CIS Submission to TRAI Consultation 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.

Is There a Need for Free Data?

No, there is no *need* for free data, just as there is no *need* for telephony or Internet. However, making provisions for free data would increase the amount of innovation in the Internet and telecom sector, and there is a good probability that it would lead to faster adoption of the Internet, and thus be beneficial in terms of commerce, freedom of expression, freedom of association, and many other ways.

Thus the question that a telecom regulator should ask is not whether there is a *need* for TSP agnostic platforms, but whether such platforms are harmful for competition, for consumers, and for innovation. The telecom regulator ought not undertake regulation unless there is evidence to show that harm has been caused or that harm is likely to be caused. In short, TRAI should not follow the precautionary principle, since the telecom and Internet sectors are greatly divergent from environmental protection: the burden of proof for showing that something ought to be prohibited ought to be on those calling for prohibition.

Goal: Regulating Gatekeeping

TRAI wouldn't need to regulate price discrimination or Net neutrality if ISPs were not "gatekeepers" for last-mile access. "Gatekeeping" occurs when a single entity establishes itself as an exclusive route to reach a large number of people and businesses or, in network terms, nodes. It is

not possible for Internet services to reach their end customers without passing through ISPs (generally telecom networks). The situation is very different in the middle-mile and for backhaul. Even though anti-competitive terms may exist in the middle-mile, especially given the opacity of terms in "transit agreements", a packet is usually able to travel through multiple routes if one route is too expensive (even if that is not the shortest network path, and is thus inefficient in a way). However, this multiplicity of routes is generally not possible in the last mile.[1] This leaves last mile telecom operators (ISPs) in a position to unfairly discriminate between different Internet services or destinations or applications, while harming consumer choice.

However, the aim of regulation by TRAI cannot be to prevent gatekeeping, since that is not possible as long as there are a limited number of ISPs. For instance, even by the very act of charging money for access to the Internet, ISPs are guilty of "gatekeeping" since they are controlling who can and cannot access an Internet service that way. Instead, the aim of regulation by TRAI should be to "regulate gatekeepers to ensure they do not use their gatekeeping power to unjustly discriminate between similarly situated persons, content or traffic", as we proposed in our submission to TRAI (on OTTs) last year.

Models for Free Data

There are multiple models possible for free data, none of which TRAI should prohibit unless it would enable OTTs to abuse their gatekeeping powers.

Government Incentives for Non-Differentiated Free Data

The government may opt to require all ISPs to provide free Internet to all at a minimum QoS in exchange for exemption from paying part of their USO contributions, or the government may pay ISPs for such access using their USO contributions.

TRAI should recommend to DoT that it set up a committee to study the feasibility of this model.

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[1] In India's mobile telecom sector, according to a Nielsen study, an estimated 15% of mobile users are multi-SIM users, meaning the "gatekeeping" effect is significantly reduced in both directions: Internet services can reach them via multiple ISPs, and conversely they can reach Internet services via multiple ISPs. See Nielsen, 'Telecom Transitions: Tracking the Multi-SIM Phenomena in India', http://www.nielsen.com/in/en/insights/reports/2015/telecom-transitions-tracking-the-multi-sim-phenomena-in-india.html

ISP subsidies

ISP subsidies of Internet access only make economic sense for the ISP under the following 'Goldilocks' condition is met: the experience with the subsidised service is 'good enough' for the consumers to want to continue to use such services, but 'bad enough' for a large number of them to want to move to unsubsidised, paid access.

1. Providing free Internet to all at a low speed. This naturally discriminates against services and applications such as video streaming, but does not technically bar access to them.
2. Providing free access to the Internet with other restrictions on quality that aren't discriminatory with respect to content, services, or applications.

Rewards model

A TSP-agnostic rewards platform will only come within the scope of TRAI regulation if the platform has some form of agreement with the TSPs, even if it is collectively. If the rewards platform doesn't have any agreement with any TSP, then TRAI does not have the power to regulate it. However, if the rewards platform has an agreement with any TSP, it is unclear whether it would be allowed under the Differential Data Tariff Regulation, since the clause 3(2) read with paragraph 30 of the Explanatory Memorandum might disallow such an agreement.

Assuming for the sake of argument that platforms with such agreements are not disallowed, such platforms can engage in either post-purchase credits or pre-purchase credits, or both. In other words, it could be a situation where a person has to purchase a data pack, engage in some activity relating to the platform (answer surveys, use particular apps, etc.) and thereupon get credit of some form transferred to one's SIM, or it could be a situation where even without purchasing a data pack, a consumer can earn credits and thereupon use those credits towards data.

The former kind of rewards platform is not as useful when it comes to encouraging people to use the Internet, since only those who already see worth in using in the Internet (and can afford it) will purchase a data pack in the first place. The second form, on the other hand is quite useful, and could be encouraged. However, this second model is not as easily workable, economically, for fixed line connections, since there is a higher initial investment involved.

Recharge API

A recharge API could be fashioned in one of two ways: (1) via the operating system on the phone, allowing a TSP or third parties (whether OTTs or other intermediaries) to transfer credit to the SIM

card on the phone which have been bought wholesale. Another model could be that of all TSPs providing a recharge API for the use of third parties. Only the second model is likely to result in a "toll-free" experience since in the first model, like in the case of a rewards platform that requires up-front purchase of data packs, there has to be a investment made first before that amount is recouped. This is likely to hamper the utility of such a model.

Further, in the first case, TRAI would probably not have the powers to regulate such transactions, as there would be no need for any involvement by the TSP. If anti-competitive agreements or abuse of dominant position seems to be taking place, it would be up to the Competition Commission of India to investigate.

However, the second model would have to be overseen by TRAI to ensure that the recharge APIs don't impose additional costs on OTTs, or unduly harm competition and innovation. For instance, there ought to be an open specification for such an API, which all the TSPs should use in order to reduce the costs on OTTs. Further, there should be no exclusivity, and no preferential treatment provided for the TSPs sister concerns or partners.

"0.example" sites

Other forms of free data, for instance by TSPs choosing not to charge for low-bandwidth traffic should be allowed, as long as it is not discriminatory, nor does it impose increased barriers to entry for OTTs. For instance, if a website self-certifies that it is low-bandwidth and optimized for Internet-enabled feature phones and uses 0.example.tld to signal this (just as wap.* were used in for WAP sites and m.* are used for mobile-optimized versions of many sites), then there is no reason why TSPs should be prohibited from not charging for the data consumed by such websites, as long as the TSP does so uniformly without discrimination. In such cases, the TSP is not harming competition, harming consumers, nor abusing its gatekeeping powers.

OTT-agnostic free data

If a TSP decides not to charge for specific forms of traffic (for example, video, or for locally-peered traffic) regardless of the Internet service from which that traffic emanates, as as long as it does so with the end customer's consent, then there is no question of the TSP harming competition, harming consumers, nor abusing its gatekeeping powers. There is no reason such schemes should be prohibited by TRAI unless they distort markets and harm innovation.

Unified marketplace

One other way to do what is proposed as the "recharge API" model is to create a highly-regulated market where the gatekeeping powers of the ISP are diminished, and the ISP's ability to leverage its exclusive access over its customers are curtailed. A comparison may be drawn here to the rules that are often set by standard-setting bodies where patents are involved: given that these patents are essential inputs, access to them must be allowed through fair, reasonable, and non-discriminatory licences. Access to the Internet and common carriers like telecom networks, being even more important (since alternatives exist to particular standards, but not to the Internet itself), must be placed at an even higher pedestal and thus even stricter regulation to ensure fair competition.

A marketplace of this sort would impose some regulatory burdens on TRAI and place burdens on innovations by the ISPs, but a regulated marketplace harms ISP innovation less than not allowing a market at all.

At a minimum, such a marketplace must ensure non-exclusivity, non-discrimination, and transparency. Thus, at a minimum, a telecom provider cannot discriminate between any OTTs. To ensure that telecom providers are actually following this stipulation, transparency is needed, as a minimum.

Transparency can take one of two forms: transparency to the regulator alone and transparency to the public. Transparency to the regulator alone would enable OTTs and ISPs to keep the terms of their commercial transactions secret from their competitors, but enable the regulator, upon request, to ensure that this doesn't lead to anti-competitive practices. This model would increase the burden on the regulator, but would be more palatable to OTTs and ISPs, and more comparable to the wholesale data market where the terms of such agreements are strictly-guarded commercial secrets. On the other hand, requiring transparency to the public would reduce the burden on the regulator, despite coming at a cost of secrecy of commercial terms, and is far more preferable.

Beyond transparency, a regulation could take the form of insisting on standard rates and terms for all OTT players, with differential usage tiers if need be, to ensure that access is truly non-discriminatory. This is how the market is structured on the retail side.

Since there are transaction costs in individually approaching each TSP for such provision of free data, the market would greatly benefit from a single marketplace where OTTs can come and enter into agreements with multiple TSPs.

Even in this model, TSPs will be charging based not only on the fact of the number of customers they have, but on the basis of them having exclusive routing to those customers. Further, even under the standard-rates based single-market model, a particular OTT may be accessible for free from one TSP, but not across all TSPs: unlike the situation with a toll-free number in which no such distinction exists.

To resolve this, the regulator may propose that if an OTT wishes to engage in provision of free data, it will need to do so across all networks, since if it doesn't there is risk of providing an unfair advantage to one network over another and increasing the gatekeeper effect rather than decreasing it.

Question 2

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

In many cases, TRAI would have no powers over such platforms, so the question of TRAI regulating does not arise. In all other cases, TRAI can allow the market to develop such platforms, and then see if any of them violates the Discriminatory Data Tariffs Regualation. For government-incentivised schemes that are proposed above, TRAI should take proactive measure in getting their feasibility evaluated.

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?

Spectrum is naturally a scarce resource, though technological advances (as dictated by Cooper's Law) and more efficient management of spectrum make it less so. However, we have seen that fixed-line broadband has more or less stagnated for the past many years, while mobile access has increased. So the market distortionary power of fixed-line providers is far less than that of mobile providers. However, competition is far less in fixed-line Internet access services, while it is far higher in mobile Internet access. Switching costs in fixed-line Internet access services are also far higher than in mobile services. Given these differences, the regulation with regard to price discrimination might justifiably be different.

All in all, for this particular issue, it is unclear why different rules should apply to mobile users and fixed line users.

Question 4

Any other issue related to the matter of Consultation.

None.