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Cc: namrata@accessnow.org, shruti@accessnow.org
Sent: Friday, September 15, 2023 8:45:44 PM
Subject: Access Now counter-comments to TRAI consultation on Regulatory Mechanism for OTT Communication Services and Selective Banning of OTT Services

Dear Shri Trivedi and TRAI colleagues,
Please find attached the counter-comments from Access Now to the TRAI consultation on Regulatory Mechanism for OTT Communication Services and Selective Banning of OTT Services. We had filed our comments on [September 1](#).

[Access Now](#) is an international non-profit organisation which works to defend and extend the digital rights of users at risk globally. Through presence and expertise based in over 20 countries across six continents, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and the protection of fundamental rights. Access Now engages with a global community of individuals from over 162 countries in our annual RightsCon summit series, in addition to operating a 24/7 digital security helpline that provides real-time, direct technical assistance to users around the world. We coordinate as part of CiviCERT (Computer Incident Response Center for Civil Society) a Trusted Introducer accredited CERT, and are a member of the global Forum of Incident Response and Security Teams (FIRST). We have special consultative status at the United Nations.

Sincerely,
Raman.

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September 15, 2023

To:

Shri Akhilesh Kumar Trivedi
Advisor (Network, Spectrum & Licensing),
Telecom Regulatory Authority of India
advmn@trai.gov.in

Submission of Counter-Comments on the TRAI Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services

We thank the Telecom Regulatory Authority of India (TRAI) for the opportunity to submit counter-comments on the Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.

At the outset, we respectfully urge TRAI to consider the following recommendations made in our initial comments dated September 1, 2023.¹

Summary recommendations:

1. To recognise that OTT services cannot be regulated in the same manner as TSPs and to not bring them within the framework for licensing or impose any fees for network usage, which would hurt free and open internet access;
2. To protect and strengthen net neutrality, and refrain from implementing any measures that would undermine this crucial rights-respecting principle and reflect a regression in TRAI's policy positions, which have previously strongly supported net neutrality;
3. To prevent selective banning of platforms, as it would perpetuate the harms of internet shutdowns, and take away from the goal of an open, safe, trustworthy and accountable internet;
4. To recognise that selective banning is not necessary, proportionate, or the least restrictive measure, and would do more harm, including to people's rights and freedoms, than good;

¹ Access Now, *Submission on the TRAI Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services*, https://www.trai.gov.in/sites/default/files/Access_Now_04092023.pdf, https://www.accessnow.org/wp-content/uploads/2023/09/Submission-on-TRAI-Consultation-Paper_Access-Now_Sep-2023.pdf.



5. To protect end-to-end encrypted communication services and prohibit any temporary or permanent ban of such services, as they play a critical role in enabling people to stay safe online and exercise fundamental rights, including the right to privacy and free expression;
6. To consult on and enable progress on the rights-affirming recommendations of Parliament's Standing Committee on IT in its 26th Report on suspension of telecommunication services.² TRAI must urge the Department of Telecommunications to engage with these recommendations – such as the creation and maintenance of a database of all instances of suspensions – and not selectively with the ones that are in fact rights-damaging, such as the one encouraging selective banning of platforms.

Response to the comments in support of selective banning of OTT communication applications:

None of the comments made has referred to any valid reason justifying the proposal to empower TRAI or the DoT to shut down access to communication services and violate the fundamental right of all individuals in India to free speech and expression.

We reiterate our initial comments highlighting the lack of any material to show a connection between the prevention of terrorist activity and public access to applications like WhatsApp and Facebook Messenger.

Given the myriad reasons for which people use OTT communication applications, including digital payments, accessing education and healthcare, and procuring essential commodities, the effect of selectively banning certain services would lead to the same dire consequences and violation of rights caused by internet shutdowns.³

It may be noted that some of the comments by stakeholders have highlighted the technical difficulty involved in ISPs/TSPs blocking access to these OTT communication services at a network level. This supports the conclusion that TRAI should refrain from making any recommendation for banning access to these services, since it is beyond its remit as the regulator of telecommunication networks.

² Parliamentary Standing Committee on Communications and Information Technology, *Twenty Sixth Report on Suspension of Telecom Services/Internet and its impact relating to the Ministry of Communications (Department of Telecommunications)*, https://loksabhadocs.nic.in/lssccommittee/Communications%20and%20Information%20Technology/17_Communications_and_Information_Technology_26.pdf.

³ Vox, *How India runs on WhatsApp*, <https://www.vox.com/recode/2022/8/24/23320183/india-whatsapp-meta-land-of-the-giants-mark-zuckerberg>.



Empowering any authority to selectively ban communications applications does not solve the real problem, which is the misuse of shutdown powers in violation of safeguards and the Supreme Court of India's judgement in *Anuradha Bhasin*.⁴ It simply gives authorities another avenue to shut down internet access.

It may also be noted that even the ISPs/TSPs have identified that there is an abuse of existing internet shutdown powers, with one TSP stating:

“...the current implementation leaves a lot to be desired. The powers are being exercised for flimsiest of reasons and pretexts including and not limited to prevent cheating in exams, completely ignoring public convenience aspect of such orders.”⁵

Response to the comments submitted by stakeholders in favour of OTT Regulation, claiming that OTT communication services are the same as ISPs/TSPs and should be regulated by the same rules:

Traditional ISPs/TSPs and OTT communication services offer individuals different services, and operate in different contexts. It may seem like a WhatsApp message is a substitute for an SMS, but this is misleading and does not lead to the conclusion that WhatsApp should be regulated in the same manner as an SMS provider simply because they can both be used to send text communication.

Innovation in internet-based services gives individuals access to diverse platforms, which are not substitutes for each other or traditional TSP offerings. Indians currently enjoy the ability to communicate safely and securely, privately with a specific intended audience, or publicly with a larger audience with audio, video, or text or some combination thereof.

The rationale for regulating traditional TSPs is to ensure public access to communications networks using scarce public resources such as spectrum or right of way, and to ensure the absence of technical issues such as frequency interference. However, OTT services do not control or operate the underlying networks in the same way and so a similar rationale does not exist to regulate them.

⁴ Supreme Court of India, *Anuradha Bhasin v. Union of India* 2020 INSC 31, https://main.sci.gov.in/pdfdate/index1.php?dt=2020-01-10&dno=288172019&filename=supremecourt/2019/28817/28817_2019_2_1501_19350_Judgement_10-Jan-2020.pdf.

⁵ Reliance Jio Infocomm Limited, *Reliance Jio Infocomm Limited's Comments on TRAI's Consultation Paper on "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services"*, https://www.trai.gov.in/sites/default/files/Reliance_Jio_Infocomm_04092023.pdf.



A few key differences are summarised in the table below, many of which are explained in detail in Access Now’s 2017 series on OTT services⁶ along with a comparative infographic:⁷

TSPs	Internet-based services
Exploit scarce resources (spectrum, within the government’s domain)	Operate in an abundance of resources
Face high barriers to entry	Face low barriers to entry
Face low levels of competition	Face high levels of competition and many alternatives
Business model based on metered consumption and billing	Business model based on data exploitation
Individuals pay TSPs to access the internet; once connected, it is difficult for individuals to switch between TSPs, and they usually use one at a time (for e.g. using one SIM card or broadband connection registered to a particular TSP, without the ability to switch between TSPs)	Individuals can access a variety of internet-based services simultaneously – a key pillar of net neutrality – switching between them for different purposes or functionalities (for e.g. switching between WhatsApp and email to communicate and share documents)

The proposal to regulate OTTs in the same way as TSPs has been clearly rejected by the ITU and regulatory bodies in the EU. The ITU in its *Output Report on ITU-D Question 3/1* (2021)⁸ has noted that OTT services are distinct from traditional services and that they should not be treated as the same. The EU has also adopted a regulatory code which

⁶ Access Now, *Internet vs. telecommunication services: differences that matter for users’ rights*, <https://www.accessnow.org/ott-vs-telecom-services/>.

⁷ Access Now, *Learn and share: Comparing “OTT” and telecom services*, <https://www.accessnow.org/learn-share-comparing-ott-telecom-services/>.

⁸ International Telecommunication Union, *Emerging technologies, including cloud computing, m-services and OTTs: Challenges and opportunities, economic and policy impact for developing countries: Output Report on ITU D Question 3/1 for the study period 2018-2021*, Section 4.2.1, 4.3.1, <https://www.itu.int/hub/publication/D-STG-SG01.03.2-2021/>.



places ISPs and interpersonal communications services (text messaging, email, and OTT messaging) in separate categories.⁹

The ITU report notes that based on these distinctions,

“there has been widespread recognition that traditional telecommunication regulations are ill-fitted and ill-equipped to address OTT applications. Extending such regulations to OTTs would be harmful to the communication market and, more importantly, to consumers. Arbitrarily imposing barriers on some types of services but not others would result in cost increases and fewer choices of innovative solutions for consumers, and at the macroeconomic level in decreases in investment, a reduction in healthy competitiveness, and less local content production.”

Response to claims that OTT services need to be classified and regulated by TRAI because they are otherwise not regulated, and that they are not obliged to offer comparable consumer grievance redressal mechanisms:

Since OTT communication services are not akin to telecommunications providers and do not own or control spectrum, TRAI is not the appropriate authority to regulate OTT services.

Response to claims that OTT services pose a risk to national security and individual privacy:

Many end-to-end encrypted OTT communications services in fact bolster privacy and national security, by providing secure channels of communication where identity can be authenticated and confidentiality of content can be preserved. Millions in the country rely on end-to-end messaging applications to maintain privacy, including government and law enforcement officials, journalists, professionals like lawyers and doctors and others.

Individuals, and indeed the government, benefit from the availability of encrypted communications at two levels - one, because they are assured of privacy and security in their everyday communications, and two, because better encryption contributes to a more resilient cybersecurity infrastructure.¹⁰

The fundamental right to privacy of Indians includes the ability to carry on confidential

⁹ The European Electronic Communications Code, European Council Directive 2018/1972/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L1972>.

¹⁰ Access Now, *Why encryption is important: 10 facts to counter the myths*, <https://www.accessnow.org/why-encryption-is-important/>.



and protected communications. OTT communication services protect this right and fill a crucial gap by providing a platform for end-to-end encrypted communications. This is essential for people to exercise their fundamental rights to free speech and expression and carry out business online without fear that their information may be accessed by bad actors. This is one of the fundamental differences between OTT platforms and TSPs.

As highlighted in our initial comments, internet-based communication services like WhatsApp are frequently being used for medical and commercial purposes. Encryption is important to protect and safeguard people's financial, health, and other sensitive information.

Response to the claim that OTT communication services do not contribute to the cost of bandwidth and are free riders, so they should pay user charges or “fair share” fees, and some “collaborative framework” must be imposed by law:

It is misleading to state that OTT communication services do not contribute towards the infrastructure that sustains the internet. Any “collaborative agreement” which imposes mandatory network usage fees on OTTs as proposed by several stakeholders in their comments will violate the principle of net neutrality and lead to decreased quality of internet access, fewer choices for individual users, and affect healthy competition.

Regulation must be in response to some specific need or market failure, which has not been identified. The mere fact that OTTs do not pay licensing fees is not sufficient to justify regulating them like licensed ISPs/TSPs. The Body of European Regulators for Electronic Communications (BEREC) has also found no evidence of “free riding” by OTTs.¹¹

We also support the comments submitted by Epicenter.works and Professor Barbara van Schewick¹² as to the harms which could be caused by imposing network fees through “collaborative frameworks” on OTTs. As Professor van Schewick points out, the status quo in India is “consistent with the ITU’s Recommendation on voluntary commercial arrangements between telecommunication network operators and OTT providers.”¹³ We highlight and support some of the key arguments made by Epicenter.works and Professor van Schewick below:

¹¹ BEREC, *BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs*, <https://www.berec.europa.eu/en/document-categories/berec/opinions/berec-preliminary-assessment-of-the-underlying-assumptions-of-payments-from-large-caps-to-isps>.

¹² Barbara van Schewick, *Response to the Telecom Regulatory Authority of India’s Consultation on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services*, https://www.trai.gov.in/sites/default/files/Barbara_Van_Schewick_06092023.pdf.

¹³ van Schewick, page 19.



- Imposing network fees will violate net neutrality, whether imposed on some or all OTTs. It is not possible to mandate network fees and maintain net neutrality, as some of the TSP/ISP submissions have claimed.
 - Selectively charging network fees from some OTTs would “distort markets that are currently highly competitive”, since any exempted service would have lower costs.¹⁴ Some TSPs/ISPs also operate services which compete with non-ISP/TSP owned internet-based services, exacerbating the problem.¹⁵
 - Charging all OTT services a network usage fee means that internet access will be limited to those services which are able to or choose to pay every ISP.¹⁶ This will result in individuals losing the benefits of the internet’s openness and incentives to innovate.
- The claim that TSPs/ISPs bear an outsized proportion of the cost of facilitating internet services is false. Individuals pay TSPs/ISPs to access the internet. OTTs also pay “hosting, transit, and content delivery network services (or build and operate undersea cables, data centers, and CDNs themselves)” for better traffic delivery.¹⁷ Forcing a network fee means that ISPs/TSPs could charge exorbitant fees, resulting in additional costs to individual end users.¹⁸
- Quality of Service concerns are better met in the present framework. Since OTT communication services, for the most part, do not own or control the network through which they operate their service, imposing the same kinds of QoS standards on them is unreasonable and ineffective.¹⁹ Further, imposing a network usage fee would discourage OTTs from making optimizations they already make — the South Korean experience shows that network fee regulation has led to a deterioration in the QoS for individuals.²⁰
- It is extremely difficult to create or enforce a mechanism to ensure that network fees are invested in infrastructure.²¹ The European regulators body BEREC and

¹⁴ van Schewick, page 22.

¹⁵ van Schewick, page 23: “For example, Jio operates two streaming services JioTV and JioCinema, an online game service JioGames, and two online communication services, JioMeet and JioChat. Thus, if forced to pay network fees, popular services like WhatsApp, Slack, Microsoft Teams, Discord, Signal and Netflix would be forced to pay fees directly to their ISP-owned competitors.”

¹⁶ van Schewick, page 24.

¹⁷ van Schewick, page 5.

¹⁸ van Schewick, page 24.

¹⁹ van Schewick, page 7.

²⁰ Epicenter.works, *Submission to the Consultation of Indian Telecom Regulator TRAI*, page 3, https://www.trai.gov.in/sites/default/files/Epicenter_works_01092023.pdf.

²¹ van Schewick, page 14.



Australian regulator RTR have found that “money is not the deciding factor” for expanding network capacity, defeating the alleged purpose of imposing network fees on OTTs.²²

Summary

The comments submitted by stakeholders in favour of selective banning of OTT communication services and in favour of imposing telecom-style regulations on such services do not take into account the harms to individual rights, the quality of access to services, or the realities of the differences between OTT services and telecom providers. Given international experience and expertise, and the fact that the ITU has chosen not to recommend the imposition of telecom-style regulation and has refrained from attempting to classify OTT services for this purpose amidst an absence of regulatory cohesion, we humbly suggest that TRAI continue to follow its policy of forbearance on this issue.

Conclusion

We thank you for the opportunity to participate in this consultation. We remain available for any clarification or queries in relation to this feedback, and hope to be of further assistance in this important process.

Yours sincerely,

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²² Epicenter.works, page 2.