February 13, 2020

New Delhi

To

1. Shri R.S. Sharma
Chairman
Telecom Regulatory Authority of India (TRAI)
New Delhi

2. Shri Asit Kadayan
Advisor (QoS)
Telecom Regulatory Authority of India (TRAI)
New Delhi

Re: Response to Consultation Paper on Traffic Management Practices (TMPs) and Multi-Stakeholder Body for Net Neutrality.

Dear Sir

Koan Advisory Group ("Koan") is a New Delhi-based policy advisory firm. Our team combines thorough domain knowledge across multiple sectors with continuous engagement of decision makers across industry and government. We specialise in policy and regulatory analysis in both traditional and emergent sectors and markets, with the aim of identifying optimal frameworks that maximise societal welfare.

We would like to express our appreciation and gratitude for the opportunity to participate in this public consultation. We strongly believe that policy decisions that impact a wide range of interest groups require the active participation of the same and commend the Telecom Regulatory Authority of India (TRAI)'s commitment to this principle. Net neutrality is essential to ensure that the character of the internet as an open, empowering and democratic medium is preserved. India's adoption of net neutrality rules in 2018 has been appreciated by experts and activists around the world, and the creation of an efficient and principle-based framework for the enforcement of the same would further India's thought leadership in this arena.

The following sections seek to provide specific responses to inform TRAI and stakeholders of key concepts for future discussions concerning monitoring and enforcement of net neutrality principles.

ISSUES

Q. 1. What are the broad types of practices currently deployed by the Access Providers (APs) to manage traffic? Out of these practices, which ones can be considered as reasonable from perspective of Net Neutrality? Whether list of Traffic Management Practises (TMPs) can be prepared in advance or it would be required to update it from time to time? If later is yes, then what framework would be required to be established by Multi-Stakeholder Body to keep it up to date? Please suggest with justification.

As stated in the consultation paper itself, the identification of reasonable TMPs is a complex issue that is accompanied by technical and measurement related challenges. Given the dynamic nature of

technology and ICT networks, any identification of TMPs must account for the potential for growth and change in technical best practices in the future. Hence, a list prepared in advance would be ill advised as this would not be able to keep up with changes and developments in technology. Therefore, it is submitted that such a list be a dynamic one which may be updated from time to time. This will give ISPs flexibility in coming up with efficient TMPs that meet the legitimate needs of traffic management without violating net neutrality principles.

It is further submitted that instead of a positive list of reasonable TMPs, TRAI consider the utility of a negative list that enumerates prohibited practices to be avoided by access providers. This has the advantage of tailoring restrictions in a narrow manner focusing on TMPs that violate net neutrality principles. Instead of waiting for particular TMPs to be approved, it would be a more efficient system where prohibited TMPs that result in blocking, throttling and paid prioritization in violation of net neutrality principles are enumerated. This will enable ISPs to identify and avoid TMPs that violate net neutrality.

Multi-stakeholder involvement in the creation and subsequent maintenance of such a list would be beneficial as this would ensure representation of various interests i.e. industry, academia, consumer organisations etc. Within the multi-stakeholder framework, access providers should be encouraged to make periodic and transparent disclosures with regard to the TMPs deployed by them. Such disclosures should be accessible to the wider stakeholder group as well as to the public at large. The access providers may be required to demonstrate how a particular TMP is not in violation of net neutrality principles and is not therefore a prohibited form of TMP.

Q. 2. Whether impact of TMPs on consumer's experience can be interpreted from its name and short description about it or detailed technical description would be required to interpret it in objective and unambiguous manner? In case of detail technical description, what framework need to be adopted by Multi Stakeholder Body to document it. Please suggest with justification.

In reporting the impact of TMPs on consumer experience, it would be advisable to do so through simplified, brief and objective description in plain language. This will bring transparency and enable primary scrutiny by laymen. A detailed technical description can also be made available to the public subsequently for detailed understanding.

As submitted above, creating a negative list of prohibited TMPs would solve for this issue as well. It would be more efficient that describing every single permitted practice which are likely to be greater in number, as it would instead identify all restricted practices and allow those which do not fall within these.

Q. 3. What set up need to be established to detect violations of Net Neutrality, whether it should be crowd source based, sample field measurements, probe based, audit of processes carried out by access providers or combination of above? How to avoid false positives and false negative while collecting samples and interpreting Net Neutrality violations? Please suggest with justification

Regulators may use crowdsourcing of consumer complaints in conjunction with data analytics to identify such TMPs in violation of principles and create a list of prohibited TMPs on this basis. TMPs which are not part of this list may be allowed, subject to periodical update of the list as mentioned above.

TRAI could consider adopting or developing applications that detect violation of net neutrality. For example, researchers from Northeastern University and the University of Massachusetts Amherst in the USA have developed a mobile app, known as Wehe, which informs users if their network providers

are giving differing levels of quality of service (QoS) to different apps on their phones. This enables users to see if a provider is throttling based on specific content, and empowers users to be aware of net neutrality violations that they otherwise might not be able to detect, and can serve as an effective and efficient reporting tool.

Q. 4. What should be the composition, functions, roles and responsibilities of Multi-stakeholder Body considering the decision of DoT that Multi stakeholder body shall have an advisory role and formulation of TMPs and Monitoring & Enforcement (M&E) rest with DoT? Please suggest with justification.

Composition – The consultation paper proposes two broad categories of members constituting the MSB –

a. Members from the industry who are directly responsible for upholding net neutrality principles and whose services are directly impacted due to its violation i.e. telecom service providers, internet service providers and content providers.
b. Other stakeholders of the internet ecosystem who are representatives of last mile customers i.e. civil society, consumer representatives and representatives from the academic community.

Categorizing or defining stakeholders in definite terms risks exclusion of certain players in the value chain who may have a bona fide interest in the subject but may not fall under precise descriptions. Illustratviely, such players include stakeholders such as communication platforms like Viber, Skype etc. who form part of the application layer.

The paper also fails to factor evolving concepts like device neutrality[1] and excludes device manufacturers from the list of identified stakeholders. The extant policy concern around net neutrality has been the regulation of gatekeeping functions internet access providers assume given their termination bottleneck. However, comparable gatekeepers also exist at different points across the internet value chain. Regulators across different jurisdictions, for example France's ARCEP, argue that the devices on which services and content are accessed, along with their associated mobile operating systems, are the remaining weak link in ensuring an open internet.

The concept of device neutrality is still a grey area and lack of clarity around it has raised concerns around net neutrality violations in India. In August 2017, net neutrality concerns were raised around Reliance Jio's 4G featurephone – JioPhone. Operating on a custom operating system – KaiOS, JioPhone creates a walled garden with its own suite of apps and services, not allowing competing apps to be downloaded on the phone. Thus, in the interest of keeping pace with the fast-changing regulatory environment vis-à-vis open internet, it is desirable to recognize and engage with device manufacturers as relevant stakeholders.

In the light of the above, it would be desirable that instead of concrete definitions or categorizations, stakeholder identification must be approached in a broad manner. It must allow entities with legitimate, bona fide interest to uphold the openness of internet by being a part of the proposed MSB.

Functions – At the outset, it is pertinent to point out that the consultation paper prioritises the structure and composition of the MSB without clearly determining its functions. Such a body will only have partial visibility of its objectives and lack the agility to keep pace with the fast-changing internet

[1] https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018-ENG.pdf

ecosystem. **It would thus be desirable to clearly define the functions of the proposed MSB before determining its composition and structure.**

The Multi-stakeholder Body (MSB) as envisaged under TRAI recommendations on net neutrality, was to be tasked with the dual responsibility of a. developing technical standards for monitoring of TMPs and b. enforcing the principles of non-discriminatory treatment. However, DoT's directives on net neutrality dated 31.07.2018 diluted the scope of the MSB, limiting it to an advisory body. The present consultation paper fails to specify the scope of its advisory function. For example, there is no clarity on whether the advice of the MSB will be binding or non-binding.

In this context, it is pertinent to mention that advisory functions have been better utilised to provide clarity, guidance, and predictability concerning the rules governing net neutrality in other jurisdictions. For example, Federal Communication Commission's Open Internet Order of 2015 provided for ex-ante advisory opinions similar to US Department of Justice Antitrust Division's business review procedure[2] allowing businesses to seek guidance on the propriety of certain practices before implementing them, enabling them to be proactive about compliance and avoid enforcement actions later.

Such an advisory function is not unfounded in Indian context. Securities and Exchange Board of India's (SEBI) *Securities and Exchange Board of India (Informal Guidance) Scheme, 2003* functions on the same underlying principle.

Further, while listing down the possible functions of the MSB, the paper goes beyond advisory mandate and includes the following additional functions –

- Prepare report and submit to DoT after capturing representations from all sections of the members of multi-stakeholder body and performing requisite monitoring and investigation in this regard.
- Perform evidence-based investigations with reference to cases forwarded by DoT related to concerns against net neutrality violation and submit report to DoT.
- Take measures to make its actions and functions transparent.
- Help DoT in handling complaints received from consumers.
- Help DoT in compilation of reasonable Traffic Management Practices adopted by TSPs with description.
- Recommending standards for technical and operational procedures for monitoring and enforcement of net neutrality.
- Consumer awareness regarding net neutrality, transparency measures of TSPs and DoT and process for raising concerns with DoT.

Even a cursory glance at the proposed functions highlights lack of coherence as the body is expected to perform functions ranging from evidence-based investigation into net neutrality violations to handling consumer disputes. Moreover, most of these functions are already being exercised by existing statutory bodies and would thus amount to duplication of efforts. For example, consumer disputes and consumer awareness fall within the ambit of The Consumer Protection Act. Assigning similar functions to the proposed MSB would lead to ambiguity, thus crippling its enforcement.

Therefore, it is advisable that the ambit of the proposed MSB's functions must be limited to the realm of network neutrality and not go beyond it. The MSB may take upon the additional role of

[2] The Antitrust Division of the Department of Justice ("DOJ") has a process that allows organizations to seek written opinions from the agency on whether proposed conduct will violate the antitrust laws. It provides a mechanism for organizations to request that DOJ review, from an antitrust perspective, a proposed joint venture or other conduct, and receive a response from DOJ on how the agency "may respond" should the proposed activity take place.

monitoring and investigation but should refrain from assuming functions which are already assigned to other bodies.

Q. 5. Whether entry fee, recurring fee etc. for membership need to be uniform for all members or these may be on the basis of different type or category of membership? What may be these categories? What policy may be adopted for initial set up of Multi-stakeholder Body. Please suggest with justification.

As a not for profit body, the body may collect fees (entry and recurring) from its members to meet its operational expenses. The fees should cover the actual expense of the industry body and its annual accounts can be used for determination of the same. TRAI should maintain a light touch approach and leave the determination of fees to the MSB.

With regards to the initial set-up, it would be advisable that DoT initiates the creation of the MSB through a notification. Given the lack of statutory authority, a government notification will provide legitimacy and legal basis to the MSB. Examples of a similar approach can be found in other jurisdictions. For example, the Brazilian Internet Steering Committee was created through an inter-ministerial ordinance.

Q. 7. What should be the guiding principles and structure of governance of Multi-stakeholder Body? What may be the roles and responsibilities of persons at different positions such as chairing the organisation or working groups, governing the functioning, steering the work etc. Please suggest with justification.

The paper relies heavily on multi-stakeholder bodies functioning across other jurisdictions, particularly the Brazilian Internet Steering Committee (BISC) and United Kingdom's (UK) Broadband Stakeholder Group (BSG), in suggesting the possible governance mechanism of the proposed MSB. In its previous recommendations, TRAI suggested adoption of a self-regulatory framework. However, both BISC as well as BSG are co-regulated bodies with government involvement in varying degrees. For example, out of 21 members of the BISC, nine are government representatives. Similarly, BSG is partly funded by the UK government.

It is important to analyse each body in its own, unique context. BISC, while being a pioneer in multi-stakeholder internet governance, is replete with deficiencies like lack of transparency tools for elected counsellors which allows them to serve their own interests. Moreover, Brazil has had a participatory governance culture even before the creation of international bodies with similar political organization such as ICANN. To mention two examples, the country pioneered participatory budgeting initiatives and is acclaimed for its public health system integration with forums of social participation. Before the creation of a specific organization to deal with Internet issues, the Internet in the country was already ordered in a multi-stakeholder way. On the contrary, Indian experiment with multi-stakeholder governance is recent and has its own challenges.

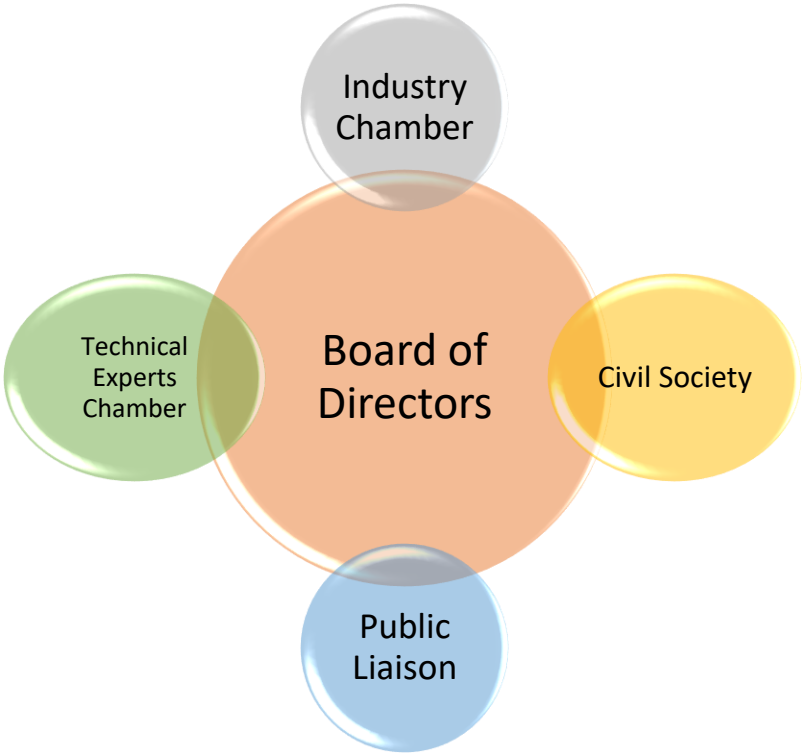
In the realm of internet governance, India's preference for multi-stakeholder governance instead of a multi-lateral approach was established only in June 2015. While there are examples where the multi-stakeholder approach was put in motion, like public consultations around net neutrality, there also exist instances where multi-stakeholder processes were carried out in initial stages but remained opaque and non-inclusive during later stages, like in the case of Personal Data Protection Bill. Excessive government control also remains a pressing issue in the process of developing an Indian approach to multi-stakeholder governance. In this regard, the unilateralism of government action vis-à-vis internet shutdown is a prime example.

Thus, developing an MSB tailor-made for Indian context would require developing processes which counterbalance excessive government influence. This can be done by facilitating widest possible participation from interested stakeholders while also ensuring government acquiescence of its expertise and recommendations.

Governance Structure –

The governance structure followed by the Internet Corporation for Assigned Names and Number (ICANN) may serve as a model framework. While the ICANN Board of Directors has the ultimate authority to approve or reject policy recommendations, Supporting Organizations (SOs) are responsible for developing and making policy recommendations to the Board. Advisory Committees (ACs) advise the ICANN Board and, in certain cases, can raise issues for policy development. The Board is also assisted by various other smaller committees including an 'At-large Advisory Committee' which comprises of internet users across the world.

Based on the above, the broader governance structure of the proposed MSB should resemble the following –



The proposed MSB may comprise of a Board of Directors, which in turn comprises of members from four different chambers – an industry chamber, a civil society chamber, a technical experts chamber as well as a public liaison wing, in a manner described below –

a. **Board of Directors –** The Board of Directors will be the decision-making body which will directly interface with DoT. The members of the board should be odd in number to prevent deadlock in decision making. It will comprise of nominated members from the four chambers described above.

b. **Industry chamber –** The Industry chamber will comprise of members from telecom service providers, internet service providers, OTT platforms, content providers, device manufacturers and any other member which the chamber may want to include.

c. **Civil Society chamber –** The civil society chamber will consist of members from consumer groups, academia, civil rights groups and Non-Governmental Organizations with a proven track record in working around issues concerning internet governance.

d. **Technical Experts' chamber –** This chamber will comprise of independent experts from disciplines concerning the physical functioning of the internet like network architecture, telecommunication engineering etc.

e. **Public Liaison –** The public liaison chamber will represent the voice of the average internet user. The chamber may follow existing public consultation models functioning across different jurisdictions like the Dynamic Coalition on Net Neutrality and Kenya's Kenya ICT Action Network (KICTAnet).

Nomination to the Board – The four chambers i.e. – industry, civil society, technical experts and public liaison should nominate their representatives to the Board annually, through a fair and equitable nomination process. In the interest of widest possible representation, the nominations should be cyclical i.e. a member who has been nominated once, should not be re-nominated till the time every participating entity has had representation on the board at least once.

Decision making process – Representatives from the industry, civil society as well as technical experts' chambers will have voting rights while the public liaison will be a non-voting member. Each member will have a single, non-transferable vote. While the Board must strive for unanimity in decision making, a two-third majority should be required to pass a resolution.