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TELECOM REGULATORY AUTHORITY OF INDIA

THE TELECOMMUNICATION TARIFF (SIXTY THIRD AMENDMENT) ORDER, 2018

(No. 1 of 2018)

NOTIFICATION

New Delhi, the 16th February, 2018

No. 312-1/2017-F&EA —In exercise of the powers conferred upon it under sub-section (2) of section 11, read with sub-clause (i) of clause (b) of sub-section (1) of the said section, of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), the Telecom Regulatory Authority of India hereby makes the following Order to further amend the Telecommunication Tariff Order, 1999, namely:-

1. (1) This Order may be called the Telecommunication Tariff (Sixty Third Amendment) Order, 2018 (1 of 2018).
(2) This Order shall come into force from the date of its publication in the Official Gazette.
(3) This Order shall apply to all telecommunication services provided throughout the territory of India including those originating in India and terminating outside India.
2. In clause 2 of the Telecommunication Tariff Order, 1999 (herein after referred to as the principal tariff order), for sub-clause (1), the following sub-clause shall be substituted, namely:-
 1. “Reporting Requirement” means the obligation of a service provider to report to the Authority any new tariff for telecommunication services under this Order or any change therein, within seven working days from the date of its implementation for information and record of the Authority, after conducting a self-check to ensure that the tariff, including promotional tariff, is consistent with the regulatory principles which, *inter-alia*, include transparency, non-discrimination and non-predation.”
3. In clause 2 of the principal tariff order:-
 - (a) after sub-clause (b), the following sub-clause shall be inserted, namely:-

“ba. “average variable cost” means total variable cost divided by total output during the relevant period;”
 - (b) after sub-clause (db), the following sub-clause shall be inserted, namely:-

“dc. “Distinct Telecommunication Services” include (i) Wireline Access Service, (ii) Wireless Access Service, (iii) National Long Distance Service and (iv) International Long Distance Service and any other telecommunication service for which licence is granted;”

(c) after sub-clause (k), the following sub-clauses shall be inserted, namely:-

“ka. “non-predation” means not indulging in predatory pricing by a service provider having significant market power;

“kb. “predatory pricing” means the provision of a Distinct Telecommunication Service in the relevant market at a price which is below the average variable cost, with a view to reduce competition or eliminate the competitors in the relevant market, as determined by the Authority;”

(d) the existing sub-clause ka shall be re-numbered as kc;

(e) after sub-clause (l), the following sub-clauses shall be inserted, namely:-

“la. “relevant market” means the market which may be determined by the Authority with reference to the relevant product market for Distinct Telecommunication Service and the relevant geographical market;

lb. “relevant product market” means the market in respect of a Distinct Telecommunication Service for which the licensor grants license to the telecom service providers;

lc. “relevant geographic market” means a market comprising the respective license service area for which the licensor grants license to the telecom service providers to provide Distinct Telecommunication Services.”

(f) the existing sub-clauses la, lb and lc shall be re-numbered as ld, le and lg, respectively;

(g) after sub-clause (le) but before sub-clause (lg), as re-numbered, the following sub-clause shall be inserted, namely:-

“lf. “significant market power (SMP)” means a service provider holding a share of at least thirty per cent. of total activity in a relevant market;

Explanation – Total activity shall be determined on the basis of either subscriber base or gross revenue.”

(h) after sub-clause (r), the following sub-clause shall be inserted, namely:-

“ra. "Total cost' means the total cost with regard to telecom services, is the cost of provision of service including items such as employee cost, administrative cost, sales and marketing cost, maintenance cost, network operating cost, government charges, depreciation and amortization, finance charges and other cost attributable to the service during the referred period;

rb. "Total variable cost' means the total cost minus the fixed cost and share of fixed overheads, if any, during the relevant period.”

rc. "Transparency' means the disclosure of all relevant information of every tariff plan by the service provider which enables the consumer to make an informed choice. The disclosed information, *inter alia*, is to be

accessible, accurate, comparable, complete, distinct and identifiable, explicit and non-misleading, simple and unambiguous.”

(i) the existing sub-clauses ra, rb and rc shall be re-numbered as rd, re and rf, respectively;

4. In clause 7 of the principal tariff order, for exiting sub-clause (iii), the following sub-clause shall be substituted, namely:-

“(iii) If a service provider fails to comply with the Reporting Requirement, it shall, without prejudice to the terms and conditions of its licence, or the provisions of the Act or rules or regulations or orders made, or directions issued, thereunder, be liable to pay five thousand rupees, by way of financial disincentive for every day of delay subject to a maximum of two lakh rupees as the Authority may by order direct;

The Authority may, on reference from any person or *suo motu*, examine the tariffs of a SMP to determine the existence of predatory pricing. The Authority may, after providing detailed reasons, disallow the relevant tariffs if they are found to be predatory.

In case of tariff being found predatory, the service provider shall, without prejudice to the terms and conditions of its licence, or the provisions of the Act or rules or regulations or orders made, or directions issued, thereunder, be liable to pay by way of financial disincentive an amount not exceeding fifty lakh rupees per tariff plan for each service area as the Authority may by order direct.

Provided that no order for payment of any amount by way of financial disincentive shall be made by the Authority unless the service provider has been given a reasonable opportunity of representing against the contravention of the tariff order observed by the Authority.”

5. For clause 10 of the principal tariff order, the following clause shall be substituted, namely:-

“10. Non-discrimination - No service provider shall, in any manner, discriminate between subscribers of the same class and such classification of the subscribers shall not be arbitrary:

Provided that every classification between subscribers shall be based on intelligible eligibility criteria where such criteria shall have a rational nexus to the purpose of the said classification.

Provided further that tariff in the nature of vertical price squeeze shall be a case of discriminatory tariff.”

Sd/-

(Shailendra Kumar Mishra)
Principal Advisor (F&EA)

Note.1. – The Telecommunication Tariff Order, 1999 was published in the Gazette of India, Extraordinary, Part III, Section 4 under notification No.99/3 dated 9th March, 1999, and subsequently amended as given below:

Amendment No.	Notification No. and Date
1 st	301-4/99-TRAI (Econ) dated 30.3.1999
2 nd	301-4/99-TRAI(Econ) dated 31.5.1999
3 rd	301-4/99-TRAI(Econ) dated 31.5.1999
4 th	301-4/99-TRAI(Econ) dated 28.7.1999
5 th	301-4/99-TRAI(Econ) dated 17.9.1999
6 th	301-4/99-TRAI(Econ) dated 30.9.1999
7 th	301-8/2000-TRAI(Econ) dated 30.3.2000
8 th	301-8/2000-TRAI(Econ) dated 31.7.2000
9 th	301-8/2000-TRAI(Econ) dated 28.8.2000
10 th	306-1/99-TRAI(Econ) dated 9.11.2000
11 th	310-1(5)/TRAI-2000 dated 25.1.2001
12 th	301-9/2000-TRAI(Econ) dated 25.1.2001
13 th	303-4/TRAI-2001 dated 1.5.2001
14 th	306-2/TRAI-2001 dated 24.5.2001
15 th	310-1(5)/TRAI-2000 dated 20.7.2001
16 th	310-5(17)/2001-TRAI(Econ) dated 14.8.2001
17 th	301/2/2002-TRAI(Econ) dated 22.1.2002
18 th	303/3/2002-TRAI(Econ) dated 30.1.2002
19 th	303/3/2002-TRAI(Econ) dated 28.2.2002
20 th	312-7/2001-TRAI(Econ) 14.3.2002
21 st	301-6/2002-TRAI(Econ) dated 13.6.2002
22 nd	312-5/2002-TRAI(Eco) dated 4.7.2002
23 rd	303/8/2002-TRAI(Econ) dated 6.9.2002
24 th	306-2/2003-Econ dated 24.1.2003
25 th	306-2/2003-Econ dated 12.3.2003
26 th	306-2/2003-Econ dated 27.3.2003
27 th	303/6/2003-TRAI(Econ) dated 25.4.2003
28 th	301-51/2003-Econ dated 5.11.2003
29 th	301-56/2003-Econ dated 3.12.2003
30 th	301-4/2004(Econ) dated 16.1.2004
31 st	301-2/2004-Eco dated 7.7.2004
32 nd	301-37/2004-Eco dated 7.10.2004
33 rd	301-31/2004-Eco dated 8.12.2004
34 th	310-3(1)/2003-Eco dated 11.3.2005
35 th	310-3(1)/2003-Eco dated 31.3.2005

36 th	312-7/2003-Eco dated 21.4.2005
37 th	312-7/2003-Eco dated 2.5.2005
38 th	312-7/2003-Eco dated 2.6.2005
39 th	310-3(1)/2003-Eco dated 8.9.2005
40 th	310-3(1)/2003-Eco dated 16.9.2005
41 st	310-3(1)/2003-Eco dated 29.11.2005
42 nd	301-34/2005-Eco dated 7.3.2006
43 rd	301-2/2006-Eco dated 21.3.2006
44 th	301-34/2006-Eco dated 24.1.2007
45 th	301-18/2007-Eco dated 5.6.2007
46 th	301-36/2007-Eco dated 24.1.2008
47 th	301-14/2008-Eco dated 17.3.2008
48 th	301-31/2007-Eco dated 1.9.2008
49 th	301-25/2009-ER dated 20.11.2009
50 th	301-24/2012-ER dated 19.4.2012
51 st	301-26/2011-ER dated 19.4.2012
52 nd	301-41/2012-F&EA dated 19.09.2012
53 rd	301-39/2012-F&EA dated 1.10.2012
54 th	301-59/2012-F&EA dated 05.11.2012
55 th	301-10/2012-F&EA dated 17.06.2013
56 th	301-26/2012-ER dated 26.11.2013
57 th	312-2/2013-F&EA dated 14.07.2014
58 th	312-2/2013- F&EA dated 01.08.2014
59 th	310-5 (2)/2013-F&EA dated 21.11.2014
60 th	301-16/2014-F&EA dated 09.04.2015
61 st	301-30/2016-F&EA dated 22.11.2016
62 nd	301-30/2016-F&EA dated 27.12.2016

Note.2. – The Explanatory Memorandum explains the reason for the Telecommunication Tariff (Sixty Third Amendment) Order, 2018.

Explanatory Memorandum

THE TELECOMMUNICATION TARIFF (SIXTY THIRD AMENDMENT) ORDER, 2018

1.0 Introduction

1.1 The purpose of the present exercise is to review some key regulatory principles of tariff, as laid down in the Telecommunication Tariff Order (TTO), issued in 1999 as amended from time to time and other related Regulations, in the light of changing market conditions and evolving product categories.

1.2 The Telecom Regulatory Authority of India (TRAI) is mandated by the TRAI Act, 1997 to regulate the tariffs offered by the Telecom Service Providers (TSPs) for their various services. Section 11 (2) of TRAI Act, 1997 reads as under:

“Notwithstanding anything contained in the Indian Telegraph Act, 1985 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act, including the rates at which message shall be transmitted to any country outside India:

PROVIDED that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid, the Authority shall record the reasons therefor.”

The telecommunications sector in India has witnessed tremendous changes in the telecom ecosystem consisting of technology, telecom service providers, range of telecom services, market composition, competition, user profile and usage pattern in the last nineteen years since the Telecommunication Tariff Order, 1999 (“TTO”) was first notified. As a result, the TTO itself has gone through numerous amendments to account for these developments (Sixty-two amendments).

1.3 The background and the rationale for undertaking the current exercise is detailed below:

2.0 **Background:**

2.1 **Telecom Tariff Order (TTO).** In exercise of the power under Section 11(2) of TRAI Act, 1997, Telecommunication Tariff Order (TTO), 1999 was first notified on 9th March, 1999. The main highlights of the TTO were the limits on tariff, reporting requirements on part of TSPs for new tariff in accordance with specific regulatory principles e.g. transparency, non-discrimination and non-predation to protect the interest of the consumers. In the last 19 years since the TTO was first notified, the telecommunication sector in India witnessed massive changes in the telecom ecosystem in respect of technologies deployed, types of telecom services, market composition, competition, user profile and usage pattern of various telecom services. Amendments to the TTO, 1999 have been made from time to time to reflect the evolving telecommunication landscape. As a result, the TTO was amended sixty two times as on date to reflect the developments in the sector.

2.2 **Other Regulations.** In addition to the TTO, various Regulations, Directions and Advisories were issued by TRAI from time to time to fulfill the regulatory requirements. For example, the Telecom Consumer Protection Regulations (TCP), 2012, as amended, from time to time defines the features of various tariff products and also addresses related transparency issues.

2.3 **Regulation of Tariff: From Fixation to Forbearance.** TTO defines Tariff as “rates and related conditions at which telecommunication services within India and outside India may be provided, including rates and related conditions at which messages shall be transmitted to any country outside India, deposits, installation fees, rentals,

free calls, usage charges and any other related fees or service charge.”Initially from the regime of ‘Fixation of tariff rates’, TRAI has moved over the years, to ‘Forbearance with prior Approval stage’ and finally to a ‘Forbearance regime with post-facto reporting obligation’ with regulatory oversight. Currently, except for the tariffs for national roaming, fixed rural telephony, USSD and leased lines, tariffs for all other telecommunication service are under forbearance. This policy of ‘light-touch’ regulation for the tariff framework gives the TSPs, which include Internet Service Providers (hereinafter collectively referred to as TSPs) the freedom to design tariffs according to the prevailing market conditions. This has resulted in emergence of new and innovative products in the market that are designed to provide telecom services at affordable and competitive price to the consumers.

3.0 **Regulatory principles governing tariff**

3.1 Notwithstanding the extant principle of forbearance, regulatory oversight over tariff is required to ensure the observance of regulatory principles. Accordingly, TRAI examines the tariffs reported to it to ensure their consistency with the regulatory principles. Through the 30th (Thirtieth) Amendment to the TTO issued in 2004, TRAI revised the “reporting requirement” to be followed by a TSP in respect of any new tariff launched by it and amendments therein. As per this, a TSP is required to report the details of each tariff to TRAI within seven days of its implementation, after conducting a self-check to ensure that the tariff plan(s) is/are consistent with the Interconnection Usage Charges (IUC) Compliance and regulatory principles in all respects which, *inter-alia*, include Transparency, Non-discrimination and Non-predation.

3.2 A TSP has the flexibility to decide various tariff components for different service areas of their operation subject to the reporting requirement and adherence to other regulatory guidelines in vogue. Flexibility given to the TSPs by tariff forbearance is a core feature of current tariff framework. At the same time, several regulatory principles have been laid down to ensure protection of consumer interest and orderly growth of the sector. Forbearance and flexibility in respect of tariff are, however, not unbridled and come with an express obligation on the part of TSPs to ensure adherence to the regulatory framework. The primary responsibility to ensure consistency of tariff with the regulatory principles, directions and guidelines rests with the TSPs. The tariff filing provision plays a critical role in this regard, enabling TRAI to monitor the prevalent reported tariffs and effectively intervene, wherever required.

4.0 **Requirement of consultation on ‘Regulatory Principles of Tariff’**

4.1 In the year 1999 when the TTO framework was put in place, the telecom sector was primarily voice centric. However, in the recent past, there has been a shift, from voice to data, driven by technological and other factors like change in user profile, proliferation of social media, development of innovative content and applications, falling cost of devices etc. Following are some of the factors that underline the need for a comprehensive review:

(a) The TTO was issued in the year 1999, when the telecom sector consisted mainly of fixed-line services and was dominated by Government operators – DoT (subsequently BSNL) and MTNL. Though in the last 19 years, TRAI carried out sixty-two amendments in the Principal TTO to keep pace with the changed circumstances, it was felt that a comprehensive review of the TTO is required to address the changes in the sector in an appropriate manner.

(b) The trend towards convergence of services too called for a comprehensive regulatory framework that supports seamless delivery of converged services in a technology neutral environment. The trend towards convergence has also resulted in parallel, but related, shifts in pricing strategies, in particular, the growing prevalence of bundled tariffs. For example, converged services like triple-play offerings (video, voice and data) are often accompanied by a bundled pricing approach. Initially, telecom services predominantly meant delivery

of voice through telecom network. In the recent past, offer of bundled services – voice and data – have become the main feature of tariff offerings by the TSPs. Bundled services are offered through composite tariff offer.

(c) There are certain principles that have been explicitly defined in the TTO, like the term “non-discrimination”, which is one of the key regulatory tariff principles. Clause 2(k) of the TTO defines it as, “*k. ‘Non-discrimination’ means that service providers shall not, in the matter of application of tariffs, discriminate between subscribers of the same class and such classification of subscribers shall not be arbitrary*”. The terms such as “class” in the definition are to be explained and other principles like ‘transparency’, ‘non-predation’, required further elaboration in the context of retail tariff.

4.2 Despite the amendments made in the TTO and other regulations to factor in the various market developments, a need was felt by TRAI to undertake a comprehensive review of the regulatory framework of tariff, albeit in a phased manner, starting with a discussion on the core regulatory principles enshrined in the TTO, Directions and Advisories etc issued by TRAI. The consultation process was in line with the decision taken in the meeting held with the CEOs of the Telecom Service Providers (TSPs) on 6th January 2017 to discuss the annual calendar of activities of TRAI for the year 2017, which, *inter-alia* included developing a new framework for tariffs in evolving telecommunication sector and on which there was a consensus. The process aimed to bring about greater clarity in interpretation of various regulatory principles set out in the TTO and other related regulations etc. in consonance, *inter alia*, with the best global practices.

5.0 **Consultation Process**

5.1 The consultation paper titled ‘**Regulatory Principles of Tariff Assessment**’ dealing with emergent issues and challenges, *inter-alia*, related to regulatory principles of tariff assessment e.g. transparency, promotional offers, disclosures and non-discrimination, adherence to the principle of non-predatory pricing, meaning of predatory pricing, relevant market, assessment of dominant position etc., was uploaded on TRAI’s website (www.trai.gov.in) on 17th February 2017. The written comments on the issues raised in the consultation paper were invited from the stakeholders by 17th March 2017 and counter-comments by 24th March 2017. The dates were extended twice on the request of the stake holders and last dates for forwarding comments and counter comments to TRAI, after the extensions were 21st April 2017 and 01st May 2017 respectively.

5.2 A total of 57 comments and 03 counter comments were received up to the extended dates e.g. 21st April 2017 and 01st May 2017 respectively and a summary of the same is placed at Annexure I. An Open House Discussion (OHD) on the Consultation Paper was held on 30th May 2017 at Scope Convention Centre, New Delhi.

5.3 Considering the importance of the subject matter from the perspective of stake holders and requests made in OHD, comments were accepted beyond the last date as research notes, as an exception. Further, efforts were also made by TRAI to obtain views of the other institutions/organizations, including the regulators of other countries. Regulators of other countries were also requested to share the experience, if similar exercise was undertaken by them in the past. The summary of views, comments and counter comments received after the due dates is placed at Annexure II. In addition, TRAI has also extensively studied the relevant articles and similar research literature available in the public domain.

5.4 National Institute of Public Finance and Policy (NIPFP), Delhi had also organized a full day seminar on 23rd May 2017 on the issues raised in the Consultation Paper. The eminent scholars, economists, industry and erstwhile senior officers of regulatory bodies like TRAI and CCI along with officers of TRAI participated in the Seminar.

5.5 The Authority held a meeting with CEOs of Telecom Companies on 15th June 2017 and discussed, *inter alia*, the issue of floor prices. The issue was brought forth by Telecom Companies. Some operators were of the view

that there should be some form of floor price in the tariff so that the possibility of predatory pricing be avoided. At the same time this was not agreed by the other TSPs who said that forbearance should continue and there should not be any floor price. One of the operators mentioned that the fixation of floor price by the Regulator would distort the market.

5.6 The Authority had another meeting with the Telecom Service Providers on 21st July, 2017; to exclusively discuss the issue of floor price and whether IUC could be the floor for retail tariffs. After detailed discussion the TSPs were found to be generally in agreement that existing policy of forbearance in telecom tariff should continue for the present. Majority of the telecom players agreed that given the complexities involved in fixation of floor price by the Regulator, it is not an idea worth pursuing at this point of time and that IUC cannot be taken as a floor for the retail tariff.

6.0 Analysis of Issues Raised in Consultation Paper

The subsequent parts of this Memorandum present an analysis of the issues raised in the form of eight questions for consultation along with rationale for conclusion and consequent decision of the Authority.

7.0 Adequacy of Transparency Measures and need for additional Measures.

7.1 The following question was asked with reference to the issue of Transparency.

- Do you think that the measures prescribed currently are adequate to ensure transparency in the tariff offers made by TSPs? If not, then, what additional measures should be prescribed by the TRAI in this regard? Kindly support your response with justification.

7.2 The stakeholders expressed their views through **their comments/counter comments and research notes** as detailed below:-

(a) Many TSPs (Idea, RCOM, Airtel, Aircel, Tata teleservices and MTNL), AUSPI and many individuals stated that *current measures were adequate* and found them of being of good standard. These TSPs listed all the steps taken by them to comply with the regulatory requirement and asserted that detailed regulatory compliance in the name of transparency will not be in the interest of industry and consumers. They have asked for certain relaxations in the existing provisions related to publication of tariff, offering to certain classes of consumers, reduction of protection period of six months for the tariff plan and removal of unnecessary restrictions imposed through regulations e.g. the Consumer Protection Regulation, 2012 which specifies types of vouchers that can be provided to pre-paid customers, to cite a few.

(b) On the other hand some TSPs (RJIL, Telenor and BSNL), organisations (MRF, Dua Consulting) and individuals have said that the *current measures were not complete and therefore not adequate*. They stated that certain offers made by TSPs directly to the consumers through SMS etc were not transparent. According to them, TSPs offering special plans to selective customers are not even filed with TRAI. According to BSNL, offering special tariff to specific filtered segment of customers which is conveyed only by SMS is a matter of concern. If there is a deviation from the offer, subscribers have no options to complain. Other suggestions by these group of stakeholders to further improve transparency received from stakeholders are listed below:-

- (i) Instead of the complex term 'Transparency', 'Lack of transparency' should be defined by TRAI.
- (ii) Easy access of information about tariff or services to make comparisons and informed decisions (MRF, RJIL)

(iii) Measures to make sure that an average consumer can interpret and understand the consequences of that information disclosure.

(Dua consulting)

(iv) Measures for rural consumers to follow the advice of retailers. **(Federation of Consumer And Service Organization)**

(v) Multiple plans can be best addressed by publishing tariff on TRAI website as done by IRDA. **(RJIL, MRF and Telenor)**

(vi) Authority can also offer a comparison tool to see all plans at similar MRP in an area. **(RJIL)**

(vii) Interactive web-based price tool/price calculator can be considered. The Authority may establish a system for the accreditation of such websites maintained by third parties. (**RJIL & MRF**)

(viii) For prepaid customers, the present stipulation of six months for protection against tariff hike may be modified to 12-24 months.

(ix) The Billing and Metering Audit should be carried out by the auditors appointed and paid by the Authority. **(MRF)**.

(x) The tariff offers should be displayed in local languages. **(Federation Of Consumer And Service Organization)**

(xi) Considering customers who feel confused by the number of tariffs offered, it is not recommended that any further reductions be made on the cap applied on the number of tariffs offered by a given TSP, as it will hinder the TSP ability to innovate and compete. **(National Telecommunications Regulatory Authority, Egypt)**

7.3 During the **Open house discussion**, the aspect of transparency and adequacy of extant regulatory provisions/measures along with the related subject was deliberated at length:-

(a) Some TSPs (Airtel, Idea, Telenor and Aircel) raised the issue of tailor made plans and segmented offers and justified the same with example of similar practice in other industries such as Hotel and airline etc. It was argued that plans and discounts offered for promotion and/or for retaining the current customer(s) may not be required to be published and filed with TRAI as that would defeat the basic purpose of giving the discount. But at the same time they stated that this should be applicable to tariffs being offered to new customers. However, there were counter arguments from other TSPs (RJIL & BSNL) and consumers' side, who argued that the principle of transparency should be applicable to all tariff offers, whether it is for customer acquisition or for customer retention.

(b) From a consumers' perspective, there has to be a mechanism, where all the plans offered to consumers are available on a common platform. It should be possible for the consumer to study all the plans and choose what is best for him. Most customers are not well versed to understand the nuances of tariff plans and offerings. They should be able to ascertain in transparent manner, the services that would be provided for the amount paid by them. The regulatory authority can put all tariffs in one place and can ensure that nothing beyond that is offered to customer, on the basis of any arbitrary segmentation and offerings.

(c) Consumers have also cited some other issues e.g. TSPs not taking consent prior to change of plans, the issue of negative billing and adjustment of negative balance during next recharge without the customer knowing about it, misleading advertisement of unlimited plan with terms and conditions in fine print etc. It was requested that adequate protective measures be prescribed to deter such undesirable practices. The issue of use/sharing of consumers' details and related data by TSPs without prior consent of the consumers was also highlighted by consumer with concern.

7.4 **Analysis and Decisions.**

7.4.1 Transparency in tariff is and has always been an issue of prime concern for the Authority. To protect the interests of the consumers of telecommunications services, the Authority has issued several directions and guidelines in order to ensure transparency in tariff offers. However, despite these measures to ensure transparency in tariffs, the Authority has been receiving complaints from consumers and consumer organizations highlighting, *inter-alia*, lack of transparency in the tariff offers of TSPs. Common to all these feedbacks is the feeling amongst the consumers that the various tariff offers being made by the TSPs are difficult to comprehend and lack full disclosure.

7.4.2 It has been constant endeavor of the Authority to give due importance to the 'transparency' which evident from the extant regulatory provisions and action taken in the past in this regard. The current consultation process, however, has raised certain specific issues which have been analysed as given below:

- (a) To ensure transparency, the tariff offers of the Telecom Service Providers (TSPs) will be examined on the touchstone of the following criteria:
- (i) **Accessible:** Is the information easy to access, find and use?
 - (ii) **Accurate:** Is it accurate, up to date and can it be checked for correctness?
 - (iii) **Comparable:** Is it presented in such a way by various providers which allows for easy and sensible comparisons?
 - (iv) **Complete.** Whether all required information is available?
 - (v) **Distinct and Identifiable.** Is the tariff offers have distinct characteristics so that it is identifiable by the consumer without any ambiguity?
 - (vi) **Explicit and Non-misleading.** The tariff offers should not have any implicit or hidden charges or conditions. They should also correctly convey what the consumer would pay and get in terms of service.
 - (vii) **Simple and unambiguous:** Is the information expressed in units, concepts or terminology that is unambiguous and easy to understand? Have the tariff offers has been communicated in simple terms?
- (b) **Cap on Tariff Plans on Offer.** Some TSPs requested removal of the cap on the number of tariff plans. As per the extant regulatory provisions, the number of tariff plans that can be offered by a service provider in each licensed service area at any given point of time is subject to a cap of twenty-five plans, by virtue of the provisions of Twenty First Amendment to the TTO. This includes both postpaid and pre-paid tariff plans. The cap on the number of tariff plans has been prescribed on the premise that too many tariff plans on offer would confuse the consumer and make it difficult for consumers to make an informed choice.

Keeping in view of relevant factors, the issue has been further analyzed. It is to be noted that as of now, flexibility in the form of Special Tariff Vouchers (STV), Combo Vouchers (CV), Add on packs is available

to TSPs. They have freedom and opportunity to innovate and design their offer suitably to compete in the market. **The Authority accordingly has decided that the cap of 25 tariff plans is justified and it should continue.**

(c) **Protection to consumers against hike in tariffs.** On the issue of protection of consumers against the tariff hike, there were also divergent views. While most TSPs asked to reduce the protection time to three months as the need to revise the tariff plan is dynamic and there exists a restriction on number of tariff plans. However, consumers and consumer organizations demanded that the consumers may be given protection for a longer period of 12 months to 24 months. It may be relevant to mention here that the 43rd Amendment to the TTO seeks to prevent too frequent changes in the tariff plans to the consumers and assures tariff stability for a minimum period of six months after enrolment into a tariff plan. This TTO states:-

“A tariff plan once offered by an Access Provider shall be available to a subscriber for a minimum period of SIX MONTHS from the date of enrolment of the subscriber to that tariff plan. However, any tariff plan presented, marketed or offered as valid for any prescribed period exceeding six months or as having lifetime or unlimited validity in lieu of an upfront payment shall continue to be available to the subscriber for the duration of the period as subscribed in the plan and in the case of lifetime or unlimited validity plans, as long as the service provider is permitted to provide such telecom service under the current license or renewed license. In the case of plans with lifetime or unlimited validity, the service provider shall also inform the subscribers of the month and the year of expiry of his current license”.

Authority has deliberated the issue afresh and is of the opinion that six months’ period (180 days) is optimal period in the existing scenario and it should continue.

(d) **Direction on publication of Tariff plans.** TRAI had issued a Direction on publication of Tariff plans on 16th Jan 2012 to facilitate the subscribers to choose plans that suit individual requirement best. Service providers are required to publish all tariff plans in a service area for prepaid and postpaid subscribers in the prescribed format in one regional and one English newspaper at an interval not more than six months. Full details are to be made available at Customer Care Centre, Point of Sale (PoS), and website in the given format with a view to facilitate easy and transparent comparison. In this respect, most TSPs suggested that TRAI discontinue the practice, as the same does not serve the purpose as the tariff plans are dynamic and need to be seen along with STVs/CVs/ Promotional offers in case of prepaid consumers and Add ons/Promotional offers in case of post paid consumers.

The Authority finds merit in the suggestion and has already asked TSPs to come up with alternate measures such as web site to display the tariff plans in English and vernacular languages, mobile applications in English and vernacular languages for the smart phone users and some SMS/USSD based solution for feature phone users (as an alternative to the news paper advertisement). **The Authority has found merit in the suggestion of discontinuing the direction for publication of tariffs in NEWS PAPER. Accordingly, Direction on publication of Tariff Plans dated 16th Jan 2012 is being withdrawn separately.**

(e) **Segmented Tariff Offers.**

(i) With reference to the demand of some of the existing TSPs for allowing segmented offers (as mentioned in paragraph above) and the counter argument of some other TSPs and consumers, the Authority has examined the issues in the light of the extant provision of TTO, TCPR, TRAI Act and the law reiterated by Hon’ble Supreme Court from time to time.

(ii) Clause 7 (i) of the TTO provides:

“All service providers shall comply with the reporting requirement in respect of tariffs specified for the first time under this Order and also all subsequent changes; PROVIDED that in respect of tariff plans offered by a telecom access provider to bulk customers, such as corporate, small and medium enterprises, institutions etc., either in response to a tender process or as a result of negotiations between the access provider and such bulk customer, the reporting requirement as define in sub-clause (l) of clause 2 shall not apply.”

The definition at Clause 2 (l) states:

“Reporting Requirement means the obligation of a service provider to report to the Authority any new tariff for telecommunication services under this Order and/or any change therein within SEVEN working days from the date of implementation of the said tariff for information and record of the Authority after conducting a self-check to ensure that the tariff plan(s)/are consistent with the regulatory principles in all respects which *inter-alia* include IUC compliance, non-discrimination and non-predation”

This definition applies the requirement to “any new tariff for telecommunication services under this Order or any changes therein”. It is necessary to understand what precisely is required to be reported: new “tariffs” and any “changes” to these tariffs. We must determine whether, under existing law, segmented discounts may be referred to as “tariffs” or whether they qualify as “changes” to tariffs. Similarly, while the non-discrimination principle at Clause 10 of the TTO is a basic requirement placed on TSPs in relation with all kinds of treatment of subscribers, the definition of the term “non-discrimination” at Clause 2 (k) of the same Order applies the principle “in the matter of application of tariffs”. The term “tariff” is defined in the TTO at Clause 2 (r) and in the TCPR at Clause 2 (q). The definitions read as follows:

"Tariff(s)" mean(s) rates and related conditions at which telecommunication services within India and outside India may be provided, including rates and related conditions at which messages shall be transmitted to any country outside India, deposits, installation fees, rentals, free calls, usage charges and any other related fees or service charge[.]”

(iii) The power of the Authority to regulate tariffs flows from Clause 11(2) of TRAI Act, 1997 which permits classification of customers. However, in the Authority’s view, TSPs must also follow the aforesaid provision in letter and spirit. It has been laid down clearly therein that if different rates are offered for different person or class of persons for similar telecommunication services and where different rates are fixed, the reasons are to be recorded. Hon’ble Supreme Court of India in *Cellular Operators Association of India & Ors. v. Telecom Regulatory Authority of India & Ors.* AIR 2015 SC 1297 had also upheld the view of TRAI in respect of not allowing arbitrary classification of customers in matters of tariff.

(iv) The phrase “rates and related conditions” is a broad formulation and does not differentiate on the basis of the different marketing and sales objectives for which such rates and conditions are set and changed. The definition is comprehensive enough to include rates for international messaging, deposits, installation fees etc. within the meaning of the term. The inclusive list of charges that may be termed “tariff” also includes the term “free calls”. This indicates that the term must be read to cover not just the application of some non-zero charge as a rate but also a rate that amounts to

zero rupees. *Reduction in a tariff changes the rate at which the service was being provided and applies a new rate altogether.* Thus, discounts, rebates and waivers when applied to a tariff would give rise to a new and distinct tariff as envisaged in the definition. **This would mean that the offer of a discount is effectively the offer of a new tariff.**

(v) In view of the foregoing, the Authority after having analyzed the issue is of the opinion that the issue brought out about the tariff plans offered to the individual customers/consumers and which are not filed with TRAI, is a cause of serious concern. Any justification with reference to such violation cannot be accepted. The argument of some TSPs that plans and discounts offered to counter the promotion effort of competitors and for retaining the existing customer(s) may not be required to be published and filed with TRAI as that would defeat the basic purpose of giving the discount, is not acceptable. It was conveyed to them during the OHD itself that the segmentation cannot be arbitrary and non transparent and the basis of segmentation should be clearly spelt out. **Therefore, the Authority is of the opinion that segmented offers which have to be necessarily transparent and non-arbitrary, either for retention or acquisition of new consumers, are to be transparently filed with the Authority in accordance with the reporting requirement. All such segmented tariffs are to be publically displayed, *inter alia*, on the website of the TSPs, for transparent and complete disclosure to consumers, without any discrimination. The Authority has already reiterated aforesaid regulatory requirement vide its Direction to TSPs dated 25th May 2017.**

(f) **Independent Audit.** As of now the Metering and billing audit is carried out by the audit agencies selected from the panel approved by the Authority for the purpose. The selection of the auditor is done by the concerned TSP and the payment is also made and borne by the TSP. It has been pointed out by different stakeholders with the request that independent audit may be ordered by the Authority for bringing transparency, accountability and credibility of Metering and billing system of TSPs.

The Authority finds merit in the suggestion and has decided that in addition of routine metering and billing audit reports filed by the TSPs, snap audit of metering and billing will be carried out by independent auditors appointed by the Authority to check the observance of transparency, accountability and credibility and protection of consumer interests by TSPs. The necessary orders in this regard will be issued separately.

(g) **Additional Transparency measures.** TRAI Direction dated 1st September, 2008, and 48th Amendment to TTO notified on 1st September, 2008 mandate several transparency measures including the restriction on number of black out days, passing the straight tariff reduction to consumers, provision for not insisting on recharge between periods lesser than six months in lifetime plans for remaining connected during the promised lifetime validity period and providing the tariff in vernacular language. Consumers have demanded more such measures whereas TSPs have asked for removal of many of these provisions. **The Authority, has decided that these are to continue. The Authority will continue to monitor and may direct additional transparency measures whenever it finds it necessary.**

(h) **Informed decision by consumers.** TRAI had issued a Direction for preventing misleading advertisements on 26th March, 2012. This Direction was intended to improve transparency in telecom tariff advertisements and to facilitate subscribers in choosing a plan that best suits an individual requirement. It was mandated that tariff advertisements published by service providers were to be transparent, not misleading and unambiguous, disclose all material information in an unambiguous manner, and contain the website address and customer- care number of the TSPs. The TSPs have to maintain an advertisement register which must include a copy of every tariff related advertisement, and carry out internal audit to ensure that they are

complying with all aspects of this Direction. **The Authority decides that in the interest of consumers, the existing provisions are to continue.**

8.0 Adequacy of definition of non-discrimination and suggestion for additional measures

8.1 The following question was asked with reference to the issue of ‘non-discrimination’ and additional measures to ensure ‘non-discrimination’.

- Whether current definition relating to “non-discrimination” is adequate? If no, then please suggest additional measures/features to ensure “non-discrimination”.

8.2 The stakeholders expressed their views through comments and counter comments along with research notes on the issue of current definition of non-discrimination and on the suggestion for additional measures and features to ensure ‘non-discrimination’:-

- (a) Most of the **TSPs, NCHSE, ISPAI**, and some individuals stated that *current definition and measures are adequate*. **NTRA, Egypt** in its comments has also stated that the current definition relating to nondiscrimination is adequate, and the same regulations have been issued by NTRA to prevent discrimination.
- (b) Some of TSPs argued strongly in support the segmented and customised offers. They stated that the TSPs had a right to retain the customer and can offer them segmented offers. Some such comments are given below :-
 - (i) TSPs have a legitimate business right to attract more customers through introductory offers, as long as the offers are in compliance with the cardinal principles (of IUC compliance, Transparency, non-predation, and non-discrimination) and any other regulations as applicable. (**Airtel**)
 - (ii) There is no need to provide information on all offers to all customers as :
 - a. Different subscribers get different offers based on their usage pattern and these are transparently communicated to them.
 - b. It is not in the competitive interest of the TSPs (**Airtel**)
 - (iii) The Authority’s concern with regard to discrimination between the new and old subscribers or offers linked to specific handsets doesn’t hold good. (**Telenor**)
 - (iv) To serve the market requirements, TRAI may only provide broad guidelines and allow the TSP’s to tailor their products to individual subscribers needs. (**MTNL**)
 - (v) Plans for new subscribers do not amount to discrimination as these terms are applicable to all who come under the category of “new consumer”. (**Shri TV Ramachandran**)
- (c) However, **MRF, BSNL** and many individuals stated that the current definition of non-discrimination is inadequate citing the following reasons:-
 - (i) Many TSPs offer special tariff to individual customers only. (**BSNL**)
 - (ii) The criteria of such classification are not disclosed.
 - (iii) Offered only to selected customers via SMS/USSD or mobile app.

- (iv) Definition of non-discrimination should be more elaborate and provide uniform opportunity for all customers to join a particular class or classification provided that they fulfil the criteria **(MRF)**
 - (v) Offers only meant for new subscribers and not the existing ones amount to discrimination. **(Federation of Consumer and Service Organization and MRF)**
- (d) **ICRIER** has observed that “With regard to approaching non-discrimination from a regulatory perspective, it would be better to offer a negative list of practices that are strictly prohibited. Given the highly dynamic nature of tariffs and consumer demand, it would be nearly impossible to envisage all types of permissible and non-permissible price discrimination. Therefore ex-ante regulations to restrict exploitation using price discrimination may not be the most efficient use of regulatory resources”.
- (e) Following additional measures/ improvements have been suggested:-
- (i) **MRF** has suggested that Service provider should not bundle the tariff plan with particular brand or technology for customer end equipment. However, **NTRA, Egypt** has opined that preventing promotions or offers that are linked to specific handset or technology as long as effective competition is in place.
 - (ii) **Dua Consulting** has suggested that the present definition of non-discrimination can be further updated to add:
 - a. That the inter-class difference in the tariff for the same type of service should not exceed a fixed percentage.
 - b. That services of same type should not discriminate between the type, make or technology of the carrier product through which those services are being utilized by the consumer.

8.3 **Views of stake holders during OHD.** During the open house discussion also, the issue of non-discrimination was extensively discussed and most TSPs (Airtel, Idea and Aircel) argued that the customized offer as per profile of the consumer should be allowed for retaining the customer. It was also argued that the whole definition of discrimination needed to be reviewed because currently customizing offers to individual’s requirement was possible since big data analytics could facilitate such customized application and service. RJIL stated that these customized offers were discriminatory and are also to be treated as promotional offer.

8.4 **Analysis and Decisions:**

- (a) Most stakeholders believe that the current definition of non-discrimination is adequate. However there are consumer concerns relating to the monitoring and enforcement of the same. There have been specific concerns on how to understand the term "classes of consumers" with some stakeholders arguing that there is a need to differentiate discriminatory classification as against reasonable classification.
- (b) **Definition and Adequacy.**
 - (i) Clause 2(k) of the TTO defines Non-discrimination as

“Non-discrimination’ means that service providers shall not, in the matter of application of tariffs, discriminate between subscribers of the same class and such classification of subscribers shall not be arbitrary”.

(ii) It is an obligation cast on a TSP that while offering retail tariffs to the consumers; it shall ensure that they (tariff) are not discriminatory. However, the issue which arises in the examination of non-discrimination is: what is fair and non-arbitrary classification?

(iii) **NTRA, Egypt** has suggested that the word “arbitrary” in the non-discrimination definition is vague and clear customer classification criteria needs to be put in place so as to enrich the definition. It could be replaced by “the classification of subscribers shall be based on objective criteria such as demographic data, geographical area, usage pattern/consumer profile, customers with special needs, ARPU level, and/or technology used”.

(iv) While the expression *non-discrimination* has been defined in the TTO, it is felt that there is a need to add further clarity into the meaning and interpretation of this term, particularly in the context of distinguishing arbitrary conduct from that which is based on reasonable classification. The Authority had already provided the following in the explanatory memorandum to the 33rd Amendment to the TTO: *"Whenever differential tariffs are offered, it shall be the responsibility of the operators to define in a transparent and unambiguous manner the eligibility criteria for availing such differential tariff. The Authority would consider such criteria to assess their consistency with the provisions of TTO relating to non-arbitrary classification of subscribers"*.

(v) Decisions of the Hon’ble Supreme Court of India on this issue are also instructive. The Supreme Court has laid down the twin test in *State of West Bengal v. Anwar Ali Sarkar* (AIR 1952 SC 75) which states that at first, classification must be based on intelligible differentia and second, the differentia must have a rational nexus to the purpose of classification. This principle has been applied by the Supreme Court in *Cellular Operators Association of India &Ors. v. Telecom Regulatory Authority of India &Ors.* AIR 2015 SC 1297 wherein it was held that the private telecom operators violated the obligation of non-discrimination set under the TTO, because the basis of classification of subscribers for imposing discriminatory tariffs failed to meet the reasonable classification test laid down in the *Anwar Ali* case.

(vi) Therefore, while retaining the current definition of non-discrimination, a need was felt to amend the TTO to explicitly state the principle which will govern TSPs in the process of classification of subscribers to avoid arbitrariness.

(vii) The Authority will apply the tests referred to in *Anwar Ali* case as discussed above to examine the classification adopted by TSPs and assess whether both the criteria and the purpose are legitimate and objective. **Accordingly, the Authority has decided to incorporate the test of reasonable classification as laid down by Hon’ble Supreme Court of India in Clause 10 of the TTO by suitably amending the definition.**

9.0 Promotional Offer: Definition, Features and Conditions

9.1 Issue (s) for Consultation:-

- Which tariff offers should qualify as promotional offers? What should be the features of a promotional

offer?

- Is there a need to restrict the number of promotional offers that can be launched by a TSP, in a calendar year, one after another and/or concurrently?

9.2 Views of Stakeholders contained in Comments/Counter Comments

(a) **Definition of Promotional offers:** Suggestions regarding definition/features of the promotional offers by various stake holders are summarized below:-

Stakeholder(s)	Definition/Features
Airtel, Federation Of Consumer And Service Organization, several individuals	Any benefit given over and above the regular/normal plan. Any offer which is substantially different from any company's ongoing offer (in terms of lower tariff, more data, waiver of any charges, or cross selling etc.)
BSNL	Should generally offer a rebate or concession in fixed cost of services i.e. concession in cost of SIM/concession in activation charges, reduced tariff offer for limited period. Maximum period of promotional offer should be 90 days and validity of concessional tariff should be limited to 60 days only.
RCOM	Only those tariff offerings, which are available for the consumers or a particular class of consumers with clearly defined eligibility criteria, for a fixed period of 90 continuous days from the date of launch of the offer, should be construed as a promotional offer.
Idea, Tata Teleservices, MTNL, Dua Consulting	Promotional offers may comprise of free or discounted voice calls, data, talk time, SMS benefits, rebate in rentals, free gifts, etc. subject to them meeting the TRAI cardinal principles of IUC Compliance, Non-discrimination and Non-predation.
MTNL	Offer given to customer for a limited time with a view to incentivize their subscription and increase their subscribers
MRF	A new or existing tariff plan which is offered by TSP, to new customers on discounted rate or free with some ingredients such SMS, DATA etc to increase the subscriber base.
NCHSE	Any tariff offers, over the cap of 25 plans, should be treated as promotional offers

RCOM, RJio, Tata teleservices, AUSPI	The promotional offers as defined by TRAI should be continued.
RJio	New player should be able to introduce introductory prices to attract consumers
Ms. Seema Chaudhary	The benefits offered to customers under packages on offer to a maximum of 90 days from the date of launch which can offer benefits like, unlimited free incoming calls while roaming on network, rebate in recharge, free internet access etc.
Shri Sekaram M Sundaram	Any extra benefits provided by TSPs to the consumers other than the regular plans, can be considered as Promotional Offers, there is a need to restrict the number of promotional offers.
NTRA, Egypt	<p>According to the Egyptian situation, promotions are defined as temporary offers to grant additional benefits to valid tariff and are designed to stimulate and encourage demand. The promotional offers include, but are not limited to, obtaining a reduction in subscription prices or exemption from installation fees or access to additional service features such as higher upload/download speed or higher capacity/quota limits during the period of benefit from the offer.</p> <p>Accordingly, the following features could be used to identify promotions: the duration period (e.g. 30 days), the renewal period/times, eligibility conditions, opening and closing dates, benefit period, subscription process, and the discount rate.</p>

(b) **Restrictions on Number of Promotional Offers:** With regard to the issue of necessity to restrict the number of promotional offers that can be launched by a TSP, in a calendar year, one after another and/or concurrently, the views of stakeholder(s) are given below :-

(i) Should be included in 25 plans: **Telenor, MRF**

(ii) Even though such discounts/freebies are part of the base plan, it should also be filed with TRAI as a separate tariff plan under the Promotional category: **Telenor**

(iii) The contours of the Tariff Plan (Promotional) such as the start and end date, price to be paid, subscription charges etc. should be clearly defined. The eligibility criteria and the exit condition should be mentioned: **Telenor**

(iv) Subsequent promotional plans including small modifications to existing plans should only be launched with approval of the authority: **Telenor**

(v) No two Tariff Plan (Promotional) can be offered to the same market segment or class of customers simultaneously: **Telenor**

(vi) Free offer of any kind should be limited to 30 days with no exceptions granted. (**Telenor**)

Completely free tariff plan should not be allowed. **MRF**

(vii) Promotional offers may also be available for existing customers/ subscribers : **MRF**

(viii) A promotional offer *when combined with* the other regular tariff offerings of the TSP should comply with these three principles (IUC compliance, non-discriminatory and non- predatory) of the telecom tariff: **AUSPI**.

(ix) There should not be any restriction regarding :

a. Number of offers in a year or

b. Offering promotional offer one after the other : **1.BSNL, 2.Aircel, 3.MTNL etc**

(x) TSPs should be allowed to offer simultaneous promotional offers for different categories of service i.e. voice, messaging and data: **Shri TV Ramachandran, AUSPI, R.Com**

(xi) TSPs should be allowed flexibility to extend or curtail promotional offers depending upon success or failure of the promotion. Ideal solution is to allow promotional offers to run for a period of maximum 6 months: **Aircel**

(xii) No continuous/concurrent/overlap launch for promotional offer should be permitted: 1. Telenor, 2. Dr. Deepa Kapoor, 3.Anita Verma, and Other Individuals.

(xiii) There should be a specified gap of say one month/three months between two promotional offers: Shri TV Ramachandran, 2.AUSPI, 3.RCOM, 4.MRF

(xiv) Restrictions on number of offers in a year should range from one offer to seven offers : **Several individuals**

(xv) “TRAI letter dated 19.06.2002 was merely advisory in nature and not binding whatsoever. Crystallized by direction dated 01.09.2008 where the Authority demonstrated that they have not barred announcing similar promotional offers at the completion of 90 days of a particular offer. The Authority’s only point was that in such circumstances, the promotional offer may be considered a promotional plans and should be counter in the limit of 25....

... No bar on offering simultaneous or consecutive promotional offers, not does it bar it from offering benefits with validity for more than 90 days”

(RJIL)

(xvi) **Dr Shekhar Shah of NCAER**, “In goods markets, CCI does not control the number of promotional offers in a calendar year. It is also against the interest of consumers for the TRAI to restrict the number of promotional offers. By and large, consumers gain from promotional offer. By restricting promotional offers, TRAI would put barriers to new entrants who would like to increase market penetration. It basically due to the promotional offer of JIO that data price of internet pack have some come down”.

(xvii) **ICRIER** stated that “In a limited online search we found no evidence of stipulated time periods for implementation of promotional offers, except for one case of proposed legislation in Italy, which recommends the upper limit on contracts with a promotional offer to be two years”...It further stated that “there is no evidence to suggest that limiting the total number of promotional offers either

restricts abuse or promotes competition. Principle-based ex-post analysis would yield better results in controlling abusive practices, if at all, through promotional offers”.

9.3 **Views during OHD.** These views were reiterated by the TSPs and other stake holders in the OHD.RJIL had raised another issue that all the tariff offers which are offered to the individual consumers and segmented offers should also be treated as promotional offers. It was stated by the RJIL representative that when an operator give promotional offer to all the customer, you want to put a 90 day condition, when an operator want to give it for select few customer without disclosing it, there is no limit or time, that inconsistency is coming into and creeping into this, from our point of view as long as the rule says 90 days, current regulation says that benefits can extend beyond 90 days which is fine because it is transparently told to customer that anyone can come and subscribe to that promotional offer if they so desire, this is part of regular business practice. Every industry gives discount and that is what is being offered. Whatever is the regulation is in vogue should be transparently adhered to and customer should be made aware that this is the promotion which is being given. Beyond that on how many discounts, whether for SMS or data, operator does it with a purpose to either create a market or get new customer or retain existing ones, whatever works best in the business interest of the operator should be allowed.

9.4 **Analysis & Decisions.**

(a) **Definition and features of Promotional tariff.**

(i) Apart from regular Tariff offers that are launched by the various TSPs, ‘promotional offers’ are launched with a view to incentivize consumers in order to retain or increase their subscribers’ base. They are different from the routine tariff offers and are in the nature of benefits available to consumers for a limited period of time. Promotional offers are generally offered to subscribers on special occasions keeping in mind the criteria such as need, profile and usage trend etc. **The Authority after having analyzed the extant regulatory provisions, is of the opinion that promotional offers are beneficial to consumers in two ways. (a) They provide additional benefits to customers (b) Promotional Offer by one operator creates a ripple effect and other operators also extend counter offers leading to competition in the market, which in turn is beneficial for the consumers. The benefits offered under promotional offers may vary and can include aspects such as Free SMS, Free/reduced/local STD/ISD rates, Gifts, FMCG products/schemes/vouchers for other products and services etc. Therefore, promotional offers are innovative by nature, generate competition and defining promotional offers in a restricted manner may reduce the scope of designing such offers and benefit to the consumers.**

(ii) With regard to counting the promotional offers within the overall cap of twenty five if these are offered as tariff plan or Plan voucher, **the Authority, after having examined the comments and suggestions, is of the view that if the promotional offer has been offered as regular plan then it will be counted as tariff plans for the purpose of application of the cap of 25 plans and restrictions of minimum 180 days for benefits to consumers will apply for these plans too. However, such tariff plans cannot remain open for subscription for more than 90 days.**

(b) **Duration.**

(i) Any of the tariff offering in terms of startup kit, Prepaid/Postpaid Plan, STV, Combo Vouchers, Add on Pack, Top up Vouchers, Rental, etc can be offered as promotional, however the promotional offer should satisfy the twin condition as mentioned in Direction dated 1st September, 2008. In other words, all other conditions that are applicable on each of these products would have to be observed with any relaxation. The Authority in its Consultation Paper on “Issues Arising out of Plethora of Tariff Offers in Access Service Provision” (29th January, 2008), noted that there are generally two kinds of promotional

tariffs. The first category is where both the offer as well as the promotional benefit so available for the customer is valid for a limited period and the second category is where the offer may be valid for a period limited to 90 days but the benefits available to the customers may exceed 90 days and can even be indefinite, just like a regular tariff offer. For example, a full-fledged tariff plan offered for subscription for a few days.

(ii) Promotional Offer, is not exempt from observance of TTO or TCPR or Directions.

(iii) Internationally, not much evidence came to our notice regarding stipulating time period restriction in respect of promotional offers except in few countries like Mauritius (restriction for duration of promotional offers for existing TSP 60 days, for new 30 days), Samoa (90 days total duration of promotional offers for SMPs only) and Rwanda (30 days). However, these are not comparable considering the significant difference in maturity level of telecom sector of these countries vis-à-vis Telecom Service Sector of our Country. In USA, the upper limit for duration promotional offer is 180 days.

(iv) **The Authority after considering all factors, including, *inter alia*, consumer interests, maturity of the telecom sector, competition, tariff forbearance and the fact that even promotional tariffs have to satisfy the Tariff principles of transparency, non-discrimination and non-predation opines there is no further need to alter the current minimal definition of the promotional offer as contained in Direction dated 1st September, 2008. The Authority is also of the view that there is no need to further restrict the time period of promotional offer from existing stipulation of 90 days. Currently, while the offer period is restricted to 90 days, there is no restriction on the period of benefit to consumers. Regulatory Principles applicable for regular tariff offers are equally applicable to promotional offers as well.**

(c) **Maximum Number and time lag.** The issues of restriction on number of promotional offers and gap between consecutive promotional offers have been examined. **The Authority is of the view that no restrictions need to be imposed on the number of promotional offers that can be simultaneously launched and time lag between same or similar promotional offers in a LSA. Restrictions may not be in the interest of consumers apart from possibly hindering competition. Promotional offers are reflection of maturity of competition at most of times and restricting them would amount to interference with market forces. In so far as a promotional offer meets the basic twin requirements in Direction dated 1st September, 2008 and Tariff principles and other provisions of TTO/TCPR, it will be permissible.**

Predatory Pricing and Related Aspects

10.0 The Consultation Paper issued on 17th February, 2017, invited stakeholders to comment on the methods and processes that should be applied by the regulator to assess predatory pricing by a service provider in the relevant market. This was accompanied by related questions -on the manner in which the relevant markets should be delineated, criteria for assessing dominance/ SMP status in each relevant market, method to assess predatory pricing by service provider having SMP. These are discussed in subsequent Paragraphs.

11.0 **Relevant Markets.** The following question was asked with reference to Relevant Markets.

- What should be the different relevant markets – relevant product market and relevant geographic market – in telecom services? Please support your answer with justification.

11.1 **Relevant Product Market.-**

(a) **Stakeholders' Views.** The TSPs and other stakeholders offered different views on the subject and a summary of significant comments with respect to relevant product markets is given below.

(i) **BSNL, Idea, Aircel, Tata Teleservices and few individuals**, the relevant product market should be (a.) Wireless voice and data services and (b.) Wireline voice and broadband services. Idea also suggested that the relevant product market classification should further be divided based on technology e.g.2G/3G/4G etc.

(ii) **M/s Dua Consulting** suggested to delineate market primarily into retail and wholesale first and then further segment them into voice, data services and combination of voice and data services, which can then be further delineated on the basis of technology (2G, 3G or 4G), and mode of transmission.

(iii) **RJIL** has suggested that the relevant market should be based on the IUC regulations, UL adopted in 2005, the recommendations on spectrum management and licensing framework in 2010 etc. **MTNL and R Com** opined that the classification should be based on four different service categories, viz. Voice, SMS, Wireless data services and Wireline data services and the same should be defined separately for all 22 relevant geographic markets (LSA). Tata Teleservices suggested that it should be based on retail and wholesale wherein retail market is for services provided to end-users and wholesale market is for wholesale services provided to Small, Medium Enterprises and Large Enterprise.

(iv) **One TSP (Telenor)** stated that current definition and measures are adequate on the basis of Demand side substitutability, Supply side substitutability and Potential Competition.

(v) **NTRA, Egypt** stated that regarding relevant product market, the proposed definition for relevant market is well defined and clear “that market which comprises all the products or services that are sufficiently interchangeable or substitutable”. In addition, the three main sources of competitive constraints identified by European Commission demand-side substitutability, supply- side substitutability and potential competition will be helpful for determining relevant market.

(vi) **ICRIER** stated that “Relevant markets are defined by the end-user and cannot be ascertained ex-ante. It is a dynamic term that varies depending on the purpose of analysis – whether an academic exploration or competitive analysis”.

(vii) **Dr Debdatta Saha, Faculty of Economics, South Asian University, Delhi** stated that “..... a potential product market definition (given convergence in platforms and technologies) can be: (i) premium customers (4G data with voice with national roaming), (ii) medium category customers (2G, 3G data with voice with national roaming), (iii) basic services I (voice only (fixed line services with no roaming facilities) and (iv) basic services II (voice only, wireless and other mobile services, without roaming facilities). This categorization requires data refurbishment on actual consumer base, elasticities of demand with respect to tariff changes in the nature of a SSNIP test and different investments to be made on fixed and wireline services for data services”.

(b) **Analysis and Decision.** The Authority has examined the issue in detail and found no rationale in delineating the market on the basis of products like voice, data and technologies like 2G, 3G or 4G due to fast changing nature of the technology and basic purpose being the transmission. It can be argued that consumers purchase services rather than a technology. Similarly, the pricing and costing policies are aligned with the

services for which the license has been obtained. **The Authority has considered all the suggestions and global best practices in this regard and acknowledges the fast changing nature of technology, dynamic nature of telecom services and products and bundled offer of services etc. It has been decided that the relevant product market for telecom services in India for the purpose of deciding predatory pricing should be in tune with distinct telecommunication services defined in Unified License and other Licenses granted by the licensing Authority i.e., DOT. Under the category of Access Service two distinct relevant product market (a) wireline access service and (b) wireless access service have been delineated as the services offered are not regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of services, their intended use and price. Accordingly, the relevant product market for the instant purpose would be (i) Wireline Access Service, (ii) Wireless Access Service, (iii) National Long Distance Service and (iv) International Long Distance Service and any other distinct telecom service for which the licensing authority grants license to the Telecom Service Providers. This approach will be in line with the extant licensing regime and would be appropriate for the above mentioned purpose.**

11.2 **Relevant Geographical Market.**

(a) **Stakeholders' Views.** The following is a summary of stakeholder comments and views in OHD with respect to relevant geographical markets:-

- (i) **Most TSPs** have suggested that Relevant geographical markets should be LSA based (LSA itself or categories of LSAs). **Shri Sekaran M. Sundaram** has also stated that “Relevant geographic market should be the relevant market in telecom services, which means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas”. **Dr Debdatta Saha, Professor South Asian University, Delhi** has also supported this view by stating that “The less controversial issue of relevant geographic market can be retained as “the respective licensed service area (LSA)”, as is in current usage at TRAI. This definition hinges on the fact that there is significant variation between LSA in terms of license fees to warrant differential market treatment by LSA”.
- (ii) Some Individuals have suggested that relevant geographical market should be based on boundary lines of region or state, as it might create discrimination in a state which is very large.

(b) **Analysis and Decision.** The Authority, after having examined the issue is of the view that in telecom service sector, the license to provide the telecom services have been awarded on the basis of the geographic area called as Licensed Service Area (LSA). The Country is divided into 22 LSA by the DoT and separate license agreements are required to be signed to operate in these LSAs by any TSP. **Hence, the relevant geographic market be defined as the LSA itself. This will be in line with the extant license regime.**

12.0 **Significant Market Player (SMP) in Relevant Markets and Method to determine SMP**

12.1 The following questions were asked with reference to the issue of dominance in the relevant markets and assessment of ‘Significant Market Power in each relevant market’ and suggestion for relevant factors:-

- How to define dominance in these relevant markets? Please suggest the criteria for determination of dominance.

- How to assess Significant Market Power (SMP) in each relevant market? What are the relevant factors which should be taken into consideration?

12.2 Views of Stakeholders.

(a) The stakeholders' views in **comments/counter comments and research notes** are summarized below:-

(i) **NTRA, Egypt** stated that the factors such as market share in terms of number of subscribers or revenues, control of essential facilities, the ease of access to financial resources, the strength of the countervailing power of consumers, economies of scale and scope, barriers to entry and potential competition, barriers to expansion (spectrum, numbering, or right of ways), strength of brand & brand loyalty, switching customers, bundling offers, customer complaints, vertical integration, the number of direct and non-direct distribution outlets (distribution networks), could be taken into consideration, while assessing the SMP.

(ii) **AUSPI** has opined that the definition of SMP provided under IUC regulations should be applied in a relevant market to determine the SMP of a TSP. Along with the SMP, other factors (as suggested above) should be considered to establish a TSP as dominant in that relevant market.

(iii) Some individuals have also stated that the SMP can be assessed in each relevant market by the market share of enterprise and share in the services provided (IUC Regulations 2003).

(iv) **Aircel** opined that as per the significant market power (SMP) definition covering various services wherein the subscriber base, turnover, switching capacity and traffic volume should be seen. In consonance with the M&A guidelines, 25% share of the total spectrum held in the circle, 50% spectrum assigned in a given band and 50% market share basis subscriber base and AGR should tantamount to qualification of an SMP. Therefore, SMP should be seen holistically to cover both M&A guidelines as well as SMP definition.

(v) **RJIL** opined that the existing provisions of the TRAI regulations sufficiently defines dominance and criteria for determination of dominance. Therefore, there is no need to redefine such criteria. However, there is an urgent need to define and address abuse of joint dominance emerging out of informal cartelization within the market.

(vi) **MTNL** stated that the "dominance" criteria w.r.t. a "relevant product market" may be based on market share, revenue, switching capacity, traffic volume etc. However to determine the dominant position of a TSP in the relevant market, the factors mentioned u/s 19(4) of The Competition Act, including "size and resources of enterprise", "economic power of the enterprise", "dependence of consumers on the enterprise", should also be considered, to ensure application of Competition Act in the relevant market.

(vii) **Telenor** stated that the SMP Criteria is not relevant in today's market context and should be done away with. All the players in the market should be treated *at par* as far as compliance to tariff framework is concerned. This will increase competitive effectiveness and ensure level playing field. SMP criterion is no more relevant to Indian telecom market and should be abolished.

(viii) **ICRIER** stated that “In a multisided market using market share or profit margins to determine market power could lead to misleading results. For multisided platforms the economic rate of return is an appealing measure of market power because it assesses the extent to which the platform has been able, through setting prices for its multiple sides, to earn more than a competitive return”.

(ix) **Dr Debdatta Saha, Professor South Asian University, Delhi** writes that “In defining dominance/SMP, we clearly mention four categories/dimensions of activities over which data should be analyzed, namely: subscriber base, turnover, switching capacity and traffic volume. Of these, subscriber base and traffic volume are demand side variables (across both the service and access dimensions). For actual measurement of traffic volume, the total on-net and off-net calls should be analyzed to see if a TSP has more origination or destination calls. Switching capacity and turnover are linked to investments made in the network by the TSP and are a function of supply-side technological factors as well as the nature of competition. The measurement of these variables will require data on: spectrum allotted to each TSP per LSA, cost of spectrum, operational cost of each TSP, investment costs on infrastructure, traffic volume break-up (on-the-net and off-the-net calls for each TSP), subscriber base”.

(b) **Views of stake holders during OHD.**

(i) During the open house discussion, most of the TSPs argued on the line of their written comments. Some operators argued that the financial strength or financial support should also be taken as one important parameter, while RJIL stated that joint dominance of the incumbent players should be considered while assessing/establishing dominance.

(ii) **Smt. Geeta Singh**, an independent consultant, stated that while determining SMP, market share does not really help, as 31% or 29% should not matter. If it is significant as per characteristic of the industry and needs to be investigated we should not just go by market share.

12.3 **Analysis and Decisions.**

(a) Significant Market Power (SMP), as a regulatory concept, has evolved in the context of identifying players that hold a dominant position in a relevant telecommunication market and it imposes specific obligations on them. The concept of SMP flows from the concept of ‘dominance’ developed under the competition laws. In some jurisdictions, such as EU, the definition of SMP is closely aligned with that of dominance under competition law. The Authority feels that the power to exclude, i.e., the ability of a dominant firm to engage in anti-competitive conduct such as predatory pricing, refusal to share an essential facility, etc. and exclude or deter competitors from the market by the SMP due to dominance is the core issue. An incumbent telecom operator who enjoys Significant Market Power (SMP) can distort the market. Therefore identification of SMP is critical. The basic objective behind this identification is to impose certain obligations on such an operator to ensure fair and sustainable competition in the telecommunication market.

(b) The term SMP was defined by the Authority in “The Telecommunications Interconnection (Reference Interconnect Offer)” Regulations, dated 12th July 2002” which states that a “Service Provider shall be deemed to have to have significant market power if it holds a share of 30% of total activity in a licensed telecommunication service area...”. The term “Total activity” here includes subscriber base, turnover, switching capacity and volume of traffic. The Authority after examining this aspect, has decided that percentage based determination is the best possible method and the same is in consonance with practice in many countries including the EU. Further, the Authority has determined that retaining the 30% threshold is appropriate. However, for the purpose of predatory pricing, determining SMP would be based on Subscriber base and Gross Revenue only as these two parameters are relevant and comparable across all the technologies. **Hence, the SMP**

for the relevant market should be defined based on any of the two parameters namely Subscriber Base and Gross Revenue. Revised Definition of ‘SMP’ for the predatory pricing has been included in the TTO.

13.0 **Determination of Predatory Pricing**. The following issues was put up for consultation

- What methods/processes should be applied by the Regulator to assess predatory pricing by a service provider in the relevant market?

13.1 **Stakeholders’ views**: Some important views with regard to appropriate cost measure, method and process are given below:-

(a) While commenting on the method, **Bharti Airtel** stated that “We believe that predatory pricing, as defined in the tariff orders, is directly related to the **absolute cost** of producing the service. Thus, predatory pricing can be defined as the offering of a service at a ‘below cost’ rate to end customers by a service provider, irrespective of its market share and size, or the technology used. IUC is an important component of the cost since the originating operator is required to pay the same to the terminating operator for call termination. Therefore, IUC-compliance is important in the context of off-net calls. Thus, any non-IUC compliant off-net tariff is also a predatory tariff”.

(b) **Reliance Communication** stated that:

“.....if any TSP leverages its SMP and (or) dominant position in a relevant market to price its services below the cost of provisioning of such services, then such tariffs / services should be considered as “Predatory Pricing” by the Regulator.

Accordingly, TRAI should examine the cost an operator bears on its own network to provide the voice and data services (per min and per MB cost respectively) and examine the tariffs of the operators in view of such costing to decide whether the tariff is compliant to the principle of non-predatory or not”.

(c) “TRAI must also assess predatory pricing not just on the basis of cost data submitted by the concerned TSP but this should be benchmarked against the industry so that a well-balanced average can be determined considering the costs of all players in the market” was the view intimated by **Airtel**.

(d) **Idea Cellular** stated that “The main steps that are involved in assessment of predatory pricing are:

- Delineation of relevant market(s);
- Assessment of dominant position / SMP in relevant market;
- Evaluation of whether the dominant enterprise is resorting to pricing below average industry cost of production for the product/service; and all the mandatory regulatory costs put together such as, LF, SUC, IUC & Service tax and all other taxes/levies/fee in the operations.”

It further stated that “Dominance in one sector should not be used to leverage predatory pricing in another sector thereby foreclosing such a market”.

(e) **RJIL** stated that “Considering prevailing laws in India, position in international jurisdictions with regard to predatory pricing, the Authority’s views on predatory pricing and fast changing technologies in the sector, we suggest that:

- (i) While moving towards newer technology, convergence of network and services, large scale adoption of OTT services which are being offered free of cost, there is no need to get into the issue of predatory pricing in telecom sector in the current scenario unless a clear case of anti-competitive behaviour is established.
 - (ii) Assessment of dominant position/ significant market power (SMP) in the relevant market is pre-requisite to entertain any complaint of predatory pricing.
 - (iii) Pricing below cost is not merely sufficient to establish predatory pricing. The same must be coupled with an intent to eliminate competitors from the relevant market through this act of pricing over a sufficiently long period of time, with the ability to then recoup the losses through significantly higher pricing later.
 - (iv) Predation can be determined only when these conditions are satisfied: dominant operator, below cost, long enough period of time, driving out competition, ability to recoup losses later. Unless these are satisfied, no decision on predation can be taken even for a dominant operator. In the era of forbearance, the Authority must not form an opinion only on gut feeling of predation.”
- (f) **Dr. Debdatta Saha** opined that “As far as predatory pricing is concerned, the regulator can implement the following practice:
- (i) Provide to all stakeholders a common definition of predatory pricing which is in consonance with the Competition Act, 2002.
 - (ii) On a monthly basis, TRAI should conduct an exercise, where it checks the Average Variable Cost (AVC) of each TSP against its price offering for the relevant service category (product market) for each LSA (geographic market).
 - (iii) If the AVC is found to be less than the relevant price mentioned in the tariff order of the TSP, the regulator should invite the TSP to its offices to explain the reason for this low pricing. If the answers of the TSP are not found satisfactory by the regulator, the TSP must be warned and asked to withdraw its tariff order with immediate effect.
 - (iv) The immediate swing effect on consumer demand due to a low pricing below AVC by a TSP can be checked through the incremental addition in the subscriber base over the previous month’s data and by checking the differential of origination and destination calls. Any substantial increase in this swing effect (more than 30 per cent), should be questioned by the regulator as this is likely to end in appreciable adverse effect on competition (AAEC) in the market.
 - (v) All free offers of services should be justified to the regulator (the business plan for break-even by the TSP offering such free services). Along with promotional offers, these free offers should have an upper cap of a month in order not to affect competition adversely in a dynamically changing market.

13.2 **Analysis and Decisions.** The deliberation referred above the general legal framework for dealing with predatory pricing in India and abroad brings out that the determination of predatory pricing by a SMP, in a relevant market, will be based on the following factors:-

- (a) Price is below the cost;
- (b) Intent to reduce competition or eliminate the competitors in the relevant market.

13.2.1 Price is below the cost.

- (a) In general, prices are considered predatory when the Significant Market Players (SMP) sets its price so low that it can be considered rational only if it reduces competition, eliminates competitors or deters entry of new market players. Such a pricing strategy by SMP enables it to retain or enhance its Market Power. Predatory Pricing by a SMP involves deliberate sacrifice of profit in order to force competitors to exit the market. In a classic predatory pricing scenario, an incumbent SMP may react to entry of new Market Player by lowering its price below its average cost and sustaining it for a period long enough to ensure that the new entrant is forced to operate at a loss. The incumbent SMP may be in a position to incur the loss but the new entrant may not be able to continue its operation with sustained losses and, thereby, may exit the market. With the exit of the new entrant, the SMP may again raise its price to recover its losses and/or enhance its market power. As cost has many dimensions, the question of selection of best measure of cost in the context of price-cost analysis for deciding predatory pricing becomes important. The following cost concepts in this regard are often mentioned as possible cost benchmarks:
- (i) **Marginal cost (“MC”)** is the cost of producing the last unit of output;
 - (ii) **Average variable cost (“AVC”)** describes how MC behaves, on average, over a given range of output. AVC is calculated by identifying those costs that vary with output, adding them together, and dividing the result by the total number of units produced;
 - (iii) **Average avoidable cost (“AAC”)** is the sum of all costs that a firm can avoid by not producing a certain quantity of output, divided by the total number of units not produced. The avoidable costs are defined as the variable costs and product-specific fixed, but not sunk, costs that were incurred to produce the given range of output;
 - (iv) **Average total cost (“ATC”)** is calculated by dividing a firm’s total costs – variable plus fixed, including common costs – by the total number of units produced. Common costs are fixed costs that support a number of activities or product lines. For example, the salary of a company’s receptionist is a common cost. It is an essential position, but no part of the salary is caused by any specific product alone.
- (b) Internationally, most countries use the AVC for determining predatory pricing in telecom as well as other sectors. As per the report on predatory pricing prepared by Unilateral Conduct Working Group, International Competition Network presented at the 7th Annual Conference of ICN, in 27 out of 34 countries, AVC is used as benchmark cost to decide about predatory pricing. The Competition Commission of India (CCI) also uses AVC as proxy to marginal cost to determine predatory pricing {Point no. 3 of CCI (Determination of Cost of Production) Regulation, 2009 refers}
- (c) **The Authority, after examining the various relevant factors such as availability of cost details, their reliability and relevance for the purpose, is of the view that AVC is the most appropriate cost measure to determine the issue of predatory pricing.** A price that is persistently below AVC indicates that the firm is not even covering all its variable costs, let alone its fixed costs. Usually, when a firm incurs such losses over time, it shuts down because continuing to operate would create greater losses than going out of business. Therefore, a firm that stays in business in those circumstances could be considered a predator unless it has a legitimate justification for offering its services at a price below AVC. As per the general practice followed by the regulators in determination of such cases, **the AVC will be calculated based on the data available or the requisite cost details which is to be specifically sought and obtained from TSPs for the purpose. The onus of timely submission of cost details of AVC and other relevant documents duly certified by cost Auditors would lie with the TSP concerned.**

13.2.2 Intent. The Competition Act, 2002, defines Predatory Price as “the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or

provision of services, with a view to reduce competition or eliminate the competitors.” Accordingly a crucial point in analysis of predatory pricing is the value of evidence showing that the SMP has predatory intent, i.e., intent to reduce competition or eliminate the competitors in the relevant market. Some jurisdictions, such as the European Union, expressly incorporate intent in their predation analysis along with price-cost tests. Others, such as the United States, are more skeptical towards intent as an indicator of predatory conduct and consequential harm to competition. Proponents of using intent evidence in predation cases tend to support their position by pointing out that business managers, not government agencies or judges, are in the best position to determine whether a predatory pricing scheme is likely to eliminate competition and ultimately be profitable. Since these managers are knowledgeable and rational economic agents, any evidence showing that they intended to carry out a predatory plan or harm a competitor is more reliable than guesswork by outsiders about whether recoupment of losses suffered due to sale below AVC, is likely in future. **The Authority is of the view that intent is a vital factor in determining whether the SMP is indulging in the predatory pricing and will examine whether there is evidence of a specific intent to engage in predatory pricing. However, the onus of providing the business rationale of pricing below its AVC and proving that the tariff below AVC is not predatory would lie with the TSP whose tariffs is under examination for predation.**

- 13.2.3 **Floor Price and IUC Compliance.** The issue of fixation of floor price by the regulator and that whether the IUC can be floor price for retail tariff, was raised and discussed by the TSPs during consultation process including during the OHD and the two meetings referred in Paras 5.5 and 5.6 above. It may be noted that a comprehensive framework to deal with predatory pricing is being prescribed through this TTO. This will restrict anti-competitive behavior and ensure healthy competition in the sector. During discussions as referred above, stakeholders also desired that there is no need to prescribe floor price for retail tariff. In view of the above, **the Authority is of the opinion that IUC cannot be taken as floor for the retail tariff. Accordingly, the Authority has decided to remove the requirement of ‘IUC Compliance’ from the reporting requirement.**

14. **Judgment dated 1st February, 2018 of the Hon’ble TDSAT.**

While the present process of consultation was going on, the Hon’ble TDSAT pronounced its judgment on 1st February, 2018 in *Bharti Airtel Ltd. vs. Telecom Regulatory Authority of India & Anr.* (Telecommunication Appeal No.2 of 2017) and other connected matters. The Hon’ble TDSAT upheld the TRAI decision communicated by letters dated 20th October, 2016 and 31st January, 2017 and dismissed the petition of Bharti Airtel Ltd and Idea Ltd. Specifically, in paragraph 32(d) of the judgment, the TDSAT has directed the Authority “*to issue suitable direction/order/regulation regarding benchmark/guideline that can be applied for ascertaining consistency with the principles of non-predation*”. The TDSAT has also called upon the Authority to, *inter alia*; issue clear guidelines and benchmarks for performing self- checks by TSPs for ascertaining consistency with the principles of IUC compliance and to work out quick collection and dissemination of relevant data in the context of predatory pricing.

With the changes brought about by the present amendments to the TTO, the Authority has laid down the parameters by which TSPs can assess whether they are in accordance with the principle of non-predation. The Hon’ble TDSAT’s specific direction above has affirmed the Authority’s ongoing process of consultation on the issue of determining principles relating to non-predation and the said amendments are in conformity with this direction.

Accordingly, it is expected that while reporting tariffs in terms of clause 7 of the TTO, TSPs would conduct self- checks for the purposes of ensuring consistency with IUC Compliance and regulatory principles of transparency, non-discrimination and non-predation, keeping in view all the relevant parameters as would now be applicable after the introduction of the present amendments. So far as IUC

Compliance is concerned, the amendments have clarified that its meaning and scope relates to the inter-operator settlement as per the rate(s) prescribed and will not be construed as a floor for retail tariff

In any event, the Authority will separately issue self- check guidelines/procedure for the convenience of TSPs on the basis of the parameters already set out in the present amendments.

It may be noted that in view of the amended definition of SMP, the relevant market is now based on any of the two parameters i.e. subscriber base and gross revenue. Data collection on the aforementioned two parameters takes place on monthly and quarterly basis respectively which is fairly efficient and expeditious to enable evaluation by the Authority on these two parameters. However, appropriate steps are being taken separately to further expedite the process of data collection subject to practicality as indicated by the Hon'ble TDSAT vide its judgment and order dated 1st February, 2018.

List of Acronyms

Sl. No.	Acronym	Expansion
1	TTO	Telecommunication Tariff Order
2	TRAI	Telecom Regulatory Authority of India
3	TSPs	Telecom Service Providers
4	TCPR	Telecom Consumer Protection Regulation
5	TDSAT	Telecom Disputes Settlement & Appellate Tribunal
6	USSD	Unstructured Supplementary Service Data
7	IUC	Interconnection Usage Charges
8	DoT	Department of Telecommunication
9	MTNL	Mahanagar Telephone Nigam Limited
10	BSNL	Bharat Sanchar Nigam Limited
11	CEOs	Chief Executive Officers
12	SMS	Short Message Service
13	OHD	Open House Discussion
14	F&EA	Financial and Economic Analysis
15	NIPFP	National Institute of Public Finance and Policy
16	CCI	Competition Commission of India
17	RCOM	Reliance Communications
18	AUSPI	Association of Unified Telecom Service Providers of India
19	RJIL	Reliance Jio Infocomm Limited
20	MRF	MMA Research Foundation
21	NTRA, Egypt	National Telecommunications Regulatory Authority, Egypt
22	PoS	Point of Sale
23	COAI	Cellular Operators Association of India
24	QoS	Quality of Service
25	NCHSE	National Council of Higher Secondary Education
26	ISAPI	Internet Server Application Program Interface
27	ICRIER	Indian Council for Research on International Economic Relations
28	ARPU	Average Revenue Per User

29	NCAER	National Council of Applied Economic Research
30	FMCG	Fast Moving Consumer Goods
31	LSA	Licensed Service Area
32	SSNIP	Small but Significant Non-transitory Increase in Price
33	UL	Unified License
34	AGR	Average Gross Revenue
35	EU	European Union
36	LF	Licence Fee
37	SUC	Spectrum Usage Charges
38	OTT	Over the Top
39	AAEC	Adverse effect on Competition
40	ICN	International Competition Network
41	MC	Marginal cost
42	AVC	Average Variable Cost
43	AAC	Average Avoidable Cost
44	ATC	Average Total Cost
45	LBJs	Legitimate Business Justifications
46	PVs	Plan Vouchers
47	CVs	Combo Vouchers
48	STVs	Special Tariff Vouchers
49	SMP	Significant Market Power

**List of Comments and Counter comments received on Consultation Paper on
“Regulatory Principles of Tariff Assessment” upto extended dates**

Group of stakeholders	Name of Stakeholders	No. of Comments received
Telecom Service Providers	Aircel	10
	Bharti Airtel	
	BSNL	
	Idea Cellular	
	MTNL	
	Reliance Comm.	
	RJIL	
	Tata Teleservices	
	Telenor	
	Vodafone	
Associations	AUSPI	2
	ISPAI	
Organizations	CUTS International	5
	Dua Consulting	
	Federation of Consumer and Service Organizations	
	MMA Research Foundations	
	NCHSE, BHOPAL	
MyGov	MyGov.	5
Individuals (Mr./Ms.)	Aman Mahajan	35
	Anita Verma	
	Anju Singh	
	Ankit Pratap Singh	
	Apoorva Sharma	
	Ashok Chhibbar	
	Ashwarya	
	Balwant Mehta	
	Deepa Kapoor	
	DevenderKanchi	
	Dr. SouvikChatterji	
	Kannan Satheesan	
	M S Kanchi	

	Madhulika Sharma	
	Miti	
	Namrata Sharma	
	Gp. Cap. Rajneesh Bhatia	
	P. Bhatia	
	Priti Rajneesh	
	Raj Bhatia	
	RakshaKumari	
	S. Iyer	
	Sanjiv Kumar Singh	
	Seema Chaudhary	
	Suchita Mahajan	
	Sunil Kumar	
	SurinderKanchi	
	Sushil Kumar	
	T V Ramachandran	
	UdayShenoy	
	Udbhav Aggarwal	
	Vaishali Singh	
	Vibha Singh	
	Vikas Kumar Singh	
	VivekRavani	
	Total	57

Counter Comments

Group of stakeholders	Name of Stakeholders	No. of Comments received
Telecom Service Provider	RJIL	2
	Bharti Airtel	
Organization	iCT Robot	1

List of comments received after the due dates

Group of stakeholders	Name of Stakeholders	No. of Comments received
Individuals (Mr./Ms.)	Anindya Sen	5
	Debdatta	
	Dr. GeetaGauri	
	S. Sriram	
	V. Sridhar &RohitPrashad	
Organizations/Institutions	Dr. Shekhar Shah (NCAER)	5
	ICRIER	
	IIPA	
	NTRA – International Telecom Regulator, Egypt	
	Mr. M. Sekaran, Federation of Consumer and Service Organisations	