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Telecom Regulatory Authority of India Releases its Recommendations on Net Neutrality

On 28 November 2017, Telecom Regulatory Authority of India (“TRAI”) released the much awaited recommendations on net neutrality. TRAI, while carving out certain exceptions to net neutrality, affirmed the principle of net neutrality and has tried to ensure that internet as a resource remains accessible to all without any discrimination.

These recommendations follow several consultation papers released by TRAI amid the concerns relating to the potential discriminatory treatment of internet traffic by licensees providing Internet Access Service.

TRAI while giving its recommendation recognised that the principle of non-discriminatory access to content, application and services on the internet is covered under the scope of the licensing terms in certain categories of license such as Unified License (“UL”); Virtual Network Operator (“VNO”); and Internet Service Provider (“ISP”).

However, TRAI has in unambiguous terms noted that to cover all other potential types of discrimination, existing provisions of the above stated license terms should be “*amplified*” to provide restrictions on any form of discrimination in internet access based on content being accessed, the

protocols used or user equipment deployed.

TRAI has defined “*discriminatory treatment*” to include any form of discrimination, restriction or interference in the treatment of content; including practices like blocking, degrading, slowing down or granting preferential speeds or treatment of any content. Also, “*content*” has been defined to include applications.

The recommended/ proposed text in the relevant license(s) prohibits licensees (providing Internet Access Service) from entering into any arrangement, agreement or contract, by whatever name called with any person, natural or legal, that has the effect of discriminatory treatment.

Net neutrality is a principle which tries to encapsulate the idea that the providers of internet access should seek to ensure equal or non-discriminatory treatment to all categories of content, application and services on the internet, subject to the flexibility to carry out reasonable traffic management, which is necessary for delivery of an acceptable level of quality of service.

However, TRAI has also recommended exempting “Specialized Services” and “Content Delivery



Networks (“CDNs”) from the scope of rules on net neutrality.

As per TRAI, “specialized services” are commonly understood to mean services other than Internet Access Services that are optimised for specific content, protocols or user equipment, where the optimisation is necessary in order to meet specific quality of service (“QOS”) requirements.

Examining the position in other jurisdictions on the issue of exemption of “specialised services”; TRAI understands that the EU regulations include health care services like tele-surgery, Voice-over-internet-protocol (“VOIP”) and IPTV services as “specialised services. TRAI also discussed the position under the FCC’s Open Internet Order, 2015.

TRAI recommends that the principle of non-discriminatory treatment by Telecom Service Providers (“TSPs”) should not be interpreted or applied in a manner that could discourage innovations in future or the development of new categories of services.

After stating the above recommendation, TRAI notes that the licence agreement identifies certain categories of services that can be offered by licensed service providers and the same include VOIP and IPTV services. According to TRAI both VOIP and IPTV may qualify as “specialised services” under the recommended definition. Thereby implying non-application of the principle of non-discriminatory treatment to both.

TRAI noted that there was a need for more transparency in the arrangements between TSPs and CDNs; and recommended that the Department of Telecommunications (DoT) may frame regulations to necessitate disclosure and transparency requirements to redress this issue. Finally, TRAI exempted CDNs, which do not use public Internet, from restrictions on non-discriminatory treatment.

Internet of Things (“IoT”), as a class of service are not excluded from the scope of restrictions on

non-discriminatory treatment. However, critical IoT (as may be identified by DoT, which fall within the definition of “specialised services”) would be excluded automatically.

In order to ensure that TSPs are able to manage their networks, TRAI has also allowed TSPs or Internet Access Service Providers to use some traffic management practices (“TMPs”) on their networks to ensure quality of services, preserve security of networks, providing emergency services and for implementing a court order or government direction or international treaty, as long as they are transparent and their impact on users is declared.

For ensuring Transparency, TRAI after analysing the disclosure obligations on TSPs in other jurisdictions as well as in India, has suggested supplementing transparency requirement by framing additional requirements relevant to the non-discriminatory treatment, such as disclosures pertaining to TMPs implemented, impact of such TMPs on user experience etc.

Lastly, in order to establish a robust monitoring and enforcement framework, TRAI has recommended that DoT may create a multi-stakeholder body, a not-for-profit, led by industry, with ISPs, TSPs, large and small content providers, representatives from research and academia, civil society organisations and consumer representatives. The TRAI will recommend terms, conditions and governance structure once this recommendation is accepted (in-principle) by the Government.



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Key Take Away

Major takeaway from recommendations is that it restricts service providers from entering into any arrangement, by whatever name called that has the effect of discriminatory treatment based on content, sender or receiver, protocols or user equipment.

On the other hand, according to TRAI; both VOIP and IPTV may qualify as “specialised services” under the recommended definition. Thereby implying non-application of the principle of non-discriminatory treatment to both.

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