutrality mean and how can telecom companies observe its principles, and should corporations be allowed to participate in internet governance? These are important questions and given the ubiquity of the internet, it is not surprising that governments, lawmakers, policy advocates, corporations, ISPs, activists and the all-important common person are all involved in this debate.

**What the net neutrality debate is all about in India**

Before delving into the new regulation issued by the TRAI, it is important to understand the concept that is at the heart of the debate i.e. the term 'net neutrality'. This term has literally become a buzzword. But what does it really mean? Is it a technology, or a packet switching feature on which internet architecture depends, or is it a law? Of course there will be technical and legal definitions to it. But in its purest form, net neutrality is really a philosophy - that everything on the internet should be accessible to everybody who wants to access it. It may sound too simplistic to define something over which battle lines are being drawn between different stakeholders. Even the regulation that propounds net neutrality in India is literally contained in one sentence. The telecom licence that governs ISPs states as follows: 'The subscriber shall have unrestricted access to all the content available on [the] Internet except for such content which is restricted by the Licensor/designated authority under Law.'

The provision essentially encompasses two important elements.

First, it means that ISPs cannot throttle any internet traffic in an unreasonable manner. Where traffic management needs to be done, it should be done in a content-agnostic manner. Simply put, ISPs cannot decide what type of content deserves better or faster bandwidth.

Second, it means that ISPs cannot prioritise any one type of content over others. So, it prevents ISPs from acting as gatekeepers to the content on the internet.

ISPs and content providers seeking to tie-up with ISPs have been questioning the ambit of the second restriction. The net neutrality law today is not clear about whether such a restriction

would mean that ISPs are completely prohibited from entering into any sort of arrangements with content providers (even if such an arrangement does not involve any traffic throttling).

To better understand the issues of net neutrality and discriminatory pricing (as discussed in detail below), it is important to identify the key stakeholders and the dynamics between them. The key stakeholders are:

- ISPs who are licensed by the government to provide the 'highways' on which content travels on the internet.
- Content providers, who own content and utilise the internet highways to deliver content to the end users. Content owners are typically not regulated.
- End users who access and consume the content via the internet. The end consumers pay internet access charges to the ISPs for accessing their bandwidth and may also pay content providers for the content.

The issue that is being questioned today is a possible scenario where an ISP ties up with content providers and provides discounted/free internet access to the end user when he/she wants to use the content provider content/applications/websites. The data charges in such cases are borne by the content providers. The end result will be that the user may still pay for content; however he/she will pay less or nothing by way of internet charges when he/she accesses the content. Such models were being contemplated for the Indian market; however, due to the new law, some of the business models may no longer be permitted.

**What does TRAI's rule against discriminatory pricing mean**  
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Telecommunications of the Government of India ('DoT') has the privilege of providing telecom services and issues licences to telecom operators for this purpose. The DoT determines the conditions of the telecom licences. The TRAI has the absolute power to decide tariffs for telecom operators. The TRAI also has the authority to provide recommendations to the DoT regarding issues of telecom policy and telecom licence conditions.

The TRAI started a consultative process on the issue of net neutrality way back in 2006. This process has not yet culminated in any concrete policy, clarification or direction. A point to note is that the issue of net neutrality is a policy issue over which the TRAI can provide recommendations to the DoT. The DoT may choose to accept, reject, or partially accept the TRAI recommendations, or engage in a discussion with the TRAI.

On a parallel track, in December 2015, the TRAI started a consultative process on the practice of differential pricing adopted by ISPs for data services. Differential pricing is a tariff matter over which the TRAI has rulemaking power.

The consultative process for differential pricing has addressed questions such as:

- Whether ISPs should be allowed to have differential pricing for data usage for accessing different websites, applications or platforms;
- If differential pricing for data usage is permitted, what measures should be adopted to ensure that the principles of non-discrimination, transparency, affordable internet access, competition and market entry and innovation are addressed; and
- Whether there are alternative business models to differential pricing.

The TRAI received numerous responses from various stakeholders as part of this consultation including from telecom operators, content providers, academic institutions and the general public.

An open house consultation meeting was also held to allow stakeholders to voice their views. Finally the TRAI on 8 February 2016 issued the Prohibition of Discriminatory Tariffs for Data Services Regulations 2016 ('Discriminatory Tariff Regulation'). The Discriminatory Tariff Regulation, explained in a nutshell, contains the following important principles:

- ISPs cannot offer any discounted/free internet access to end users if such access is linked to specific content or applications or websites available on the internet;
- Following from the principle that what cannot be done directly also should not be done indirectly, which means that any arrangement between ISPs and content providers that has the effect of a discriminatory tariff being provided to end users will also not be allowed; and
- These restrictions will not apply in closed networks, which do not use the internet to transmit content.

### **Impact of the TRAI's Discriminatory Tariff Regulation**

When the consultation process for differential pricing was started by the TRAI, it purely dealt with tariffs. However the ultimate Regulation has an impact on various issues, which the TRAI itself recognises. The Discriminatory Tariff Regulation contains an explanatory memorandum in which the TRAI has spoken about the various reasons for this Regulation, including net neutrality. This

Regulation impacts the industry and related players in a number of ways.

## Impact on the flexibility in tariff making

For the internet, the TRAI has historically followed a policy of forbearance regarding the rates at which internet services are offered and has allowed market forces to determine such rates. Further, in the telecom world, telecom service providers have traditionally been allowed flexibility to fix differential tariffs for different classes of customers, provided that certain regulatory principles are followed: (a) the classification is non-discriminatory, reasonable and based on an intelligible differentia; and (b) there is adequate transparency provided to consumers with respect to the tariffs. For instance, telecom companies could offer a different tariff plan such as a 'student plan.' However, now, the Discriminatory Tariff Regulation has prohibited ISPs from offering differential tariffs for data services by having tie-ups with content providers or otherwise. There are no exemptions that operators may explore such as plans based on intelligible differentia.

## Impact on all forms of zero rating

In the recent past, there were attempts to make available certain 'zero rated' applications by telecom companies in the Indian market where the subscriber is not required to pay data charges to access certain content. The Discriminatory Tariff Regulation has effectively put an end to all permutations of zero rating applications that may have been possible.

There are many pros and cons that one can think of when considering zero rating applications and the much talked-

about relationship between ISPs and content providers.

The benefits of such tie-ups are easy to see. The content providers get easy access to the huge subscriber base that the ISPs already have, the pains of administrative functions such as billing can be subsumed by the existing infrastructure of the ISPs and subscribers benefit from access to content. On the flip side, there is the possibility that such tie-ups may distort the market and present a skewed/biased view of the internet to the end user. This issue may be particularly relevant for those who get their first access to the internet solely on the basis of such tie-ups.

In the explanatory memorandum to the Discriminatory Tariff Regulation the TRAI has spoken about the various reasons behind this Regulation. The TRAI speaks about the need to preserve the unique architecture of the internet, which is unlike any other traditional market, and the risk that tie-ups between ISPs and content providers may shape the user experience of the internet.

There is no denying the soundness of these principles and the TRAI is to be commended for these efforts. It does not look as if any of the stakeholders deny that these could be very real issues. The question to be addressed is whether by altogether prohibiting all models where ISPs and content providers can tie-up to subsidise content, has the TRAI really addressed the issue or has it stifled what could be a means to bridge the digital divide?

As discussed earlier, telecom companies have to follow regulatory principles of non-discrimination and transparency. One wonders if it could have been possible to achieve the objective by having any intended tie-ups between telecom companies and

content providers follow sound regulatory principles rather than ousting them altogether. The jury is still out on this subject.

## Uncertainty about the exceptions

There is an exemption in the Discriminatory Tariff Regulation for 'closed electronic communications networks' i.e. when content is not transmitted or received over the internet. This exception has not been clearly defined by the TRAI. For instance going by this exception, an ISP may be able to tie-up with a content provider and provide free/discounted access to the content over a closed network (not available on the public internet). However, if such arrangements are viewed as an attempt to indirectly evade the Discriminatory Tariff Regulation, then such models may be in violation of the Regulation.

The telecoms sector in India requires a lot of investment. The sector has been struggling and such regulatory uncertainty may dampen investment in a sector that is already in difficulty. Regulatory uncertainty is never good for progress.

The Discriminatory Tariff Regulation is a very significant development in the Indian market. There are many in support of it. While it has also been opposed by many, it has not yet been legally challenged by any stakeholder. It remains to be seen how the market will evolve and adapt itself around this Regulation and what position the Indian courts may adopt in case of a challenge!

**Gowree Gokhale** Partner  
**Rakhi Jindal** Co-Head of the Telecom Practice  
Nishith Desai Associates, Mumbai  
gowree.gokhale@nishithdesai.com  
rakhi.jindal@nishithdesai.com

1. TRAI recommendations titled 'Delivering Broadband Quickly: What do we need to do?,' dated 17 April 2015.