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By Email

To
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Dated February 27, 2020 IFF/2020/113

Subject: Counter comments towards TRAI's Consultation Paper on "Traffic Management Practices and Multistakeholder Body for Net Neutrality"

Respected sir,

Internet Freedom Foundation ("IFF") is a registered trust which advocates for people's rights over the internet across public institutions and the private sector. IFF's origins stem from the SaveTheInternet.in movement through which more than a million Indians advocated that net neutrality be recognised as a core tenet of the public internet. We are committed to the advance of net neutrality and continue to run SaveTheInternet.in ("STI.in").

We request you to kindly consider this submission as IFF's counter comments to TRAI's consultation to determine the scope of reasonable traffic management practices ("TMPs") and the multistakeholder body for net neutrality. We request authorities to read it in conjunction with our primary response dated 13 February, 2020 bearing reference no. IFF/2020/108.[1] In particular we respond to submissions made by certain large telecom providers, hardware/equipment manufacturers, and large industry associations. Our concerns are that if such recommendations are accepted it will compromise constitutional rights, and market competition/innovation in the context of smaller businesses.

At the outset we reiterate that for meaningful network neutrality, the implementation framework must hold internet access providers ("IAS") honest and accountable. This requires:

1. Clear and narrowly defined criteria for exceptions to the net neutrality principle to limit misuse; and
2. Transparency in terms of disclosures, monitoring and detailed measurement systems; and

1 https://main.trai.gov.in/sites/default/files/Internet_Freedom_Foundation_14022020.pdf

3. Inclusivity within strong institutional structures towards compliance.

For added texture, we believe that implementation and enforcement of the principle of non-discriminatory treatment of internet traffic should advance **three discrete ideas**. First, as mentioned in our main submission, authorities should implement the framework to realise the Powell Principles. In essence this means that net neutrality protections must help ensure users have the freedom to access and convey content, freedom to use applications, freedom to attach personal devices, and freedom to obtain service plan information.[2]

Second, since the public internet is an information market, **governance should not be solely informed by economic and financial considerations**. The internet is meant to serve as a platform which facilitates decentralised innovation, and fulfils stimulates political discourse, mobilisation, socio-cultural interaction and the ability to exchange ideas freely. In this context, we take the liberty to highlight TRAI's own explanatory memorandum to the Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016. In it your Authority refers to the Hon'ble Supreme Court in *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*.[3] The case in question recognises that the right to free speech and expression allows the public the benefits of plurality of views and therefore includes the right to express oneself as well as the right to receive information. Based on this your Authority clearly noted that the governance of the internet must be done in a manner which advances the free speech rights of the citizens, by ensuring plurality and diversity of views, opinions, and ideas.

For greater specificity when discussing information and media markets the Hon'ble Supreme Court has previously noted that the right to freedom of speech and expression includes the well established principle of *marketplace of ideas*.[4] Moreover, your Authority, in the context of media ownership, has astutely noted that such markets "***cannot, and should not, be bracketed with general commodities and services. The market for ideas is very different from that for, say, shoes or biscuits***."[5]

Third, India's net neutrality movement was born out of the collective desire to ensure that access and enjoyment of the internet was taken out of the hands of access providers. It aimed to shift towards a paradigm which is individual-centric (away from access provider control) and facilitates permissionless innovation, a term which has been misused by stakeholders like COAI in their own comments to the ongoing consultation.

2Remarks of Michael K. Powell Chairman, Federal Communications Commission At the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age" University of Colorado School of Law Boulder, Colorado February 8, 2004.

3 (1995) 2 SCC 161, para 201 (3)(b)

4 *Bennett Coleman & Co. & Ors*. v. *Union Of India & Ors*., 1973 SCR (2) 757, https://www.sci.gov.in/jonew/judis/6674.pdf.

5 TRAI, *Recommendations on issues relating to Media Ownership*, TRAI (12 Aug. 2014), https://main.trai.gov.in/sites/default/files/Recommendations_on_Media_Ownership.pdf ("TRAI Recommendations on Media Ownership")

In this context, please see below IFF's substantive counter comments that are separately attached to this covering letter.

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***IFF's Counter Comments* towards TRAI's Consultation Paper on "*Traffic Management Practices (TMPs) and Multistakeholder Body for Net Neutrality*"**

At the outset, IFF would like to address calls by stakeholders like **Bharti Airtel** and the **Cellular Operators Association of India (COAI)** requesting authorities to apply neutrality principles over other entities across the internet value chain falls. This topic beyond the remit of this consultation. Therefore, it should not be afforded any consideration.

In this context, please find below our substantive counter-comments along with justification divided across the two central themes of the consultation; namely: (a) reasonable traffic management practices; and (b) the multistakeholder body.

Section 1: Reasonable Traffic Management Practices

1. Narrowing the definition of "reasonable" TMPs

1.1. In this section, we strongly disagree with industry submissions requesting light-touch regulation and excessive exceptions. It is apparent that such recommendations are essentially negotiating for the flexibility to discriminate between different classes of internet traffic. Such recommendations if accepted will serve to dilute the net neutrality principle of non-discrimination of internet traffic.

1.2. In opposition we endorse recommendations made by **Dr Barbara van Schewick** to this consultation.[1] At this moment we recall IFF's prior submission to this consultation (dated 13 February, 2020) which relies on prior works of Dr van Schewick. This is because Dr van Schewick's work is globally renowned as the seminal work on the subject matter at hand. Her works have been relied on by the US Federal Communications Commission, the California State Legislature, the Canadian Radio-Television and Telecommunications Commission, EU's BEREC and TRAI's own non-discrimination order for data tariffs (Feb 2016).

1.3. In this regard, the consultation at hand seeks to determine the scope of "reasonableness" of traffic management practices. As articulated by your authority for a traffic management practice to be reasonable it must be: (a) proportionate, (b) transparent and (c) transient.

1.4. Of the three, the term which requires greater specificity is "proportionate". Unfortunately, industry stakeholders across the spectrum and especially those representing the interests of internet access providers, have rallied around this to advocate for greater flexibility in class-based

1 Barbara Van Schewik, Comments on TRAI Consultation Paper on "Traffic Management Practices (TMPs) and Multi-Stakeholder Body for Net Neutrality", Stanford Law School, Feb 2020, https://main.trai.gov.in/sites/default/files/Barbara_van_Schewick_14022020.pdf

discrimination of traffic. Such requests are packaged as traffic management practices in pursuance of network efficiency.

1.5. In contrast IFF would suggest TRAI adopt Dr van Schewick's recommendations which seeks to limit the discretionary scope of internet access providers . Dr van Schewick astutely recommends that for traffic management practices to be "proportionate" they have to be as application-agnostic as possible.

1.6. As Dr van Schewick points application-agnosticism within traffic management practices is a critical principle which has been integrated in leading net neutrality frameworks (in jurisdictions within the US, Canada and Europe) including BEREC's implementation guidelines on net neutrality. Dr van Schewick clarifies that for a measure to be "application-agnostic" there should, *inter alia*, be no differentiation based on the class of internet content, applications, services or devices.

1.7. Such a measure is important from a welfare standpoint since it promotes competition, technological neutrality, permissionless innovation, freedom of speech, diversity, plurality and consumer choice. It brings legal certainty and helps with ease of doing business since it erodes ambiguities which if not addressed breeds excessive litigation and accompanying costs. Moreover, as Dr van Schewick points out class-based distinctions in traffic management inadvertently undercut protections associated with net neutrality.

1.8. We endorse her justification that the measure would limit loopholes for access providers to argue that tailored approaches to network management are permissible means of congestion management. Class-based distinctions in network management lead to discriminatory outcomes as has been the case in countries like the UK.[2] Experience in countries like the US and Canada also show that application-agnostic congestion management systems have been effectively developed by access providers to the benefit of all internet users.

1.9. With respect to the exception[3] in Dr van Schewick's proposed definition, we suggest that exceptional measures should be disclosed to the public and relevant authorities, along with justification. Disclosures should include details of the measure, grounds, whether application-agnostic options were considered, and why they could not be applied, and so on.

1.10. This allows for sufficient auditability and bakes accountability into the exception. Finally, we are aligned with Dr. van Schewick's articulation of the considerable social costs of class-based discrimination which include competition distortion, reduced innovation, harm to individual users, dissuades the use of encrypted traffic[4], increases scope for discretionary decision making.

2 Ibid.

3 … *as far as possible...*

4 By putting all encrypted traffic in the slow lane.

1.11. Authorities like Sir Tim Berners-Lee, Lawrence Lessig and Dr van Schewick have previously written to European authorities[5] where they have advocated for regulators to stop carriers from discriminating across classes of internet traffic to manage their networks. In particular we endorse the following statement:

> *" Carriers would like to define classes of traffic to be sped up or slowed down, even in the absence of congestion. They say this will let them offer better quality Internet access. But class-based traffic management lets carriers discriminate against services at will….. class-based traffic management can only be used as a last resort during exceptional or temporary congestion if less discriminatory methods cannot solve the problem…. class-based traffic management can be used only if less discriminatory, application-agnostic methods cannot solve the problem, regardless of whether there is congestion or not."*

1.12. Regulators must also remain careful about the scope of the *specialised services* exception. As Sir Tim Berners-Lee et al[6] have stated that the specialised services exception can be a loophole through which normal services/applications can be granted network fastlanes. Some of the requests from industry players to this consultation certainly allude to this risk. Therefore, Indian authorities must address this risk through appropriate means. For this we suggest two things. First, regulators should list all activities which are allowed to be offered as specialised services. Second, there should be a smooth mechanism for periodic review which is subject to public consultation.

1.13. While there are many excessive practices which industry players have put forth as reasonable TMPs, we strongly oppose any suggestions to legitimises content filtering tools, parental controls; and deep packet inspection (DPIs). We contend that measures like parental controls and content filtering tools are discriminatory and excessive in terms of the right to receive and impart information and marketplace competition/diversity. Similarly, we feel DPIs are invasive and compromise people's online privacy respectively. In particular, DPIs can allow for network snooping down to the level of domain names which can reveal very intimate and sensitive details about an individual internet user.[7]

2. Avoiding light touch frameworks and prioritising strong enforcement

2.1. We urge your Authority to not pay heed to representations of stakeholders like **Bharti Airtel, COAI** and **Reliance Jio Infocomm Limited**, statingt since the introduction of net neutrality provisions into the licensing frameworks there have been no net neutrality violations. These representations are disingenuous.

5 Tim Berners Lee et al, *Four days to save the open internet in Europe: An Open Letter*, Open Web Foundation (2016), https://webfoundation.org/2016/07/four-days-to-save-the-open-internet-in-europe-an-open-letter/

6 Ibid.

7 EDRi, Net neutrality overhaul: 5G, zero-rating, parental control, DPI, October 2019, https://edri.org/net-neutrality-overhaul-5g-zero-rating-parental-control-dpi/

2.2. We would like to draw your attention to previous letters IFF has sent to the DoT and TRAI dated 27 March 2019 and 29 May 2019. In them we reference a crowd-source mechanism through which we observe that in the time period between January-May 2019, we received 307 instances of alleged violations by licensed internet access providers. In particular we noted that specific kinds of services namely: streaming, VPNs, pornographic material, cloud storage services like Cloudflare's DNS server, et al are on the receiving end of discriminatory treatment. For greater texture about this initiative we request you to kindly visit our website here.

2.3. In the interest of the wider internet ecosystem, there should be a resistance to representations of access providers when they ask for a light-touch or hands off approach to implementation and/or enforcement. We call upon you to read this section in conjunction with our earlier demand that there is a need for frameworks to develop brightline frameworks which can be implemented in the interim as well. The ecosystem should not fall into the trap of a "wait and watch" approach as it allows network providers to continue operating with impunity and thereafter should there be unfettered innovation, a rollback of network architecture and the processes which support it will become untenable.

3. Not falling for the 5G red herring

3.1. We have noted how many industry submissions and in particular telecom players like **Bharti Airtel, Broadband India Forum (BIF)** and **COAI** have noted that without an enabling net neutrality framework, there will be a hindrance to India's 5G growth story. We submit that this has been a common tactic deployed by telecom operators for a number of years in different jurisdictions to dilute net neutrality protections.

3.2. This was the case in Europe in 2016[8] when 5G standards and technologies were at a more nascent stage than it is now. Similar lobbying efforts are even being undertaken by telecom players in international fora such as the Internet Governance Forum in 2018.[9]

3.3. We agree with the position of stakeholders like the **Asia Internet Coalition** to guard against the development of 5G enabling technologies like network slicing, software defined networks and network function virtualisation being used as an excuse to justify discretionary prioritisation or blocking of internet traffic.

3.4. The fact that certain players put forth that investments in 5G are contingent on an "enabling" net neutrality framework is again a disingenuous representation. First, according to the DoT's own steering committee report on "Making India 5G Ready" (August 2018), it is stated that even after the first deployment of 5G, it would take more than a decade to phase out older 2G, 3G and 4G

8 Kwame Opam, Major telecoms promise 5G networks if EU cripples net neutrality, The Verge, July 2016, https://www.theverge.com/2016/7/10/12139700/telecom-companies-5g-service-european-union-net-neutrality

9 intgovforum.org/multilingual/content/igf-2018-ws-142-net-neutrality-vs-5g-and-new-technological-challenges

networks.[10] Therefore, a conversation on 5G and net neutrality is not one which merits incorporation into the immediate implementation and enforcement framework. Such pre-emptive carve outs do not fall into the category of responsive regulation. Particular carve outs which are narrowly defined in terms of scope can be identified as technologies like network slicing & SDNs, mature and scale.

3.5. Moreover, 5G has more to do with spectrum, hardware, fiber backhaul, etc. The deployment of 5G has been underway for years across the world and has been almost completely unaffected by this side of the regulatory landscape despite the protestation of telecom and access providers in many other jurisdictions.

3.6. At the same time EDRi i.e. European Digital Rights has endorsed a provision relating to network slicing in BEREC's draft Guidelines on the Implementation of the Open Internet Regulation.[11] The power or agency of what application is allocated to what slice of the network should be vested at the hands of the user.[12] While we cannot comment on the appropriateness of the provision at this stage, we certainly do believe that allocation of applications to network slices will require some degree of safeguards to curb the scope for unfettered discretionary decision making of access providers.

3.7. We would like to conclude with the thoughts of former BEREC chief Johannes Gungl who has previously opined (October 2018) that present day net neutrality frameworks remain flexible enough to support 5G development.

4. Transparency is the key to accountability

4.1. We strongly oppose the recommendations of **Asia Internet Coalition** and **Bharti Airtel** which advocate for self-regulation and self-certification of traffic management practices. Similarly, we do not think that **BIF's** recommendation that disclosures in terms of service agreements are enough, as we have already mentioned in our original submission how such clauses are typically hidden and struggle to elicit any meaningful consent.

4.2. Our position is more aligned with **NASSCOM's** response to the consultation in which they advocated for a two-tier disclosure model. A more comprehensible one for the users and a more detailed/technical one which can be audited by the authorities and external experts. For further details kindly refer to IFF's main consultation response dated 13 February, 2020 (Link).

10 *Making India 5G Ready*, Report of the 5G High Level Forum | Prepared by the Steering Committee, Department of Telecommunications, August 2018m See Page 17, https://dot.gov.in/sites/default/files/5G%20Steering%20Committee%20report%20v%2026_0.pdf?download=1

11 BEREC, Public Consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation, BoR (19) 180, October 2019, https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/8849-public-consultation-on-the-draft-berec-guidelines-on-the-implementation-of-the-open-internet-regulation

12 EDRi, Net neutrality overhaul: 5G, zero-rating, parental control, DPI, October 2019, https://edri.org/net-neutrality-overhaul-5g-zero-rating-parental-control-dpi/

5. Detection, Monitoring and Assessment

5.1. While disparate models have been advocated by stakeholders, there is a need for authorities to embrace the use of technical tools and measurement systems. There is of course a need to build models and tools which are adapted to the Indian context. Such tools, if deployed to assess entire tomographies and topographies, are effective in complementing probe and investigation based mechanisms. Authorities may consider partnering with Indian subject matter experts and international third party measurement experts like M-LAB and the Open Observatory of Network Interference (OONI).

5.2. We are aligned with **Mozilla Corporation's** submission which advocates that TRAI follow BEREC's Model towards creating a Net Neutrality Measurement Tool. Since the tool itself will be open source when released, TRAI could consider leveraging its existing MoU with BEREC[13] to collaborate on a project which helps develop an Indian network measurement tool. Such detection and measurement tools could be deployed across DoT offices in the 22 telecom circles, possibly stationed in India's 34 Telecom Enforcement Resource and Monitoring (TERM) cells.

5.3. For further texture on IFF's main recommendations on detection and monitoring please refer to our main submission dated February 13, 2020 (Link).

Section 2: Multistakeholder Body for Net Neutrality

6.1. IFF strongly urges your Authority to resist submissions by parties like the **Asia Internet Coalition, COAI, BIF** and **Bharti Airtel** which represent that there is no need for a multistakeholder body at all. The commonality of argument across some of these representations is striking and we feel TRAI should give due regard to it when it weighs their proposition. Airtel's argument is predicated on the fact that the relevant provisions embodying the net neutrality principle of non-discriminatory treatment of internet traffic are embedded into relevant licenses. Therefore, it argues that TRAI and DoT have the requisite authority/capacity to adequately enforce the framework upon the detection of a violation.

6.2. However, this may be viewed as a disingenuous representation. This is because it does not account for the fact that both your Authority and the DoT would benefit from additional institutional capacity to overcome existing limitations in monitoring and enforcement. As mentioned earlier, IFF has previously found that net neutrality violations by licensed access

13 Body for European Regulators for Electronic Communication,, *Joint statement for an open internet - BEREC and the Telecom Regulatory Authority of India (TRAI) announce their intention to collaborate closely and expose their common understanding of net neutrality*, June 2018, https://berec.europa.eu/eng/news_and_publications/whats_new/4976-joint-statement-for-an-open-internet-berec-and-the-telecom-regulatory-authority-of-india-trai-announce-their-intention-to-collaborate-closely-and-expose-their-common-understanding-of-net-neutrality

service providers have allegedly gone unchecked due to minimal enforcement of the license amendments.

6.3. We also urge your Authority to resist recommendations by **Reliance Jio Infocomm Limited** and the alternative suggestion from **Bharti Airtel** which talks about an industry-led body which would give primacy to the inputs of TSPs/ISPs. Should such a TSP focused industry body undertake investigations, there are obviously risks of conflict of interests and biased outcomes. In particular, we disagree with **Bharti Airtel's** suggestion that the financial burden in establishing and running the multistakeholder body should be borne by non-TSP/ISP stakeholders. We feel this will lead to exclusionary outcomes to the detriment of public-facing organisations which have the institutional capacity but may not have the financial security to keep such large players honest.

6.4. We are primarily aligned with the submissions of stakeholders like **NASSCOM, CISCO, IAMAI** and **Mozilla Corporation** which ask for broad based multistakeholder bodies which can collectively hold service providers accountable. It should be able to balance factors like access, constitutional imperatives of free speech and privacy, general consumer rights/redressal, publishing reports, undertake investigations, set domestic standards, participate in international standard setting, working with the network measurement tool providers, and can also be a medium to raising consumer awareness on network neutrality. The MSB could also be a body which can holistically monitor and when required develop recommendations on the interaction between net neutrality and next generation access technologies like 5G.

6.5. Additionally, as we mentioned in our original substantive inputs to this consultation multistakeholder bodies if designed poorly are susceptible to industry capture. Since internet governance is linked with the advance of constitutional rights (as mentioned in our cover letter), it is imperative that the eventual structure of the multistakeholder body is inclusive in nature. We agree with **Mozilla Corporation's** suggestion that a principle of fair, reasonable and non-discriminatory treatment may be integrated into the charter of the multistakeholder body.

6.6. IFF also recalls its orignal substantive comments stating that since the role of the multistakeholder body is supposed to be advisory in nature, the body need not have a government-heavy composition -- along the lines of Brazil's Internet Steering Committee. Instead the composition of the body should have a proportionate number of representatives across TSPs, ISPs, small content providers, large content/application providers, civil society, think tanks, consumer advocacy groups, legal experts, free speech scholars and so on.

6.7. Finally, we reiterate[14] that in order for multistakeholder internet governance institutions to have better outcomes, they must prioritise fair processes which are inclusive, balanced and accountable.[15] Similarly, according to a UNESCO report multistakeholder internet governance

14 As advocated by civil society organisations like the Electronic Frontier Foundation (EFF)

15 Jeremy Malcolm, Fair Processes, Better Outcomes (Sept. 30, 2016) (available at https://www.eff.org/deeplinks/2016/09/fair-processes-better-outcomes).

institutions must be inclusive, diverse, collaborative, transparent, flexible, relevant, private, safe and accountable.[16]

16 Anri van der Spuy, What if we all governed the Internet, UNESCO (2017) (at https://unesdoc.unesco.org/ark:/48223/pf0000259717/PDF/259717eng.pdf.multi).