

30th June 2016

To,
Shri Arvind Kumar,
Advisor (Broadband and Policy Analysis),
Telecom Regulatory Authority of India,
New Delhi

Re: Internet Democracy Project's Comments to Consultation paper No. 7/2016
on Free Data

Dear Sir,

Thank you for the opportunity to comment on the consultation paper on Free Data.

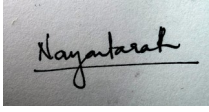
The Internet Democracy Project is a Delhi-based civil society initiative that works for an Internet that supports freedom of expression, democracy and social justice through research, advocacy and debate in India, and beyond.

We hope that the outcome of this consultation leads to the strengthening of the Prohibition of Discriminatory Tariffs for Data Services, 2016 Regulation ("discriminatory tariffs regulation"). Business models which do not come under that regulation but run the risk of having similar harms as discriminatory pricing should be given the same regulatory treatment.

In general, we urge TRAI to develop a principle-based framework to preserve the Internet's ability to function as an open and free infrastructure, which expands and refines principles that it has started to develop with the discriminatory tariffs regulation.

We hope that our comments are taken into consideration.

Thanking you and Yours Sincerely,
(for the Internet Democracy Project)

A small rectangular image showing a handwritten signature in black ink on a light-colored background. The signature is written in a cursive style and appears to read "Nayantara".

Nayantara Ranganathan
Programme Manager- Freedom of Expression
Internet Democracy Project

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.

TRAI has taken a valuable step in the discriminatory tariffs regulation by identifying principles that have guided its decision. It identifies the principles “non-discrimination, transparency, non-predatory, non-ambiguous, not anti-competitive and not misleading.”¹ These are useful pointers for the current consultation, and *not* whether platforms are TSP-agnostic.

While this consultation seeks to address few of many business models and is therefore specific, the question is framed embedding assumptions in it. Making platforms TSP-agnostic does not ensure that non-discrimination is ensured or anti-competitive harms are eliminated, and therefore this cannot be the decisive criterion around which to decide the desirability of business models.

There is some guidance for what the recently affirmed principles could mean in practice in network neutrality expert Prof. Dr. Barbara van Schewick's paper 'Network neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like'.² Her approach through a principle-based framework is also in alignment with TRAI's light-touch regulation methods. The table with the framework is reproduced below.

A network neutrality rule should meet the following criteria-

- It should preserve the factors that have allowed the internet to serve as a platform for application innovation, free speech and decentralised economic, social, cultural and political interaction in the past:
 - *User choice*: Users independently choose which applications they want to use, without interference from network providers
 - *Innovation without permission*: Innovators independently choose which applications they want to pursue; they do not need support or “permission” from network providers in order to realize their ideas for an application

1 Para 1, Page 5,

http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf

2 <https://cyberlaw.stanford.edu/publications/network-neutrality-and-quality-service-what-non-discrimination-rule-should-look>

- *Application blindness of network*: The network is application-blind. An application-blind network is unable to distinguish among the applications on the network, and, as a result, is unable to make distinctions among data packets based on this information

- *Low cost of application innovation*: The costs of application innovation are low

- It should not constrain the evolution of the network more than necessary
- It should provide certainty to industry participants
- It should keep cost of regulation low

These principles go beyond looking at the Internet simply as a market, and account for the social, cultural and political benefits of the general-purpose infrastructure of the Internet. The Internet Democracy Project, in its previous submissions to TRAI, has argued for an outlook where the Internet is considered a public good, and not merely a market.

The four factors of user choice, innovation without permission, user choice and application blindness of the network are useful as parameters against which models can be evaluated, and a regulatory response (or lack thereof) can be decided. We examine some of the main shortcomings of the models using these parameters.

A. Reward-based models

The regulator should distinguish between models that reward continued use of apps/websites and models that reward other actions; prohibit the former and allow the latter.

There are two kinds of reward-based models discussed-

“(1) Discovery Apps dedicated to providing rewards in return for engagement; such as mCent, Gigato, Taskbucks, Ladoo, EarnTalktime, Pokkt and many more and

(2) Rewards platforms that can enable any app/site to offer rewards for desired action or even mobile data rewards for everyday activities like paying electricity bill on time or checking out of the hotel on time etc.”³

These apps or platforms entail rewards for a range of actions, including but not limited to access or continued use of a certain application/website. Rewards for continued use of apps/websites and rewards for other kinds of actions have not been distinguished as such by these platforms. Many of these platforms leave room to include a greater variety of actions for rewards in the future as well.⁴

Nonetheless, it is important to differentiate between a reward for continued use, and a reward for other actions, as the former runs the very same danger that the discriminatory tariffs regulation seeks to protect users from, as we explain below.

- Rewards for continued use of apps/websites give a competitive advantage to such apps/websites and negatively affect user choice

Incentivising the continued use of certain applications or websites in a market with network effects starts a positive feedback loop, such that these apps/websites are advantaged over their competitors with similar functionalities.

In the explanatory memorandum on discriminatory tariffs regulation, TRAI says that in formulating a regulatory approach towards differential pricing on the basis of content, one of the license conditions and legal principles that is relevant is Clause 2.1 of Chapter IX of the Unified Licence Agreement, which provides that:

"The subscriber shall have unrestricted access to all the content available on internet except for such content which is restricted by the Licensor/designated authority under Law."⁵

It is further explained that ‘restrictions’ could take several forms, and one of them is price-based differentiation. It elaborates that making certain content more attractive to consumers in an indirect fashion is also problematic-

“Price-based differentiation would make certain content more attractive to consumers resulting in altering a consumer's online behaviour. While this

3 Para 12, Page 5,
http://traigov.in/WriteReadData/ConsultationPaper/Document/CP_07_free_data_consultation.pdf

4 See for eg. Gigato <http://www.gigato.co/tos/>, Earn Talktime <http://earntalktime.com/earntt/terms-of-use.jsp>, Pokkt <http://www.pokkt.com/terms>

5 Supra note 1, Para 24, Page 12

might not be a major concern in a country where the majority already has internet access, in a nation like India which is seeking to spread internet access to the masses, this could result in severe distortion of consumer choice and the way in which users view the internet. While not a direct restriction on a subscriber's access to the internet, such practice acts as an indirect restriction by affecting the way consumers view content online.”⁶

Rewards in exchange for continued use of certain apps/websites makes certain content more attractive to consumers than others where there is no rewards involved.

After isolating what effects TRAI is trying to guard against, the memorandum goes on to state that-

“Further, applying the principle that what cannot be done directly, cannot also be done indirectly, TSPs are also prohibited from entering into arrangements that have the same effect as charging discriminatory tariffs on the basis of content. Thus, an arrangement by which, instead of a service provider differentially charging tariffs to the consumer, other arrangements are made by the TSPs which in effect make accessing some content cheaper, for example through a refund to the consumer or other methods, are likewise barred.”⁷

TSP-agnostic reward-based platforms also have to enter into arrangements with all TSPs, attracting the above prohibition.

- Rewards for continued use of apps/websites negatively affect low cost of application innovation

Rewarding users for continued use of apps/websites disproportionately benefits already entrenched apps/websites, as opposed to new entrants.

It is profitable for big firms to gather users through reward-based platforms, even at the cost of paying for their data use, as their money power and network effects allow them drive out competition from the market.

In addition, in cases where such firms’ business model is advertisement driven rather than depending on a fee paid by the user for the service, the user is in fact the product, providing an additional incentive to increase the number of users to the extent possible within a business’s financial means.

6 Ibid.

7 Supra note 1, Para 28, Page 14

If these models are allowed, new entrants who seek to compete with such businesses will then not only have to compete with their products/services, but will also need to be able to reimburse data used by their customers to stand a chance in the market.

Reward-based models that reward access or continued use would thus have considerable negative effects on the cost of innovation in India.

Competitors of these apps/websites have to compete with existing products/services, while also being able to reimburse for data use by their customers.

There should be clear directions from the regulator that access or continued use of certain apps/websites should not be part of reward-based models or platforms.

B. Toll-free models

The regulator should altogether disallow this model as it is not very different from the ‘zero-rating’ model, which has been banned by the discriminatory tariffs regulation.

- Toll-free models negatively affect user choice

Users not being charged for data usage over certain apps/websites skews user choice in favour of these apps/websites, to the disadvantage of competitors and non-commercial players who cannot afford to pay for their customers’ data usage. As we have explained above, incumbents have a variety of strong reasons to attempt to entrench their position in the market by paying for their users’ data in one form or another. Consolidation of the market by such means is not in users’ interests.

- Toll-free models negatively affect innovation without permission

According to the consultation paper,

“In this model, the TSP does not act as a gatekeeper and plays a passive role. The platform owner has a business interest to allow any and every content provider making the model neutral.”⁸

The assumption that a platform owner has a business interest to allow any and every content provider is an oversimplification. Big players in the primary market for carriage could have indirect control over products or services in the complementary

8 Supra note 3, Para 13, Page 6

market for apps/websites and platforms. For example, Bharti Group, which owns the Airtel network in the primary market for carriage, also co-owns Bharti Softbank, a company that is behind apps like Wynn. Big firms in the market for carriage are not stopped from entering the complementary market for toll-free platforms through indirect means. In such a situation, the platform may not allow its competitors easy entry onto its platforms. Platforms reserve the right to decide which applications may or may not be on their networks. Given carriers' strong stance against applications like Internet telephony, a toll-free platform over which a carrier exerts control has an incentive to exclude applications which compete directly with its revenue in the primary market.

The assumption on which TRAI's assessment of this model is built is faulty as it does not take into consideration factors like firms in the primary market of carriage having control over products in the complementary market for platforms.

- Toll-free models negatively affect low cost of application innovation

Toll-free models discriminate in favour of apps/websites that are capable of paying for their customers' data usage. The cost, whether monetary or otherwise (like complying with technical specifications), of being on toll-free platforms affects the low cost of application innovation.

In the explanatory memorandum to the discriminatory tariffs regulation, one of the reasons given for prohibiting differential pricing is that

*“differential tariffs arguably disadvantage small content providers who may not be able to participate in such schemes. This may create entry barriers and non-level playing field for these players stifling innovation.”*⁹

The same risks present themselves in the toll-free model as well, where the bigger, already entrenched players again are disproportionately benefited, undermining healthy competition.

For the reasons mentioned above, this model should definitely be disallowed by the regulator.

C. Direct benefit models

9 Supra note 1, Para 5, Page 6

This model incentivises the continued use of certain websites/applications over others, and is therefore hit by the same problems as reward-based models that reward access, and should not be allowed.

- Direct benefit model affects user choice

This model has been compared to oil/natural-gas subsidies by direct transfer of cash. However, unlike such direct transfers by the government to ensure fulfilment of basic human needs, the transfers in the current context are being made by private businesses.. Certain apps/websites obtain a clear advantage over others because they are able to pay for the data usage of their customers. This tilts user choice in favour of those apps/websites that can offer benefits of direct transfers of cash.

The consultation paper implies that simply if the model is designed to be TSP-agnostic, it is beneficial. But this assumption does not account for the system of incentives that a richer firm in the market for apps/websites can employ to affect user choice. Again, such a trade-off can only be beneficial to firms who are rich, or firms who already have a large enough user-base, and can sell access to such a user base to third parties like advertisers who would be willing to reimburse data usage over the firm's apps/websites.

- Direct benefit model negatively affects low cost of application innovation

Apps/website developers who do not have resources to pay for data usage over their app/website are at a disadvantage, compared to those players who are well-funded and can afford to prioritise gathering users over keeping costs low, or who already have a dominant position in the service they offer, and can sell access to their users to third parties in exchange for covering the costs of reimbursement. This negatively affects the take-up of products and services of new entrants, and makes it much more expensive for them to compete on an equal footing.

For the above argued reasons, direct benefit models, where the benefit originates from the content provider or app/website, and not the government, should be disallowed.

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

TRAI has made an excellent start towards laying down a framework, with the discriminatory tariffs regulation, in which it identified non-discrimination and transparency as key principles that should guide its decisions in this area. It is also

encouraging that TRAI recognises that complex questions remain, as is exemplified by the current consultation.

This recognition points towards the need for a clear, overarching principle-based framework, that can be used as a touchstone against which to assess any existing or proposed business models. Such a framework will allow the network to evolve while at the same time providing considerable certainty to industry participants, be it incumbents or new entrants. By adhering to the principles outlined in the framework, they will be able to innovate without the risk of their enterprise being struck down due to non-conformity with post-facto assessments.

Such a framework would, thus, also ensure that the regulatory costs can remain limited, and though there may be some initial boundary testing, TRAI does not have to assess every model that comes up in the market.

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?

It is beneficial to not have a chasm between the quality and nature of use over different modes of access. Allowing free data or suitable reimbursement only for mobile data users privileges one mode of access over the other, creating more differences than what the technical challenges present, for use cases over essentially the same network environment. While many new users in India in particular will be mobile-only Internet users, the lack of access to a variety of devices will shape their use in a number of ways, not all of which are positive (applications for jobs and educational opportunities, for example, do often still require access to larger screens). So as to not add to the reasons to remain a mobile-only user, as far as possible, the benefits available to users of mobile data should therefore also be extended to subscribers of fixed line.