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Our Ref: VNOAI/REG/TRAI-Cp/

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The Advisor

Networks, Spectrum and Licensing (NSL)

Telecom Authority of India

Doorsanchar Bhawan, Old Minto Road,New Delhi-110001

Sub: VNOAI- Comments on consultation paper on reforming the guidelines for transfer/ Merger of Telecom License dated 19th September'2019.

Dear Sir,

We are thankful for considering the role of MVNO's/VNO's in the consultation paper for the reforms in the existing M&A policy by TRAI on the basis of the reference received from DOT. In the consultation paper it is proposed to relook into the existing M&A Guidelines issued by DOT in 2014._TRAI has put up set of questions for the comments of the stake holders in the consultation paper.

On behalf of all the VNOs/MVNOs in India VNOAI is submitting herewith suitable reply for the relevant question as per attached annexure sheets with case studies and Global practices wherein the regulators have intervened and mandated the MNOs to provide capacities to the VNOs/MVNOs.

Best Regards

For Virtual Network Operators Association

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VNO Association of India

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Reply of Virtual Operators Association of India(VNOAI) on the Consultation paper issued by TRAI on "Reforming the Guidelines for Transfer/Merger of Telecomm Licenses" Dated 19th September'2019.

Qustion-2 of the consultation paper.

"Whether mandatory access to MVNOs should be provided in the DOT M&A Guidelines to address the competition concerns? If yes ,in which cases the access should be mandated and what should be the guiding principles for provision of wholesale access to MVNOs? If no, kindly provide justification."

VNOAI-Reply: In reply to the above **Question No-2** of the consultation paper following is the detailed reply from VNOAI with Case studies and best Global Practices being practiced Globally as detailed below:

i) Current Telecomm Market Scenario in India VNOAI prospective:

Please refer to the recent M&A activity happened in India thereby reducing the Telecomm market of 11 players in 2011 to 3+1 players market (Three private operators plus one PSU). The telecom especially mobile market in India is mature enough that the regulator and licensor need to give a serious thought on the current reduction of competition in the telecom market due to which choice available to the customer is very limited. There are chances of cartelization by the players to exploit their dominance thus limiting the choice available to the customers. The consultation paper issued by TRAI is at right time and need urgent examination of the market scenario based upon the recent M&A activity happened in India in the Telecomm sector and the interest of the customers are to be taken care by the regulators so that the customers have the choice for subscribing the services and products and the monopoly scenario in India is not exploited by the Telecomm operators.

In the above-mentioned circumstance Mobile Virtual Network Operator (MVNO/VNO) has to play prominent role in the Indian Telecom Market. Therefore, refer TRAI recommendations dated 1st May,2015 for introducing Virtual network Operators in

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Telecom sector wherein TRAI had envisaged that introduction of VNO's will ensure to maintain the level of competition for the benefit of end customers. In the recommendations TRAI had the visualized that the mature Indian telecom market was ripe for entry of VNOs for providing differentiated, value added and customized services for which competition was practically non-existent.

ii) Introduction of UL-VNOs Licensing Guidelines by DOT in India on 31st May'2016

On the basis of TRAI recommendation in 2015 DOT issued UL-VNO Licensing Guidelines vide No.800-23/2011-VAS(VOLII) vide dated 31st May,2016 for Grant of UL-VNO (Virtual Network Operators) License. It was a visionary step initiated by DOT and it was hoped that new players will enter the Indian Telecom market and provide suitable choice to the end consumers by providing differentiated, value added and customized services for which competition is practically non-existent. It was also opinioned that VNOs are likely to invest in less competitive areas (like 'C' class towns / villages) where NSOs have not ventured. This will increase the rural tele-density and broadband penetration in such areas.

iii) Status of New UL-VNO Licenses issued by DOT in May'2017

In 2017 some of the entities acquired UL-VNO licenses in Access service, ISP service, NLD and ILD services and DoT issued a few of licenses in these authorizations. It is a fact that UL-VNO licenses in ISP, ILD and NLD authorizations are working perfectively. However, in the case of Access service which involves resale of MOU's by MNOs to VNOs for Mobile services to serve the niche market in India.

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iv) Currently in India the absence of any mandate to MNOs the VNOs do not get access to MNO-Networks and it is show stpper for the VNOs to start the services.

After the recent consolidation of Indian market to 3+1 scenario the VNOs which has taken Access service license in all the service areas having Global experience in Europe, USA, Australia could not start the Mobile services as the existing private TSP's were not interested to provide access to their Networks and only the government operator agreed to provide access to VNO. But the government operator has got many limitations of spectrum and technical network related issues inorder to enable start of Mobile VNO services. Thus the said VNO having invested heavily in acquiring UL-VNO licenses in 2017 and incurring heavy losses to retain the licenses as it has to pay the presumptive license fee without earning any revenue.

v) Need of Intervention by the Licensor and Regulator

In these circumstances there is urgent need for intervention on the part of Licensor and Regulator for mandating the existing MNO's to provide access to the VNO's in the Mobile Access Services. In India entry of VNOs will definitely going to provide new innovative services, value added services and customized services for end consumers and act as a catalyst in the overall telecomm market. Globally MVNOs are doing exceptionally well and directly benefiting to the end consumers. In the forthcoming paras further details pertaining to different case scenarios in different Global geographies where Regulators have intervened in the interest of sustaining the competition in the telecom market. We just enumerate the Global Case study scenarios where the regulators and Licensors had to intervene in order to protect the interest of the end consumers and maintain the sufficient competition in the market.

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CASE STUDIES:

Some of the Global Case studies where MNOs are mandated to share the capacities with MVNOs are described below:-

a) Advantages that MNO could have by giving access to MVNO's:

1. By selling the network capacity to one or several MVNO's can bring new subscribers and traffic into the network hereby broadening the customer base of incumbent operators at zero cost of acquisition.

2. Selling of the capacity is also an efficient way to share the network costs. MNO's rather than resisting the whole sale market if they embrace the whole sale market by leasing out their IT service. This certainly supports retailers (MVNO's) but retailers' brand can take them to where MNO's themselves can't go. It is also not uncommon for the operator to take a stake in the MVNO – examples include Virgin Mobile's original deal with Mercury One2One and Tesco's 50:50 joint venture with O2 in the UK. Further, MVNOs may bring ready-made retail distribution networks (e.g. Virgin mega stores) and online channels and the ability to leverage experience and customers from other businesses. If the MVNO is providing a mobile service integrated with a mobile content portal, the partner may bring valuable content, such as music or other VAS services and provide connectivity in the areas where the MNOs have not ventured.

b) Concerns of some of MNOs:

On the other hand, MNOs have concerns as well, because by creating a new player in the shape of MVNO their position is threatened. As this will give birth to competition due to which they will lose control over the market. Therefore, many existing network operators still view the entire MVNO concept as a considerable threat. **Omnitel Pronto Italia,** for one, takes the position that: "MVNOs' presence in the market would generate enormous disincentives for infrastructure investments by mobile operators. Such mobile operators normally take on substantial upfront risk when choosing to invest massively in technologically advanced infrastructure and consequently have a reasonable expectation of having a return on capital commensurate with risk. It can be said, that the situation is

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kind of paradoxical: MNO's securing their own interests by not letting MVNO's in, unless they are certain that the MVNO in question will not enjoy significant success. MNO's thus find the 'Comfort Zone' the most beneficial and profitable amount of network capacity contracts. However, while searching for this comfort zone MNO's should keep in view the pricing, customer structure, services and the business strategy of the MVNO as well. Nevertheless an issue that arises is that would it be possible that the MNO's will take into consideration MVNOs interests while having negotiation for setting up a commercial agreement. An alternative mechanism to set the balance between both the parties (MVNOs & MNOs) could be through regulatory intervention. This has been discussed in depth below while taking into consideration examples of different jurisdictions as to how they managed to tackle and resolve these issues.

c) Regulatory supports for MVNOs in order to increase competition in the market:

Regulatory bodies are striving to increase competition in the telecommunication sector by mandating opening up of systems and access to networks. However, unlike so many other areas of telecommunications, MVNOs have come about without encouragement or interaction from regulators. It was in Scandinavia, however, that the first real steps towards launching an MVNO were taken in 1997 by the Sense Communication called Net system International. Sense planned to offer integrated fixed and mobile telephony products, under its own brand, using third parties' networks. Sense established an MVNO agreement with Sonera in Finland, but its initial attempts to make similar arrangements in Sweden, Denmark and Norway failed. Neither company was successful in establishing their setup. *The reason why they failed was lack of any regulatory provision that could have helped establishing an agreement with MNOs.* Sense then tried to exploit EU regulatory provisions that require networks with significant market power (SMP) to grant new networks direct interconnection. In Sweden, the regulator supported Sense's position, but did not have power to force Telia to enter into an MVNO arrangement. In Denmark, the regulator determined that Sense was not itself a network operator and hence had no rights to interconnect. Sense was in the process of appealing against this decision when it ran out of funds. Later backed with funds Sense launched its business as a service provider instead of MVNO.

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After the failure of Sense communications discussion started as to what should be the approach. Whether there should be any regulatory intervention to help develop MVNO's or the other way around. Some argued in favour and some against. Both views are discussed below:

d) Proponents of regulatory intervention:

Those in favor of regulation argue that mandatory access through regulatory intervention is necessary because MNOs do not allow access on commercial terms and merely try to *sustain supernormal oligopoly profits, reduce consumer choice to keep their customers, and hinder consumers to access competing mobile portals.* They argue that the mobile network operators control the available radio spectrum, which is a bottleneck facility and an entry barrier for new mobile network operators. Also, mobile network operators are less likely to provide MVNO access unless it is a regulatory requirement. They maintain that regulation of the mobile market is failing, which is another reason why MVNO regulation maybe a good idea. Mobile operators have very high profit margins of per cent, in some cases significantly over costs. Current regulation, as interpreted by some national regulatory authorities, already gives them the power to enforce an access obligation on existing operators. Proponents of regulatory intervention stress that an increase in competition between networks will lead to improvements in service quality.

e) Opponents of regulatory intervention:

Those against regulatory intervention base their arguments on the fact that the benefits of MVNOs are as yet unproven, and that there is inadequate evidence that market failure has occurred. The mobile market is competitive by nature and therefore does not require regulation. There is no industry consensus that MVNO access is necessary, and the bleak possibility that MVNO's could even discourage investment in mobile networks (both 2G,3G and 4G). They argue that given that MVNOs have emerged without regulation, any change may adversely affect this market. Keeping in view above mentioned different approaches towards regulatory intervention steps have been taken differently at different levels.

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<u>Though there are no direct regulations however the most relevant regulations at EU level are set forth.</u>

f) <u>In EU Telecomm is considered as essential facility and therefore mandated MNOs to provision capacities for MVNO to avoid anticompetitive actions:</u>

In the telecommunications sector there are at least two types of relevant product markets: that of services to be provided to end users, and that of access to those facilities that are needed to provide the services in question to the customers. To provide services in the communications market, an undertaking may need to obtain access to various Essential facilities. And devoid of the access to those facilities it is not achievable for especially new and keen players to enter the market. To make it feasible for the potential entrants into the communications market to get access to such Essential facilities from the incumbents EC treaty plus EU regulations provided such provisions that prohibited any anti-competition actions.

g) <u>Mandate by EU to MNOs helped communication industry to flourish</u>:

Such regulations made at EU level to help facilitate communication industry to flourish, brought many incentives to new entrants in the market. *<u>The main idea under which these regulations were based upon is to evolve competition in the market. All the regulations spin around this theme.</u>* For the reason that competition has many advantages e.g. when new players enter the market, they utilize all their efforts to make their position in the hearts of the consumer. This can only be possible by decreasing prices in addition providing value added services as much as they could. As a result, the incumbents automatically cut down their prices and try to come up with new innovations to keep their place in the market. Through this rivalry of both new and incumbent's competition develops and via which market environment prospers.

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Recent communication directives issued by European Union have especially enabled the business opportunities for MVNO's. The most significant directives are presented as follows:

A) Access Directive issued by EU:

The division of telecommunications operators to network operators and service operators is based on the EU legislation. The main focus of telecommunications regulation (including fixed and Mobile telecommunications networks) is to obligate network operators to give access to facilities and/or services from their networks to another undertaking at a fair price. ***Under Article 2 of EU "Access Directive"*** Access includes : "access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop), access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems, access to number translation or systems offering equivalent functionality, access to fixed and mobile networks, in particular for roaming, access to conditional access systems for digital television services; access to virtual network services". There are clear implications for MVNOs here, if MNO's core network assets are deemed to be 'essential' and the presence of MVNOs is considered a requirement of a competitive market.

To know what this term essential facility stands for and how the facilities that MVNOs require could possibly are 'essential' is discussed in length below.

B) What essential facilities stand for under Access Directive?

Originally the term "facilities" or more commonly known as essential facilities was used in the commentary on United States antitrust case law (United States v. Terminal Railroad Association), however now it has multiple meanings and has been applied to justify imposing an obligation on a dominant players to share its assets with its competitors.

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C) An Essential facility Doctrine (EFD):

Now an essential facility is recognized as a doctrine and applied quite often in numerous sectors. An **"essential facilities doctrine" (EFD)** stipulates where the owner(s) of an **"essential"** or **"bottleneck"** facility is obligated to provide access to that facility at a "reasonable" price. This can be illustrated by an example; a railroad made available on "reasonable" terms to a rival rail company or an electricity transmission grid to a rival electricity generator. In MCI, The plaintiff providing long distance telephone service alleged that AT&T obstructed its connection to local exchanges; the Seventh Circuit held that a monopolist must, when feasible, make its essential facility available to a competitor who is unable to duplicate it.

In the concept of **"essential facilities"** two markets are necessary and they are often expressed as "**upstream market**" and a "***downstream market***" such as manufacture and distribution. Normally, one firm is active in both markets i.e. upstream and downstream and other firms are active or wish to become active in the downstream market. A downstream competitor wishes to get access to an input from the integrated firm, but is refused. *An EFD defines those conditions under which the integrated firm will be obligated to give access to such essential facilities.*

D) Refusal to Grant access is hindrance to competition

A refusal to grant access may have the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. The unfair competitive advantage that the control over an essential facility may give to a competitor is the rational for the limitation of the principle of freedom of contract i.e. it is an exception to the broad general rule that allows firms to deal with whom they choose. The rational for this heavy interference with the basic freedom to contract is that, in the case of an essential facility the dominant firm is able to maintain its dominance not because of higher efficiency, but rather because of externalities which make the duplication of that facility economically impossible for the firm's rivals.

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E) MVNO Model to avoid oligopoly

If we look at MVNO model closely it appears quite clear that all these aforementioned requisites are present in it. Spectrum is a scarce utility and cannot be owned by more than exceptionally five operators. This demonstrates that it is a situation if left untouched give rise to oligopoly. And access directive spirit is to end the monopoly of few from the market by mandating access to undertakings by the incumbents. Furthermore it is not a new concept applied in telecommunication sector. It is well settled that access to potential essential facilities in telecom sector include: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to the facilities and services necessary to provide services over the local loop), access to physical infrastructure including building, ducts and masts, access to relevant software systems including operational support systems, access to number translation or systems offering equivalent functionality. If access to all these facilities is obligated on the basis that it will evolve competition in the market than why not access to spectrum and related facilities to MVNOs. Because no doubt they will bring competition in the mobile market which is otherwise not possible.

F) Framework Directive in EU:

The regulatory term **'significant market power' (SMP)** is used to describe an operator having a remarkable market share of a certain type of a service. Network operators having SMP must provide fair access to their networks. Furthermore, they are obliged to provide the financial information of transmission services to the regulator so that the fairness of their network tariffs can be estimated.

G) Universal Service Directive (Mobile Number Portability) EU:

There is another EU directive which is worth mentioning **'Universal Service Directive'**. Though there are many positive dominos of USD but as regards MVNOs concern Article 30 is crucial. Under this article all subscribers of publicly available telephone services, including mobile services, who so request can retain their number(s) independently of the undertaking providing the service.

H) Provide Competition in the Market EU Directive:

In 2003, the European Commission issued a recommendation to national telecom regulators (NRAs) to examine the competitiveness of the market for wholesale access and call origination on public mobile telephone networks. The study resulted in new legislation from NRAs in countries like Ireland and France that forces operators to open up their network to MVNOs.

The purpose of these regulatory actions has been to increase competition in the mobile communications business field and thus accelerate the development of new services and technical innovations. MVNOs are favored by regulators because they promote this goal. To make the mobile communications market easier to access, national regulators can impose incumbent operators to lower the barriers to enter the market. Examples of these acts are mobile number portability (MNP) and price regulation of interconnection and termination fees. Especially for the small MVNOs, the regulation of these fees is essential to enter into mobile communication markets.

I) MVNOs and the European regulatory environment:

In various European countries, MVNOs' fortunes have been greatly affected by the decisions and actions of national regulators and the European Union. In a handful of countries, most notably the UNITED KINGDOM, operators opened their networks to MVNOs entirely voluntarily, with no regulatory intervention sought or required.

However, in other countries, the national regulator has taken steps to force the MNOs to sell capacity to MVNOs, citing competition issues. This has been the case in countries such as DENMARK where the legislation passed in mid-2000 obliged SMP providers to conclude MVNO agreements. That is how regulator made the ground breaking move of putting mobile operators on the same basis as fixed operators, giving new entrants rights to national roaming across all networks and the right to interconnect. Likewise in SWEDEN PTS, the Swedish regulator also requires that 3G networks host MVNOs but it is not very prescriptive in its definitions. However, overall its strategy is amongst the most pro-MVNO.

Europe has been providing conducive environment for the MVNO business through pro-competitive measures and potentially mandating wholesale access. Initially, most regulators maintained a "watchdog" position; that is, they carefully monitor the interactions between MNOs and MVNOs. Later on, regulatory interventions have been practiced, where required. Some of these practices are detailed below;

"EU Member States/NRAs have included wholesale access obligations in radio spectrum assignment proceedings, notably in Germany (historically only airtime resale), and Ireland (where the 2100 MHz spectrum assignment proceeding included offering a license which required MVNO access)".

Those in favour of regulation argue that mandatory access through regulatory intervention is necessary because MNOs do not allow access on commercial terms and merely try to sustain supernormal oligopoly profits, reduce consumer choice to keep their customers, and hinder consumers to access competing mobile portals. Also, mobile network operators are less likely to provide MVNO access unless it is a regulatory requirement. Proponents of regulatory intervention stress that an increase in competition between networks will lead to improvements in service quality.

Mandate to MNOs to provide access to MVNOs in EU:

MVNOs, citing competition issues. This has been the case in countries such as Denmark where the legislation passed in mid-2000 obliged SMP providers to conclude MVNO agreements. Regulators should engage with MNOs and other relevant stakeholders i.e. e-commerce players, Fin Tech's, IT players etc. on the issues related to operations of MVNOs. In the fast-developing digital economy, regulatory provisions are required to enable other businesses to partner with Telco's for new opportunities. Opening of access for MVNOs/ Third Party Service Providers (TPSPs) / Payment System Operators (PSOs) / Payment Service Providers (PSPs) with the joint collaboration of the Central Bank "financial regulator" and telecom regulator will open up niche market for the provision of technical services for digital financial services / mobile banking, payment system and interoperability.

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VNAOI Recommendations

In the light of above case study submissions it is proven that in Regulators had to intervene in EU in the interest of sustaining healthy competition and availability and choice of variety of products for the benefit of end consumers. On behalf of all the current licensed VNOs and many prospective VNOs who are eager to enter the VNO market in India as VNOAI it is requested to TRAI and DOT to consider to review the existing M&A Guidelines and mandate to MNOs to provide access to the Telecomm Networks in the interest of competition and overall health of the Telecomm industry in India.

The telecom sector in India heads towards a duopolistic market, this could be the biggest risk for the subscribers as well as the government. A number of government initiatives including Digital India, Financial Inclusion Schemes, Social Impact schemes in addition to telecom dependent businesses which have been flourishing based on low connectivity costs could get affected. And the effect on

the employment market? The economy risks being adversely affected with similar consequences of how energy costs shooting up would affect transportation and manufacturing resulting in inflation.

Virtual Operators Association of India

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