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GSMA Response: Pre-Consultation Paper on Net Neutrality

Dear Mr. Ravi,

The GSMA welcomes the opportunity to provide its views on the TRAI Pre-Consultation Paper on Net Neutrality. We appreciate the Authority's efforts in continuing to engage with multiple stakeholders on the topic of net neutrality.

Our detail response is structured as follows:

A. Policy Framework
B. Traffic Management
C. Principles based approach
D. Need to modernise the regulatory framework

GSMA looks forward to continued dialogue with the government and the regulator on this topic. Please do not hesitate to contact us if you have any questions on the above issues.

Yours Sincerely,

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GSMA Views on the TRAI Pre-Consultation Paper on Net Neutrality
July 2015

A. Policy framework should support investment and innovation in broadband infrastructure and rely on the existing ex post competition law standards to address potential concerns (*Ref Q3)*

Preserving an Open Internet, in the sense of consumers being able to access the content, services and apps of their choice, is an important principle. The GSMA and its members are committed to this principle, but it is also important that operators are allowed the flexibility to differentiate between different types of traffic to ensure that the Internet remains open and functional.

It is also important to note that within a single network, many types of services can co-exist, including internet access services that are delivered on a best effort basis, and other data services that provide assured delivery of certain applications and services. These other data services include Virtual Private Networks, Internet-based Video, machine-to-machine communications and a whole range of innovative services such as remote health monitoring, smart homes and connected vehicles, which require specialised management and treatment as well as a prescribed level of quality of service but which do not interfere with the operation and provision of best effort internet services, as they operate separate and apart from full internet access offerings. Accordingly, operators should be free to offer these other services over their networks through various business models and tie-ups with third parties. **The net neutrality debate is focused on the technical and commercial considerations in relation to internet access services, and not these other services, and our views expressed in this response are from this perspective.**

While there is a broad consensus on the principle of the 'Open Internet', there is a wide variety of views on the role of regulation to maintain the openness of the internet. The success of the internet has been achieved without significant regulatory intervention. Competitive mobile markets and the growth of a broader internet ecosystem offering a variety of content and applications have been major drivers of the growth of the internet ecosystem. The competitive mobile market is delivering, enhancing and expanding the open internet in India.

Some proponents of net neutrality regulation hold the view that in the absence of specific regulations, Telecom Service Providers (TSPs) might act as gatekeepers to the internet and engage in anti-competitive behaviour. But, this call for regulation of internet access, should be carefully assessed by policy makers to avoid unintentionally hindering innovation and investment in broadband networks and digital services. The GSMA notes that the DoT Committee also acknowledged the importance of facilitating investments in affordable and widely available broadband infrastructure and its desire to balance this with the principle of Open Internet.

The view of TSPs as occupying market power and acting as "gatekeepers" is being replaced by a more sophisticated view of the current, complex, multi-sided, internet ecosystem that acknowledges the role of multiple entities (Content Providers, TSPs and device manufacturers) with interdependent relationships. A recent study on the internet value chain published by the GSMA noted that the interdependencies between segments of the value chain are powerful and complex and therefore decisions based on a

narrow view could be seriously flawed, either for a company that may miss broader competitive threats, or for a regulator misjudging the true nature of the competitive dynamics.[1]

The same study found that online services captured nearly half of the global internet ecosystem revenues in 2015, while the proportion of value captured by the connectivity segment (includes TSPs) is declining. Market power should be assessed in light of all the competitive constraints faced by a firm rather than a theory that TSPs enjoy market power over other players, some of whom are powerful platforms, in the internet ecosystem. In fact, some of these online platforms have been subject to competition law investigations in a few jurisdictions. Based on the existing trends and evidence, the GSMA submits that **one cannot conclude, as a general proposition, that TSPs occupy a position of "gatekeeper" in the internet ecosystem**.

The GSMA submits that the competitive landscape has changed considerably and that a more holistic approach to competition policy is necessary, rather than a view that narrowly focuses on theories of harm based on potential conduct of TSPs. In this complex internet landscape, a TSP does not have the ability to exercise unilateral market power and set prices and/or quality independently of other entities in the ecosystem.

Policymakers should also be cautious in using the language of non-discrimination to impose expansive rules on internet access policy. Non-discrimination should nether be simplistically interpreted as equality of bits nor interpreted without objective justification to unnecessarily restrict conduct in the absence of market power.

Moreover, given the overarching national imperative to rollout a ubiquitous broadband infrastructure in India, it is necessary to incentivise continued investments in networks, innovation of services and affordable tariffs for consumers. Policymakers should balance this overarching broadband infrastructure investment need with choices for consumers to access the services they want over the internet infrastructure. As TRAI noted in the previous consultation paper on net neutrality, the primary question is the ability of public authorities to foster effective competition and to address ant-competitive conduct.

The GSMA believes that there is no need for specific ex ante regulation related to net neutrality to achieve the policy objectives and the delicate balance between them. The delicate balancing of encouraging investment, promoting welfare and efficiency benefits and addressing competition concerns is best achieved through competition law standards. Unnecessary regulation, in the absence of market power assessment, could impact the investment incentive and skew the competition dynamics in a complex, multi-sided and dynamic internet ecosystem. Allowing technical and commercial flexibility, whilst relying on ex-post case-by-case assessment under competition law standards, is the right policy approach without rushing to a speculative conclusion that TSPs can act as gatekeepers. The existing legal and regulatory framework provides Indian authorities adequate safeguards to address potential concerns that may arise while still allowing the market and innovation to flourish.

[1] GSMA (2016), *The Internet Value Chain*

B. Traffic management is essential and regulation should not attempt to restrict the flexibility to manage networks and traffic (*Ref Q2)*

Traffic management is an essential network function to meet the performance characteristics of different types of traffic traversing the network and to ensure satisfactory experiences to all users. The strict interpretation of net neutrality that requires treating each bit of data equally ignores the reality of how networks are designed and how consumers use it. Internet Protocol (IP) based networks have been designed to route IP data packets according to their performance characteristics.[2] Packet delivery therefore needs to take into account multiple characteristics - type of traffic, destination of packet, availability of routing options, network propagation environment, etc.

The pre-consultation paper recognises the essentiality of traffic management to protect the quality of consumers' experience. The DoT Committee report also acknowledged a number of circumstances that require traffic management including satisfactory delivery of time-sensitive services, managing contractual agreements, blocking illegal content following a court order, securing and protecting the network and congestion management.

It is therefore important to recognise that traffic management is beneficial to overall consumer welfare and network efficiency and avoid prescribing a limited list of cases where traffic management is deemed reasonable. Traffic management will increase in relevance as more devices get connected and a greater variety of services and applications are delivered over networks of the future. Regulation or restrictive guidelines should not inhibit the development of such innovations in services and network management. Taking away the flexibility to manage networks would be detrimental to the user experience and also make networks costlier to build and operate, in addition to dissuading investment. Limiting operators' ability to make the most of their networks would not only impede the pursuit of expanding broadband infrastructure, but also slow the speed and diminish the quality of customers' connections.

Additionally, enterprise class of customers require tailor-made connectivity standards and should therefore be considered as falling outside the bounds of the net neutrality principles. As mentioned in the introductory section of our response, a variety of data services other than internet access (sometimes referred to as managed services) to consumers are offered over TSP networks. These other data services include connected vehicles, remote surgery, and other M2M systems and enterprise services. These other data services require assured delivery of quality or other performance attribute and are different from "best-effort" internet access and are, therefore, outside the scope of any principles-based framework for traffic management practices. TSPs should be free to offer such services and enter into commercial agreements with consumers and business on the performance attributes and terms and conditions of such services.

Providing operators with flexibility in deploying traffic management measures will help them to manage the growing traffic, secure their networks, deliver satisfactory services and benefit consumers and the

[2] For example, ITU-T REC G1010 recommendation lists examples of different types of traffic (e.g. one-way video, still image, interactive games, e-commerce, etc.) from users' perspectives. Other standards development organisations (e.g. 3GPP) also highlight the different performance requirements of different types of services and applications.

broader Internet ecosystem. Traffic management has not been used anti-competitively by operators in India. The GSMA agrees with the broad approach of the DoT Committee's recommendation on this aspect of the debate – allowing reasonable traffic management practices that are transparent and not anti-competitive. This principle should be equally applicable to all stakeholders in the digital ecosystem and deliberated in the upcoming consultation paper.

C. Principles-based approach rather than ex-ante regulation (*Ref Q1)*

Globally, the Net Neutrality debate and related policy perspectives have evolved over time recognising the complexity of the debate. There is no single "one-size-fits-all" approach. Different countries have adopted different approaches. Whilst some regulators (e.g. the FCC of USA) have decided that specific net neutrality regulation is necessary to protect the open nature of the Internet, many countries, including some that have extensively deliberated this topic, have not enacted specific regulation, deciding that no specific regulation is required. Even those markets that have adopted open internet regulation, have acknowledged the essentiality of technical and commercial flexibility for TSPs and have opted for case-by-case assessment of such practices. For example, TSPs and end-users are free to conclude commercial agreements under the recently adopted Open Internet Regulation of the European Union, unless such practices are assessed on a case-by-case basis to have a material impact on consumer choice.

The competitive mobile market in India is delivering choice, innovation and value-for-money for consumers and therefore there is no case for regulation. A competitive market, rather than ex-ante regulation, is the best way to ensure that the Internet remains a platform for growth and innovation. At this stage, when the technologies, services and commercial models of the internet ecosystem are evolving, the best way to deal with the debate on net neutrality in India is to let the market find balanced solutions to meet consumer expectations.

Competitive markets and competition law provide sufficient safeguards to prevent any anti-competitive behaviour. The existing legal and regulatory framework in India provide authorities adequate safeguards to address potential concerns that may arise. India's Competition Act 2002 provides the legal framework for the enforcement of sector neutral competition law in India and the Competition Commission of India has carried out investigations on potential restrictions of competition. The Competition Commission has been applying section 3 of the Competition Act to alleged anti-competitive agreements that have an *Appreciable Adverse Effect* on competition in India. The Competition Commission considers a number of factors when assessing the effect on competition. **The GSMA submits that in the presence of this ex post framework and in the absence of market power finding or market failure, there is no need for ex ante regulation or rules related to the topic of net neutrality.**

Instead of rigid rules, the GSMA suggests six objectives for a principles-based framework, for further deliberation during the consultation stage that follows this pre-consultation paper, to promote consumers' interests, service innovation and broadband investment in India:

1. Facilitate deployment of broadband services to all citizens

The primary policy objective of the government, as evidenced by the Digital India initiative, is the deployment of broadband service to all corners of the country. Accordingly, policies should be geared towards incentivising investment in building networks and increasing capacity to serve all of India. The core objective of net neutrality principles should be to build the broadband infrastructure and enable the vision of Digital India. Operators should be allowed commercial and regulatory flexibility, allowing decisions to be driven by competitive market forces, offering service packages responsive to consumer desires and demands, rather than rigid guidelines that only hamper innovation.

2. Foster consumer choice:

The foremost focus of this debate should be on ensuring consumer choice rather than restricting choices in the marketplace through strict rules that either prescribe or prohibit certain practices. Consumers should be provided with choices in terms of volumes, throughputs, prices and types of content and applications that they can access to most effectively and directly provide them with the level of service they demand for their individual purposes. Consumers themselves know best what services they desire and what services they need. In the competitive mobile market in India, TSPs will compete to ensure consumers are offered the choices they demand.

3. Permit reasonable traffic management practices:

Most stakeholders, including the TRAI (in its consultation paper) and the DoT Committee (in its report), acknowledge the essentiality of traffic management. The types of services delivered over the network and the sophistication of traffic management will evolve as networks and services become more complex. TSPs should be provided with the flexibility to manage their networks and differentiate between different types of traffic. Reasonable traffic management practices should be permitted while encouraging transparency (see below #5) and applying consistent standards across the entire internet / digital ecosystem.

4. **Allow variety of commercial propositions**:

Differential pricing is necessary for encouraging the deployment of innovative services, efficiently allocating network resources to meet consumer preferences and creating more opportunities for low-income consumers to access services offered over the internet. Commercial flexibility is indispensable to addressing the needs of different types of customers and to offer them greatest value for money as per their choices. TSPs should be allowed to offer differentiated products (e.g., application specific packs) that combine different price, throughput, inclusive data allowance and bundled content. Further, TSPs should be allowed to charge differentially for the specialized services and to explore various business models.

5. Encourage transparency:

Consumer understanding of the internet ecosystem to help them in deciding the choice could be enhanced by providing meaningful information on their internet access service, applications and content. In recognition of the complexity of information and the diverse consumer needs, communicate the necessary

information is communicated. The policy makers may wish, in consultation with all parties, to set general transparency objectives. It is also important that these objectives apply equally across the entire internet value chain.

6. Follow competition law standards:

Given the complexity and dynamism of the internet ecosystem and the variety of network technical requirements and commercial models to meet that needs of this ecosystem, the use of ex post, case-by-case assessment under competition law standards seems far more preferable to "one size fits all" ex ante regulation. The Competition Act of India already provides the framework for addressing appreciable adverse effects on competition. Theories of harm that might rise from potential anti-competitive practices can be dealt with under this framework without the need for any specific regulation or guidelines.

D. <u>The regulatory framework should be modernised to level the regulatory playing field (*Ref Q4-6)*</u>

Investments and innovations in mobile technologies, networks and services are driving usage of IP-based services. This has seen the entry of new types of Internet-based service providers, also referred to as OTTs, offering a variety of services over TSP-provided connectivity. Despite the shift in the competitive landscape as a result of OTT services, the existing regulatory framework is still too focused on TSPs. While operators are subject to a number of regulatory and public policy obligations--facing compliance obligations regarding payment of regulatory fees, access to public emergency services, publishing tariff plans and network information, network security measures, quality of service obligations, providing interception assistance to law enforcement and maintaining personal data confidentiality—OTTs have greater regulatory flexibility. Operators should have the same flexibility as other players in the broader Internet ecosystem.

The new digital ecosystem requires a fresh review of the regulatory landscape facing mobile operators. The TRAI should endeavour to achieve competitive neutrality of the regulatory framework through the application of the "same, service, same rule" principle. TSPs should be afforded the same opportunities to innovate as OTTs, under a light-touch, proportionate, technology-agnostic approach.

The GSMA recommends consideration of the impacts of the new competitive landscape and modernisation of the regulatory framework in the authorities' review of the regulations imposed upon TSPs, eliminating all unnecessary rules or rules that do more harm than good by limiting innovation and discouraging investment. In considering modernisation of the regulatory framework the GSMA put forwards the following general principles for a new regulatory framework:[3]

1. Regulations should be based on the "same service, same rule" principles, focusing on functionality rather than on legacy industry structure or technology and applied across the ecosystem using the same principles so that the greatest benefit is attained at the lowest cost.

[3] GSMA (2016), *A New Regulatory Framework for the Digital Ecosystem*

2. A dynamic and flexible model of regulation that focuses on performance standards is better suited to the fast pace of technological and market innovation. Performance-based and ex post approaches should be preferred over prescriptive regulations.
3. Recognise that many legacy regulatory structures are outdated and take a bottom-up approach by assessing both current and potential new regulations and regulating only when it can be demonstrated that benefits will exceed costs.

In relation to the specific subject areas raised in the pre-consultation paper, the GSMA notes that the ability to collect, store, transmit and use data is an important component of economic and social value created in the digital ecosystem. This raises policy questions in relation to consumer privacy, data protection and national security as identified in the consultation paper. There are legacy regulations that set objectives for these topics with TSPs being subject to sector-specific obligations. Such sector-specific rules lead to discriminatory regulation that slow innovation and competition. A new framework should not only ensure equal obligations on all competitors, but also provides consumers with an acceptable baseline level of protection that is proportionate and fit-for-purpose.

Additionally, the GSMA encourages the TRAI to allow operators and OTT service providers to negotiate between themselves without regulatory interference to innovative commercial relationships for new offerings to consumers. As the GSMA lays out in its response to the recent Free Data consultation paper, a flexible, market-led model will produce the combination of products and service offerings most appealing to consumers. Furthermore, provisioning different services and offering multiple commercial propositions will encourage operators to invest in their networks and expand and improve Internet access to consumers and enterprises.

Following the approach of the general principles outlined above, **the GSMA requests a bottom-up review be conducted based on a technology and business model agnostic approach to regulation in these areas. The new regulatory framework should adopt a functionality based approach and policy should move toward horizontal rules instead of sector-specific regulation.** This acknowledgement of the regulatory asymmetries is a positive starting point and we hope to engage with the policymakers as they develop proposals to modernise the regulatory framework.

GSMA looks forward to continued dialogue with the government and the regulator on this topic.

For further information, please contact:

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