



## EBG FEDERATION

### **EBG Federation's response on TRAI Pre Consultation Paper on Net Neutrality**

**EBG Federation (EBG)** was established on 11th March, 2015 as a Section 8 company under the Companies Act 2013 in order to ensure long term stability and clarity on its purpose as a not for profit organization offering support and advocacy for European businesses in India. Founded as the European Business Group (EBG), in 1997, as a joint initiative of the European Commission and the European Business Community in India, EBG has come to be recognized by the Indian Government and the European Commission as the industry advocacy group representing the interest of European companies in India.

EBG Federation is supported by the Delegation of the European Union to India and represents the 28 Member States of the European Union as well as accession countries and its partners in European Economic Area (EEA). The EU Ambassador is our Patron.

Currently EBG has Chapters in Delhi, Mumbai, Bangalore and Chennai with approximately 170 companies as Members. Telecommunications is one of the strongest and best represented sector committees of EBG Federation. Mr. TV Ramachandran is currently the Chairman of the Telecom Sector Committee of the EBG.

The primary objective of EBG is to actively support growth in India-EU trade relations, become the most relevant advocate for European business in India and ensure that the needs of European business are well presented to policy and decision makers.

#### **Preamble:**

India is indeed poised at a unique position in the development of its internet communications where it can create a holistic and workable regulatory solution to empower its citizens for using the internet innovatively yet safely.

The TRAI paper correctly points out the teledensity of Indian users is a huge 81.83% but its internet users in comparison is low at 136.5 million users.

EBG lauds the initiatives the Hon'ble Prime Minister has given the country in the form of Digital India, Make In India, Smart Cities, Skill India, etc to empower everyone by bringing them on a common digital platform of 'broadband for all'.

India has its own unique set of social and economic conditions which have to be considered as per the indigenous requirements of India.

The internet is a tangible thing, a network of infrastructure pulsing with light, winding its way into and beneath buildings. It's also a marketplace. There is the physical location where the fiber-optic cables full of data cross, and then there are the financial deals that direct the traffic down each specific set of wires. This combination of physical wires and ephemeral business transactions will shape the future of the digital world.

The Hon'ble Authority had raised a 118 page paper on 27<sup>th</sup> March 2015 on OTT services which raised 20 questions. These 20 questions need much more intensive discussion and debate in an open house since this has not been done yet.



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The Licensor/ Policymaker (DoT) had, subsequent to TRAI's March 2015 paper, formed a high-level expert committee which provided some excellent guidance on Net Neutrality in its May 2015 report. For the Consultation Paper which would follow this Pre\_consultation, the questions from the 27<sup>th</sup> March, 2015 paper of TRAI should be added to the Consultation Paper on Net Neutrality for open discussion while taking cognizance of the excellent recommendations from the DoT report.

EBG supports the policy and principles of an Open Internet, which to us means an entire Internet ecosystem that enables users to exchange ideas and communicate freely, gives them freedom to access the lawful applications and content they wish to use, and affords them the ability to choose and assemble packages of services and equipment that meet their needs.

EBG would like to highlight that the DoT's Committee on Net Neutrality has very rightly recommended that the framework/ guidelines of net neutrality should not be applicable for managed/ Enterprise services provided by the TSPs. Managed /Enterprise services are excluded primarily because the Enterprise users necessarily require that their traffic is managed in a specific way according to their business needs. Telecom operators have been offering managed data services to Enterprise customers for years, over their data connections and private IP infrastructure. It may be noted that such exclusions are also maintained by Regulators in other countries

EBG believes that any net neutrality principles that are adopted should be equally applicable to all components of the internet eco-system

EBG lauds the efforts of TRAI and DoT to work towards a fair and equitable regulation by involving all stakeholders.

Needless to say, European companies have contributed greatly to voice infrastructure in India and look forward to being a major contributor for Data Infra as well.

EBG therefore submits the following responses to the questions raised:

- 1) What should be regarded as the core principles of net neutrality in the Indian context? What are the key issues that are required to be considered so that the principles of net neutrality are ensured?**

There is no one standard definition of Net Neutrality. The internet is a complex entity. It requires a flexible and dynamic review over time as per the need of the times.

An internet ecosystem that characterises Net Neutrality as appropriate for India would feature the following characteristics:-

- 1. Open Internet** by which is meant that the full resources of the internet and the means to operate on it are easily accessible to all individuals and businesses, subject, of course, to legal stipulations. If any.
2. Open Internet is not limited to network operations but includes Internet Governance, open standards and protocols, transparency, absence of censorship and low barriers to entry.



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3. **No network throttling or blockage of sites** except on legal grounds or official government orders is permitted.
  4. **“Improper (paid or otherwise) prioritization may not be permitted”**. (This DoT Recommendation clearly implies that there could be legitimate grounds for paid prioritization in some cases. Perfectly plausible and reasonable.)
  5. **Free access does not mean free or equal usage charges for different categories of traffic**. Open, easy and non-discriminatory access would be mandatory but actual usage of the resources would need to be appropriately treated.
  6. Recognising that **there are distinctly different categories of traffic which place significantly different demands on the limited network resources**, viz., email, browsing and the like (Category 1), YouTube, video streaming, movie downloads and like (Category 2), Specialised Services like remote medical diagnosis, disaster management, emergency services etc (Category 3), it is understood that different traffic management techniques would need to be used to ensure QoS, Security & integrity of network, congestion control etc. However, **it is to be ensured that there is no discrimination within a category**.
  7. **In view of different demands for network resources between categories and the different traffic management tools employed, there could be reasonable tariff differentiation between categories. Equal is clearly not equitable in this situation**. All such treatments should however be transparent, proportional and non-discriminatory in nature and must be effectively and understandably disclosed to consumers.
  8. Recognising the paramount national policy goal of achieving Digital India through “Affordable Broadband”, “Quality Broadband” and “Universal Broadband”, India’s concept of Net Neutrality would include permission for Zero-Rating systems on an ex-ante regulatory examination basis.
  9. Indian version of Net Neutrality must be such as to attract the huge investments needed for creating the investment for infrastructure. It must also balance this with the need to promote innovation in the applications & content as well as in the. Networks. **Equitable regulatory treatment of similar or near-similar services needs to be ensured to achieve this goal**.
- 2) What are the reasonable traffic management practices that may need to be followed by TSPs while providing Internet access services and in what manner could these be misused? Are there any other current or potential practices in India that may give rise to concerns about net neutrality?**

Traffic management is a vital means to provide efficient, effective and safe internet access services as well as other services to meet different needs and types of use with varying and flexible quality levels.

By other services, we mean services which are designed for specific content, applications or services, or a combination thereof. Such services rely on traffic management or other networking techniques to ensure the desired or necessary level of network resources that determine subscriber experience (such as capacity, quality) with the aim to securing enhanced quality

2<sup>nd</sup> Floor, Building No. 6, Okhla Industrial Estate, Phase 4, Okhla, New Delhi 110 020, INDIA

Ph.: 9811418874 E-mail: [gm@ebgindia.com](mailto:gm@ebgindia.com)

Website: [www.ebgindia.com](http://www.ebgindia.com)



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characteristics. They are delivered from end-to-end and are not marketed or widely used as a substitute for Internet access services.

The voluntary code of practice on traffic management transparency for broadband services published in May 2013 by the Broadband Stakeholder Group in UK gives an overview of what traffic management is:

*“Traffic management is a component of an ISP’s overall approach to network management. Network management includes elements such as capacity planning and network dimensioning to provide a quality of experience for [customers]. Traffic management practices are subsequently used to deliver and maintain that experience for [customers].”*

Traffic management can only be done in the infrastructure domain the operator controls and is required to operate, administer and maintain it.

Traffic management measures are necessary in particular to:

- Prioritise time-critical applications (voice, video, emergency notification) – since best effort delivery does not provide any time and bitrate predictability
- Preserve the integrity and security of the network, services provided via this network, and the end-users' devices
- Protect the network from overload conditions

Traffic management is key to prevent congestion for:

- Load balancing of flows in the network to improve the overall resource usage while avoiding local traffic bottlenecks when possible, and
- Admission control prior to the admittance of new flows in order to avoid that running services suffer from a lack of bandwidth if new flows arrive while the remaining available physical or logical bandwidth are not sufficient.

It is also important to allow TSPs to optimise traffic management when congestion occurs to:

- Treat flows having a higher priority prior to other flows,
- Re-route flows to reduce local congestion, etc.

Preventing congestion and optimising traffic management when congestion occurs are part of the traffic management tools applied at all time on a network.

The Dot recommendation of May 2015 addresses this very appropriately as follows:

*All data packets are not created equal. Data packets of different applications (e.g. an email packet and a VoIP packet, a data packet carrying emergency service information versus another packet carrying video information etc.) have different characteristics and they need different type of treatment on the network for a variety of reasons. The concept of “One size fits all” does not work and networks are inherently designed to differentiate between different types of data packets so that they can be treated differently. Therefore, the puritan view of Net Neutrality has practical limitations and it does not work in the real world. In a pure world of data, there will be differentiation between data packets for one reason or the other, technology also permits this and therefore exceptions will have to be made within the overall principles of Net Neutrality.*



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*The commitment to Net Neutrality, explicitly and implicitly, has been expressed by countries and regulators across the world. However, there is also no doubt that the concept of Net Neutrality would need to be circumscribed by certain unequivocal conditions that do not breach the core requirements of Net Neutrality as it is commonly understood. These conditions include the intrinsic need to protect networks from disruptive attacks, the management of the flow of Internet traffic, the need to comply with legal obligations, maintenance of acceptable levels of quality of service (QoS) for some real time services etc. This requires the network to be managed with acceptable tools for traffic management.*

### **3) What should be India's policy and/or regulatory approach in dealing with issues relating to net neutrality? Please comment with justifications.**

Investment and Innovation need to be encouraged for growth and propagation of internet services in India. Similar regulatory treatment is required for similar or near-similar services. The DoT report of May 2015 also emphasizes this well.

*“Investment in networks is a sine qua non condition for spread of broadband and through broadband, the growth of the Internet economy. If investment in networks falls then the impact would be felt in terms of access, speed and quality of services. This would affect the spread of Internet and use of the Internet for innovation at the edges of the network. Innovators and potential customers alike must have access to high quality and affordable broadband Internet. The network itself must be resilient to promote investments. There is a symbiotic relationship between expansion of broadband infrastructure through investment (both Government and private) and the opportunities thrown up by an explosion of innovation in Internet content and applications. One cannot survive without the other. Therefore, innovation and infrastructure have both to be promoted simultaneously and neither can spread without the other. **The endeavour in policy approach should be to identify and eliminate actions that inhibit the innovation abilities inherent in an open Internet or severely inhibit investment in infrastructure.**”*

***It might be worthwhile mentioning here the EU Rules on net neutrality (or open internet) applicable as of 30 April 2016, following the adoption of Regulation (EU) 2015/2120 on 25 November 2015. The rules enshrine the principle of net neutrality into EU law: no blocking or throttling of online content, applications and services.***

*Every European will be able to have access to the open internet and all content and service providers will be able to provide their services via a high-quality open internet.*

***All traffic has to be treated equally. At the same time, equal treatment allows reasonable day-to-day traffic management according to objectively justified technical requirements, and which must be independent of the origin or destination of the traffic and of any commercial considerations. Common rules on net neutrality mean that internet access providers cannot pick winners or losers on the internet, or decide which content and services are available.***



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**4) What precautions must be taken with respect to the activities of TSPs and content providers to ensure that national security interests are preserved?  
Please comment with justification.**

TRAI and DoT need to allow a level playing field with light touch regulations which allow market dynamics to continue driving the net. Innovation and empowerment will only take place in a freely competitive environment (in which environment the net has grown till now); and otherwise will be greatly curbed with heavy regulatory measures imposed on CAPs and/or ISPs/TSPs.

The DoT recommendation provides a very balanced and suitable response as follows:

*National security is paramount, regardless of treatment of Net Neutrality. The measures to ensure compliance of security related requirements from OTT service providers need to be worked out through inter-ministerial consultations.*

*Suggested enforcement process is as follows:*

- (i) Core principles of Net Neutrality may be made part of License conditions and the Licensor may issue guidelines from time to time as learning process matures.*
- (ii) Since Net Neutrality related cases would require specialized expertise, a cell in the DoT HQ may be set up to deal with such cases. In case of violations, the existing prescribed procedure may be followed. This would involve a two stage process of review and appeal to ensure that decisions are objective, transparent and just.*
- (iii) Tariff shall be regulated by TRAI as at present. Whenever a new tariff is introduced it should be tested against the principles of Net Neutrality. Post implementation, complaint regarding a tariff violating principle of Net Neutrality may be dealt with by DoT.*
- (iv) Net Neutrality issues arising out of traffic management would have reporting and auditing requirements, which may be performed and enforced by DoT.*
- (v) QoS issues fall within the jurisdiction of TRAI. Similarly reporting related to transparency requirements will need to be dealt with by TRAI. TRAI may take steps as deemed fit.*

*Enforcing Net Neutrality principle is a new idea and may throw up many questions and problems as we go along. For this purpose, an oversight process may be set up by the government to advise on policies and processes, review guidelines, reporting and auditing procedures and enforcement of rules.*

**5) What precautions must be taken with respect to the activities of TSPs and content providers to maintain customer privacy?**

**Please comment with justification.**

In addition to the dilemma of different levels of protection being provided over data as it flows through different jurisdictions, access by law enforcement to data stored in a different jurisdiction, or data from one country accessible to law enforcement because it is being processed in their jurisdiction, are two other complications that arise. These complications cannot be emphasized more than with the case of the NSA Leaks. Because Indian data was residing in US servers, the US government could access and use the data with no obligation to the individual. In response to the NSA leaks, while citizens initially sought to hold the companies who disclosed the data to US security agencies such as Google, Facebook etc. accountable, because the companies were



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acting within the legal limits of the United States where they were incorporated, they could not be held liable.

There may be a need to examine and prepare a legal & regulatory framework from the perspective of privacy of users of OTT services and for national security.

Furthermore, the privacy principles in line with global standards including the EU, OECD, and APEC principles on privacy should be adhered to. These comprise: notice, choice & consent, collection limitation, purpose limitation, access and correction, accountability, openness, disclosure of information, security.

The DoT Committee provides the following point of view which we are in agreement with:

*The existing law affords protection to the subscriber from unlawful interception as well as unlawful access to data and information. These provisions act to safeguard privacy and ensure data protection. However, this ability stands affected with the advent of application providers where the data and information reside outside national jurisdiction. New business models have emerged where the service is provided free to the user, but the information generated out of the usage of service can be monetised without the specific knowledge of the user or provided to external agencies without consent (e.g. the Snowden saga). The only instrument available is reliance on the statement of the application service provider without any legal ability to monitor or enforce in case of breach or suspected breach of trust in data protection. While local hosting requirements by application service providers have been resorted to by some countries, such conditions are generally termed to be onerous for conduct of legitimate businesses. **Therefore, there is a need for a balance to be drawn to retain the country's ability to protect the privacy of its citizens and data protection without rendering it difficult for business operations. One possibility is to identify critical and important areas through public consultations where there may be a requirement to mandate local hosting or retaining enforcement capabilities in cases of breach.***

*Some of the security related measures may be in the nature of ex ante obligations (lawful interception, security audit etc) whereas others would be in the nature of ex post enforcement (public order, prohibited content, protection of privacy, data protection). It is, therefore necessary for duly authorised legal entities to have the ability to seek implementation of the ex-ante obligations and ensure ex post enforcement. With the rapid transformation of the ICT and the expected emergence of new forms of communications, there is probably a need to define a new legal architecture for meeting the challenges to security.*

*The market concentration of the search engines space has also the ability to distort the freedoms and user rights on the Internet. The ruling of the European Commission in May 2014 can be noted in this context, which based on its 1995 Data Protection Directive held that its Directive applied to search engines too and gave the right of users of the Internet to seek removal of personal information in digital space by search engines and social media platforms. **The DoT Committee has flagged this issue as a concern for public discussion in its report.***

### **6) What further issues should be considered for a comprehensive policy framework for defining the relationship between TSPs and OTT content providers?**

TSPs/ISPs and Content and Application providers (CAPs) are equally speaking commercial players as far the internet is concerned and regulations should be created which are fair to both.



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The DoT Committee on Net Neutrality recommendations (in the Points below) in May 2015 covers this point with the following view which is in essence true. However, the 20 questions raised by the Authority in the TRAI CP on OTT Services on 27<sup>th</sup> March 2015 would cover this issue more thoroughly through open forum debate. We therefore request that the questions posed in the TRAI paper be treated as part of this Consultation Paper also.

*d) In case of VoIP OTT communication services, there exists a regulatory arbitrage wherein such services also bypass the existing licensing and regulatory regime creating a non-level playing field between TSPs and OTT providers both competing for the same service provision. **Public policy response requires that regulatory arbitrage does not dictate winners and losers in a competitive market for service provision.***

*e) The existence of a pricing arbitrage in VoIP OTT communication services requires a graduated and calibrated public policy response. In case of OTT VoIP international calling services, a liberal approach may be adopted. However, in case of domestic calls (local and national), communication services by TSPs and OTT communication services may be treated similarly from a regulatory angle for the present. The nature of regulatory similarity, the calibration of regulatory response and its phasing can be appropriately determined after public consultations and TRAI's recommendations to this effect.*

*f) For OTT application services, there is no case for prescribing regulatory oversight similar to conventional communication services.*

*The existence of a regulatory arbitrage in addition to the pricing arbitrage adds a degree of complexity that requires a calibrated response to bring about a level playing field. It is relevant to note that the European Commission has made a policy pronouncement on May 6, 2015 for a Digital Single Market Strategy for Europe arguing, inter alia, that there is a need to review telecom rules to look at ways of ensuring a level playing field for players in the communications market to the extent that they provide competing services and also for meeting the long term connectivity needs of the European Union.*