

Response of IT for Change, Bengaluru,
to Telecommunication Regulatory Authority of India's (TRAI)
Consultation Paper on 'Free Data '

Question 1: Is there a need to have TSP agnostic platform to provide free data or suitable reimbursement to users, without violating the principles of Differential Pricing for Data laid down in TRAI Regulation? Please suggest the most suitable model to achieve the objective.

We are not clear about the objective of this current round of consultation, which follows the rather clear recently passed order on 'Prohibition on Differential Pricing for Data Services Regulation, 2016'. We take it that there is no intention to amend this important regulation. We see this clearly stated in the above question. Any model suggested under this consultation, therefore, should not only ensure that TSPs themselves do not offer differential pricing but also, to quote the mentioned 2016 regulatory order;

“No service provider shall enter into *any arrangement*, agreement or contract, by whatever name called, with any person, natural or legal, *that has the effect of discriminatory tariffs for data services* being offered or charged to the consumer on the basis of content.”
(Emphasis added.)

The key condition for any suggested model in response to this consultation is that it must not involve a TSP entering into any kind of agreement or arrangement “that has the effect of” discriminatory tariff charged to the consumer on the basis of content. *This will also rule out any kind of “passive role” (the term used in current consultation) as well, which could be of facilitating a discriminatory tariff arrangement*, even if the TSP itself collects nothing. It was made clear in the explanatory text of the mentioned regulation that *discriminatory tariff involves both “zero or discounted tariff”*.

However, we are concerned that *most examples provided in the consultation paper*, of what it considers “TSP agnostic models” that now seem to be open to be considered, *would clearly involve TSPs entering into some kind of “...arrangement ... that has the effect of discriminatory tariffs for data services being offered or charged to the consumer on the basis of content”*. They are therefore clearly in violation of the regulatory order on differential pricing. Since these examples that violate the earlier order are put forward in this consultation paper, we are afraid that there seems to be an intention *to open the earlier order to some amendments, or perhaps some kind of 'technical' bypassing*. We hope such fear turns out to be unfounded.

The current paper is very clear in its opening part that the responses should suggest possible options that facilitate some kinds of free access “*without violating the existing TRAI Regulation on discriminatory tariff for data services*”. We hope that this proviso of the current consultation is maintained to be absolutely inviolable.

Two types of models seem to be under consideration. For the first kind, *the TSPs provide some kind of technical interface*, or API, that “enables” content providers – via a third party TSP agnostic platform – to either *post facto* reward consumers for accessing some content, or *simply pay to the TSP the cost of accessing such content*, which therefore becomes free for the consumer to access. The second kind is where a third party platform rewards consumers accessing certain content “*without involving the TSPs at all*” – like the quoted current rewards based businesses already existing in India, and listed in para 12 of the paper.

For the first kind, where the TSPs offer an technology interface, or API, to facilitate shift of “cost burden” for certain content from the consumer to a “platform provider”, *it clearly involves an “arrangement”* that 'has the effect of discriminatory tariffs for data services being offered or charged to the consumer on the basis of content'. Such a model therefore clearly violates the recent regulation against such practices and thus cannot be allowed. We are not able to see why such a model is even cited as an example in the current consultation paper. Any such API will have to separately bill different types of content for each consumer, charging some of it to the consumer and rest to the zero-rating platform provider. This clearly constitutes an “arrangement” with the platform provider, that has the effect of discriminatory pricing to the consumer – where some content is coming to her free and not the rest. This would be inadmissible under the recent order.

The last round of consultation was dominated by debates around the Free Basics platform. The consequent regulatory decision was then rightly read, and celebrated, as disallowing Free Basics kinds of practices. The question now is, if the above kind of model is allowed, what stops Free Basics from becoming that “TSP agnostic platform”, using the API provided by the TSPs to zero-rate content that is on Free Basics. *We would then just be seeing Free Basics, and similar applications, coming back through another route.* Just that now they have to be equally available on all TSPs, and not just one or two, as Free Basics earlier was. *It is not clear how spreading the problematic Free Basics like practices now equally to all TSPs rather than just one or two can be considered a good move* – when most people had expressed views against such practises. Such practises are also roundly criticised in the recent regulatory order on discriminatory pricing. Allowing such a model therefore would be almost going completely against that much-praised order.

That leaves a second kind of model where platforms – like the existing ones in India cited in para 12 of paper – reward accessing certain content post facto, directly to the customer, including through providing data top-ups. *This may be possible to do without any kind of direct arrangement with the TSP*, and therefore does constitute a distinct case. Here, our main argument is that *law and regulation must aim for right outcomes and not just look narrowly at the processes of providing a service.* A regulation against price discrimination in data services must ensure that the consumer does not face any price discrimination, whichever way it may come. In so far as *this second kind of model also has exactly the same final effect as the first*, in that the consumer gets some data free but the rest gets costed, still fully contravenes the spirit of the recent regulation, and should therefore not be allowed. As the regulatory order had rightly observed, “what cannot be done directly also cannot be done indirectly”. This is just doing price discrimination, which includes, zero-rating, somewhat indirectly. It must not be allowed.

We are unclear about another model suggested in the paper, that of direct cash transfer. Is it a cash transfer to the consumer from government or some other public interest agency to cover the access cost for the full Internet (even if just to some extent)? Or is it some kind of cash transfer from a content provider, directly or through a third party service provider (platform), to the consumer just for data charges for accessing only its content? If the former, it is most welcome and should be encouraged. But instead of transferring cash to the consumer, the government or other public interest agency can directly pay the TSP. Such an arrangement, since it does not facilitate discriminatory pricing, would not be illegal under the recent order. However, if the latter, whereby a content provider makes cash transfer for accessing its content, it really, in effect, means free data for some content and not for other content, which is again as much a case of discriminatory pricing as any else. This fully goes against the spirit of the recent order, and causes all the undesirable social outcomes that the order's explanatory note discussed so eloquently.

From the media interviews of TRAI officials, it appears that the whole basis of the earlier order and overall regulatory exercise, that caught popular imagination as nothing like this before, is being dramatically changed. Suddenly we are talking of something entirely different. To all the involved people, it was always about net neutrality, that all content on the Internet, as the consumer receives it, is treated in the same fashion. ***It now appears that the main issue here is being described as whether or not the same services and offerings (whether net neutral or not) are available equally on every TSP or not. This is an entirely different matter, and not what has been bothering people, and they responding about. For instance, people clearly had a problem with Free Basics as being not net neutral; one did not hear anyone having the problem why is Free Basics not available on all TSPs.*** One did not hear anyone on either side of the debate talk about this issue. This amounts to upending the whole idea and spirit of the debate in which the nation so passionately and also rationally engaged. If such a shift in the basic proposition of these consultations is actually being done, it amounts to a great disrespect to the public, and public opinion, regarding a cause in which it showed much interest and passion.

One last point; the fact that this new consultation is being done does appear to mean that there is now some predilection towards allowing some latitude on zero-rating; perhaps along the models that have been discussed in the paper. As argued, these models all go against the letter and spirit of the recent order. We see that there is some, unsubstantiated, shift towards arguing that such zero-rating provisions will somehow be most used by small entrepreneurs. This is especially evident in paras 8 and 9 of the consultation paper. Whereas in the last round, the deep pocket content providers were, rightly, considered most likely to dominate the zero rating scene. ***We could not understand the basis of such a shift now, to consider zero-rating as more likely to be done by small entrepreneurs.*** If the models discussed in the current paper are allowed, they will also be most used by big content providers, with the same kind of deleterious affect on consumers, including the poor among them, and on the general society, as were so well argued in the last order. ***No reasons have been provided why the new discussed models will be more used by small entrepreneurs rather than big companies.*** This is an absolutely wrong premise, on which this new consultation seems to be standing. All these models cost money to content providers, and will be most used by those who have the most money. We think that the cover of the supposed benefit to

small entrepreneurs is unjustly used by big companies who want such practices to be allowed, to

enable them to dominate and close the market to newcomers. Therefore, allowing even the new discussed models will actually harm small entrepreneurs, which is why most of them have been arguing for complete ban on all kind of zero-rating models.

Question 2: Whether such platforms need to be regulated by the TRAI or market be allowed to develop these platforms?

No kind of platform that enables zero rating or otherwise any kind of price discrimination for data services ***should be allowed, whether run by TSPs, facilitated by them, or run by other parties.*** TRAI, like for any good law or regulation, must regulate for actual social outcomes, and not just with regard to technical or business processes that produces them. Enabling clever new business/technical models to do what TRAI has well argued in its recent order as being detrimental to consumers, even more to the poorer among them, as well as to the larger society, will just make a mockery of law and regulation.

It is important to remember that the Internet is basic to almost all emerging social systems. Just like a small change in the DNA magnifies manifold in the human body, allowing even a small loophole in the regulation that allows TSPs and big content providers to set up non net neutral business models, will immediately be greatly exploited using clever new business practices, in a manner that such non net neutral models would become the dominant ones. Such are the extremely powerful “commercial forces” backing changes to the neutral character of the Internet, which does not allow easy (improper) exploitation of this key part of new social systems.

Question 3: Whether free data or suitable reimbursement to users should be limited to mobile data users only or could it be extended through technical means to subscribers of fixed line broadband or leased line?

As we discuss in answer to the next question, number 4, it is important for TRAI to look at ways whereby disadvantaged citizens are able to get some basic data entitlement. Such an entitlement should be provided both on mobiles and wired networks. As there is much more bandwidth available on wired networks, which is required for many tasks, that are increasingly essential, like e-education, e-health, e-governance, e-agriculture, and so on, such a basic free quota for everyone is very much necessary to be provided on wired networks, in addition to being provided on mobile networks (since mobility is also a very important matter).

Question 4: Any other issue related to the matter of Consultation.

We understand that a key concern that bothers TRAI, and very rightly so, is how to ensure that Internet connectivity is universalized as soon as possible, as most social systems shift to the Internet. Not connecting everyone sooner than later will cause major and unacceptable exclusions. The best way to do so is to provide a basic free quota of connectivity to every citizen, separately on mobile and wired networks.

Communication resources are most logical as well as convenient to adapt to a basic entitlement

framework. Here, we do not have a material resource being distributed, where each additional unit costs considerably to make. First of all, once a communication system is set up, there is very little marginal cost for providing additional resources. Further, any communication resource employs significant public resources like spectrum and the right of way. ***Government must leverage the public resources it makes available to communication companies to make them provide a free data quota to all citizens. This can be done as a licensing condition for communication companies.*** Government should also consider paying out of the ***Universal Service Funds***, and/or set up corpus for private contributions. In fact, the enormous ***earnings from spectrum allocation, and locally from giving right of way***, should logically be used for universalizing Internet connectivity, through supporting such free data quotas.

Fortunately, much more than other subsidies, free data quotas are also easier to manage. They do not have much of a targeting problem. They can be given to all citizens, and, such is the exploding need for data for almost every possible activity that, those who have extra money would still spend considerably on data above the free quota limit, and thus the companies would not lose much revenue. Even the disadvantaged, or poorer, people, who get such free quota would mostly come to spend beyond this quota limit to get additional services, and thus it simply brings many new customers to the companies, apart from serving a most important public interest. There is also no leakage, because if a part of the licensing conditions there will be no payments involved, and even if payments are involved, they go directly to the TSPs.

We should also leverage National Optic Fibre Network (NOFN), a public infrastructure, to provide wholesale backhaul to community run networks, which should provide a free basic data entitlement to everyone, while commercializing the rest of data provision. Local governments will also be willing to invest money into such local community run networks, and thus the burden of subsidy gets distributed. We understand that the current effort is to rely wholly on private partners for last mile connectivity from the NOFN. This policy should be revised, with a greater tilt towards community run networks. Even a rich country like the US, and many others similarly placed, are increasingly relying on community run networks. US President, Barack Obama, has [strongly backed community based networks](#). In the circumstances, it is unfortunate that a developing country like India is not looking seriously into this option.

Lastly, we also think that basic government services, and other public interest services (as identified by TRAI), should by regulation be provided free by all TSPs. As more and more public services migrate to digital platforms, they cannot be denied to any citizen just because she may not have a data package, or may have exhausted it. We see that the recent order makes an exception for emergency service. Such an exception should also be extended to key public services, and other specifically identified public interest services. The list of such exempted services should be decided by the regulator and not the TSP. TSPs cannot be allowed any leeway in this regard. Such positive discrimination, a long-cherished concept of social policy, cannot be equated with problematic zero-rating, as decided by the TSPs.

A combination of basic free data allowance, and free essential services, is essential for an inclusive digital India. There is no way around it.