



# Counter Comments to the TRAI Consultation paper on “Privacy, Security, and Ownership of the Data in the Telecom Sector”

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We would like to thank the Telecom Regulatory Authority of India (‘**TRAI**’) for providing us the opportunity to provide counter-comments to the Consultation Paper on “Privacy, Security, and Ownership of the Data in the Telecom Sector” [**Consultation No. 09/2017**].

The Honorable Supreme Court judgment mentions various aspects of collection, use and handling of data, such as big data, data analytics, use of wearable devices and social media networks etc. resulting in generation of user data to end-users’ lifestyles, choices, preferences and for tracking user behavior and for the creation of user profiles. These broad observations must be taken into account while framing a neutral data protection law to ensure the right of privacy of an individual is recognized as also recognize the right of the individual to transfer such data freely.

As TRAI itself has noted throughout the Consultation Paper, the rapid proliferation of connectivity and telecommunications services in India has driven unprecedented growth in the economic and social development of the country. The ongoing drive for Digital India hinges on leveraging the digital platform for socio-economic empowerment of all citizens. It also entails developing an indigenous Digital Economy worth \$1 Trillion by 2025, and we are optimistic that the new age internet sector being driven by the tech start-ups in India will ensure that target is reached.

Within this context, it is of paramount importance that India’s legal and regulatory frameworks are aligned with these broader policy objectives. We have in our original submission suggested that any data protection regulation should follow some basic principles:

- I. Prevention of Harm
- II. Technology Neutral
- III. Principle based regulation
- IV. Consent cum Rights based approach
- V. Free flow of information
- VI. Innovation booster
- VII. Accountability of service providers

We have had the opportunity to review the comments provided by various stakeholders in the telecommunications ecosystem, and offer our brief comments as follows.



## **Ensuring cross-border data flows and guarding against forced localisation**

A primary reason for the growth of the internet and other digital services has been the ease with which information can flow across borders to consumers around the world. Indian companies have benefitted significantly from this free-flow of data with India's largest IT companies deriving significant revenues from markets abroad. These channels would not exist if India had in place a framework which prohibited the cross-border flow of data by mandating localisation of data. Not only may such a policy measure drive foreign data-driven enterprises out of India, but may also motivate foreign jurisdictions to enact similar measures – completely shutting foreign markets to India's large outsourcing sector.

Therefore we would like to highlight that *any sort of mandatory requirement which disrupts data flows will harm India's global competitiveness, and close off the country to the benefits of a globalised economy and trade flows. We request the Authority to take this concern into cognizance while making any regulatory suggestion related to data localization.*

## **India specific regulations**

The regulations pertaining to Data Privacy are being drafted in the context where we are contemplating the next National Telecom Policy to ensure greater digital penetration and better provisioning of digital service like healthtech, edutech, m-governance etc for the larger and marginalized section of the polity. With around 51% of Urban Internet penetration and only 17% rural internet penetration in 2016, the unique challenge before India is to bridge the digital divide.

Onerous privacy regulation would impede the growth of SME/start-up segment by erecting new legal barriers to market entry, and driving up compliance costs for existing players.

The same effects are likely to arise if TRAI seeks to blindly co-opt a foreign regulatory approach to data protection such as the GDPR in the EU, which has an average internet penetration rate of more than 70% - more than twice India's current levels. There are already rising concerns that the GDPR is likely to increase costs by up to 40% for European SMEs and start-ups (*Christensen et al.*), and impede research in key fields such as AI (*Nick Wallace on Tech 360*).

*We urge strong caution while enacting any such provisions for India and would suggest that the socio-economic consequences of any such provisions be studied (as is being done in EU today).*

## **Monetisation of digital services**

Furthermore, large amounts of content on the internet are free to access and use on account of the presence of online advertising. The biggest challenge before any tech start-up in India is concerns of scalability and monetization, and a digital advertisement is the key economic driver for majority of digital



services, both for start-ups and established businesses. Any framework which interferes with this business model poses grave implications for the ecosystem in India.

*Any policy measure proposed by TRAI should be carefully evaluated to ensure that it is tailored to India's context and does not directly or indirectly harm India's pressing connectivity goals.*

## **Regulating the entire Digital Ecosystem**

Certain stakeholders have also commented on the need to extend TSP-like regulatory requirements to OTT constituents of the ecosystem, based on the argument of 'same services same rules' which is a common refrain reiterated periodically on consultations related to various other issues in the past. We believe this debate was successfully put to rest in the ongoing consultation on Net Neutrality and the position taken on Differential Pricing; and the issue of OTT regulation in general is clearly outside the scope of the present TRAI Consultation. TRAI must disregard comment calling for general OTT regulation as being outside the scope of the present inquiry.

*We reiterate that following the recent Supreme Court directives and taking into consideration the ongoing process in MeITY, it is expected that a data protection framework will soon be introduced. Once the data protection law is enacted, TRAI should review the existing provisions in the Indian Telegraph Act and licensing conditions to recommend changes to the Department of Telecommunications ("DoT") to align with the new requirements. DoT/TRAI could issue advisory or guidelines for the telcos to comply with these new requirements.*