

# TRAI order: A sledgehammer, not a scalpel

Pranesh Prakash

2016-02-11

Indian Express

## Abstract

TRAI has fixed the problem but over-regulated in the process

---

Through this order, TRAI has put in place the most stringent regulations on differential pricing that exist anywhere in the world.

The Telecom Regulatory Authority of India (Trai) has heeded the call of the Save the Internet campaign and its millions of supporters who called for a ban on zero-rating. Digital rights activists across the world have been putting out jubilant tweets. Many civil society organisations abroad had been keeping a keen eye on the Indian regulator in order to bolster their own activism with their regulators and governments.

Trai rightly recognised the harmful potential of differential pricing (of which “zero-rating” is one form) on the basis of content/ applications/ services (“content” for short) and has, in record time, come out with a forceful order. It is also momentous that in the explanation for its decision, Trai has used net neutrality principles, despite not explicitly using that term, thus paving the way for much-needed regulation of internet service providers (ISPs) on quality of service issues. Despite welcoming the order for all these reasons, I have some reservations: The order allows some tariff schemes that may be harmful and bans some that may be beneficial, and has some unintended consequences. I won’t focus on the potential negative effects on pro-consumer innovation here.

Through this order, Trai has put in place the most stringent regulations on differential pricing that exist anywhere in the world. It has barred all telecom service providers from having discriminatory tariffs for data services, termed all charging of differential tariffs on the basis of content as “discriminatory”, even though in the past, it has noted that differential pricing and discriminatory pricing aren’t the same. Thus, while the regulator had the option of banning only anti-competitive or discriminatory forms of differential pricing, it chose to use a sledgehammer rather than a scalpel. It has fixed the problem it identified but has over-regulated in the process.

Some forms of unpaid zero-rating, which were providing access to limited services to people who can’t afford access to the internet, now stand banned. Thus, insofar as this order reduces access to technologies of expression and communication, and decreases the diversity of accessible information, it has negative

consequences on freedom of expression guaranteed under Article 19(1)(a) of the Constitution. To counter this, it is incumbent on the government to ensure that those whose rights have been negatively affected because of Trai's order are provided access in a manner that is compliant with it. If that doesn't happen, and soon, we are excluding a class of people from being equal to the rest of us — richer people with access to the internet. One way forward would be to view the internet as critical infrastructure for freedom of opinion and expression, and work out ways to provide open internet to all for free. The government has Rs 40,840 crore (\$6 billion) in the universal service obligation fund (USOF) that it has collected from telecom companies — this money ultimately comes from consumers. It could study the feasibility of incentivising telcos to provide access to the full internet at a low speed to all by lessening the USO burden of those who do so.

Trai has also provided two exceptions: For “closed electronic communications network”, and for emergency services or in times of grave public emergencies. The first exception leads to an absurd and counter-intuitive position: Reliance Communications will be allowed to charge less for Reliance Entertainment traffic as long as it isn't over the internet but is separately provided within an intranet. And if Facebook's Free Basics, instead of providing access to mobile-optimised low-bandwidth internet content based on technical criteria, provided only limited content over an intranet, that would be fine. So, closed networks are okay, but partially or even almost-open networks are not. Some would note that the order also states that if the service provider is doing so “for the purpose of evading the prohibition in this regulation”, that is not allowed. If only the Income Tax Act included such language, we wouldn't need to fret about the difference between legal tax avoidance and illegal tax evasion, since even tax avoidance would be prohibited.

Lastly, there are many unintended consequences. Pro-consumer services like having a “gaming-optimised” package with lower latency for gamers will now stand prohibited. ISPs are banned from providing hospitals “telemedicine-optimised” services over the internet. And since the order covers all telecom licensees, even some non-consumer networks — like enterprise virtual private networks (for example, MPLS networks), which work atop the internet, and on which service providers charge differentially for high-quality video conferencing versus other traffic — might get covered, despite Trai not intending that.

All in all, there are reasons both to cheer this order and to be cautious. Most importantly, if these regulations end up furthering digital exclusion, increasing barriers to access, reducing speech diversity and harming freedom of expression, we might claim victory in the net neutrality battle, but we would have lost the war for an open internet that empowers all.