

**IndusLaw's Comments to the Consultation Paper on Regulatory Framework for Over-The-Top  
(OTT) Communication Services**

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1. Which service(s) when provided by the OTT service provider(s) should be regarded as the same or similar to service(s) being provided by the TSPs. Please list all such OTT services with descriptions comparing it with services being provided by TSPs.

and

2. Should substitutability be treated as the primary criterion for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers? Please suggest factors or aspects, with justification, which should be considered to identify and discover the extent of substitutability.

Same or similar services

The term 'telecom service provider' has not been defined under any relevant legislation, however, the term 'telecommunication service'<sup>1</sup> has been defined under the Telecom Regulatory Authority of India Act, 1997. Therefore, it can be concluded that any person providing telecommunication services would be considered as a telecom service provider ("TSP"). Basis this, the following are services when provided by over-the-top service providers ("OTTs") that should be regarded as same or similar to services being provided by TSPs.

- a. *Messaging services* – Instant messaging services provided on internet-based applications are similar to text messaging services provided by TSPs, which does not require internet connectivity.
- b. *Voice calling services* – One of the primary services provided by TSPs is voice calling services. OTTs providing voice and video calling services through the internet on internet-based applications are similar to voice calling services by TSPs. Similarly, the VoIP services offered by OTT communication service providers are a perfect substitute for internet telephony services offered by licensed TSPs.

It is pertinent to highlight that the definition of 'telecommunication services' specifically excludes broadcasting services. Accordingly, it is crucial to set out the definition of 'communication services' provided by OTTs. OTT communication services are significantly distinct from 'application services' provided by OTTs. While application services are based on the content posted on the platform (such as music, video, and text) and are available to the general public, OTT communication services are real time, person-to-person telecommunications services. The nature of services provided by OTT application service providers and audio-video content platforms is such that information is accessible and available to multiple persons simultaneously. For this reason, it is not one-to-one 'communication' per se, and therefore such OTTs should not be seen as offering services which are same or similar to TSPs. OTT communication services, on the other hand, are therefore exactly the same as telecommunications services provided by licensed TSPs

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<sup>1</sup> Section 2 (1) (k) of the TRAI Act, 1997 defines 'telecommunication service' to mean service of any description (including electronic mail, voice mail, data services, audio tax services, video tax services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means but shall not include broadcasting services.

except that instead of providing these services through their own networks, OTT communication service providers provide these services over the internet.

### Substitutability

Yes, substitutability should be a key factor to determine whether regulatory or licensing norms applicable to TSPs should be made applicable to OTTs. However, it is important that the regulatory and licensing norms currently applicable to TSPs should not be made applicable *in toto* to OTT communication service providers in their current form. The regulatory framework for OTTs should be customized to suit the nature of communication services provided by them over the internet, while taking elements from the existing regulatory framework applicable to TSPs. We have provided our detailed comments on this point in response to Questions 7, 8 and 9.

The key factor to determine substitutability should be the functionality of the services. The term 'functionality' should strictly be limited to the nature of service provided by a TSP which is directly substitutable for a service provided by an OTT communication service provider. We note that the Consultation Paper refers to the test proposed by the European Union under the draft Electronic Communications Code i.e. to test whether the functionality is 'substantial' or 'ancillary'.

We have attempted to identify some of the potential issues with this test, as set out below:

- a. As rightly highlighted in the Consultation Paper, the practical challenge in applying this test is that there are several instances where OTTs are providing multiple services, thereby resulting in multiple functionalities which may or may not be substitutable to a service provided by a TSP. Therefore, it may be difficult to identify or isolate the core functionality and ancillary functions of OTTs.
- b. The 'core' and 'ancillary' functions of OTTs may be dynamic in nature and may vary with the evolving business model of the OTTs and diverse user perceptions.
- c. The assessment of functionality being 'substantial' or 'ancillary' can only be judged on a case to case basis, resulting in applicability and enforcement becoming a concern.

Therefore, we are of view that substitutability should be assessed based on whether (a) the service in question is a communication service that is same or similar to a communication service provided by TSPs; and (b) whether the service is being provided on a stand-alone basis, and not to facilitate the provision of a separate service that does not qualify as a communication service.

It is our suggestion that the OTT regulatory framework should aim to balance regulating the OTT communication service providers, while encouraging growth and competition. In our response to Questions 7, 8 and 9, we have elaborated on the extent of regulatory compliance that should be imposed on OTT communication services providers.

3. Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required from time to time for network capacity expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks? Please justify your answer with reasons.

At the outset, we would like to draw your attention to one of the 'Recommendations of the DoT Committee on Net Neutrality':

*"There should be a separation of "application layer" from "network layer" as application services are delivered over a licensed network."*

In furtherance of DoT's recommendations in this regard, the application layer and network layer should be separated. The Telecom Regulatory Authority of India ("TRAI") has, in its Recommendations on the Regulatory Framework for Internet Telephony in 2017 ("**Internet Telephony Recommendations**"), also emphasised that the separation of network and service layers of telecom service offerings is the natural progression of the technological changes in this domain. The same trend needs to be reflected in the regulations for such network and service layers for OTT communication service providers as well. Subjecting new age OTT service providers to traditional regulatory regimes will only have the impact of creating huge entry barriers, as opposed to supporting innovation and development. Therefore, the question at hand should be limited to determination of whether there is parity in the treatment of TSPs and OTT communication service providers only to the extent of services provided by them.

As the Consultation Paper highlights, while OTT services have led to social and economic benefits, it is the TSPs who have served as the backbone for enabling access to services. However, in the last few years, reliance on traditional communication services offered by TSPs has considerably decreased and data usage is consistently increasing as a result of penetration of several types of OTTs in the market. The TRAI, had in fact, in its Internet Telephony Recommendations, noted that the increasing revenue realizations from data services due to increasing internet traffic will not only compensate for the revenue loss of the TSPs, but will also increase their revenue potential. As mobile penetration reaches saturation levels, revenues earned from voice traffic will eventually plateau. Data traffic will then become the primary source of revenue for the TSPs. The wide variety of OTT services including communication services, have in fact, played a huge role in driving the demand for data-based services and internet usage. Given that data usage tariff is under forbearance, TSPs should be able to capitalize on the increasing usage of data across urban and rural areas as a result of ease of availability and accessibility of OTT platforms using TSP networks.

Also, in terms of usage of network, OTTs have no visibility of the payload or the volume of data consumed by end users. The upward trend in the number of entrants (OTTs) in this space is directly related to increasing demand and reliance on internet-based communication services. In this crucial stage of pre-legislation, we should be mindful of the fact that over a period of time, market forces will resolve pricing related issues for TSPs.

In response to the latter part of this question - we believe that OTTs should not be required to participate in infusing investment in telecom networks for the reasons stated above. However, TSPs should be permitted to charge for the usage of the infrastructure by the OTTs to provide their services - the pricing mechanisms can be left to market forces. For instance, the TSPs can charge network usage charges to TSPs based on the extent of usage of network for hosting the services; this would incentivise the TSPs to make available their infrastructure to the OTTs while encouraging the OTTs to optimise network efficiency. However, the pricing mechanism should in no manner be linked to volume of data consumed by end users or the retail tariff charged by the OTT.

The regulator should also extend the required support to enable the TSPs to adapt to data-based services and new age technologies, and should consider providing a favourable regulatory regime by reducing *inter alia*, spectrum prices and licensing fees applicable to TSPs.

4. **Would inter-operability among OTT services and also inter-operability of their services with TSPs services promote competition and benefit the users? What measures may be taken, if any, to promote such competition? Please justify your answer with reasons.**

In general, inter-operability between OTT application services is not a requirement from a commercial standpoint, since (a) the entry costs are minimal; (b) there are no switching costs for users; and (c) the users can switch between OTT application service providers quickly with minimum disruption. Also, users exercise their discretion to move from one platform to another for several factors, given the ease of accessibility and availability of choices. Further, the nature of OTT application services is such that a user can access and use multiple platforms simultaneously – this in itself promotes competition and benefits users.

With specific reference to OTT communication services there are several OTT players in the market currently, and each player is coming up with new technology and features. The end that the Consultation Paper is suggesting, of promoting competition and benefitting users, is being achieved nonetheless through other means.

If the intent of suggesting inter-operability among OTT communication services is to promote competition, open the market up for new entrants and to benefit users, the proposed regulations can evaluate the option of prescribing minimum technological standards and requirements to be adhered to at any given point in time and encourage the use and adoption of global standards. However, interoperability between OTT communication services and TSPs may not be feasible, unless the regulatory framework for both the sectors are identical. This mirroring of regulatory framework will not work given the nature of regulatory compliances imposed on TSPs (*such as those linked to the network resources*) and the distinct nature of OTT communication services.

5. **Are there issues related to lawful interception of OTT communication that are required to be resolved in the interest of national security or any other safeguards that need to be instituted? Should the responsibilities of OTT service providers and TSPs be separated? Please provide suggestions with justifications.**

All communication transmitted through OTT platforms are subject to the provisions of the Information Technology Act, 2000 (“IT Act”) and the Government has the power to intercept, monitor or decrypt any computer resource and also monitor and collect traffic data or information through any computer resource for cyber security in accordance with the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 and ‘Standard Operating Procedures for Lawful Interception and Monitoring of Telecom Service Providers’. However, the applicability of the said provisions as provided under Section 75 of the IT Act is limited to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India. In practice, several OTTs do not store the data in India and data pertaining to the services and persons using the services is stored in data centres/servers overseas. The territorial scope of the IT Act may prove to be a barrier when it comes to lawfully intercepting data which is beyond the territory of India. For this purpose, OTTs should be mandated to maintain a real-time back-up of the data within India.

In order to ensure greater responsibility of OTTs, the proposed regulation for OTT communication service providers should prescribe certain obligations on OTTs, with a view to ensure OTTs do not divulge or intercept in any unauthorised manner the contents of any electronic message and maintain utmost secrecy. Also, in terms of encryption, there are no modes or methods of encryption prescribed by the Government in exercise of its powers under Section 84A of the IT Act. There are certain standards prescribed under the Information Technology (Certifying Authorities) Rules, 2000 and also by the Reserve Bank of India which prescribe the minimum level of encryption for Internet Banking.

To summarise, by giving effect to the provisions of Section 84A of the IT Act, prescribing minimum standards for encryption and imposing obligations on OTTs to maintain secrecy and not divulge or intercept the contents of any electronic message, the overall objective can be achieved.

The obligations of OTTs and TSPs should be clearly separated and TSPs should not be obligated to provide or be responsible for any lawful interception on any data on their network and should only be required to comply with the obligations under the license agreement to the extent of the underlying network. This is to ensure that TSPs are not perceived to be violating terms of the license agreement for activities beyond their control.

6. **Should there be provisions for emergency services to be made accessible via OTT platforms at par with the requirements prescribed for telecom service providers? Please provide suggestions with justification.**

In the context of emergency services, we would like to draw your attention to the Internet Telephony Recommendations where TRAI was of the view that a balance has to be struck between imposing obligations and encouraging new initiatives. For these reasons, internet telephony service providers were encouraged to facilitate access to emergency number calls and not be mandated to provide such services. This approach has also been adopted by other jurisdictions allowing internet telephony services. As mentioned above, VoIP services offered by OTT communication service providers are similar to internet telephony services offered by licensed TSPs and therefore to the extent that TSPs providing internet telephony are not mandated to provide emergency services, even OTTs should not be mandated to do so.

From a technological standpoint, it was discussed under the Internet Telephony Recommendations that accurate identification of geographical location of subscriber is a must for availing emergency services and it may be a challenge to accurately map position information while originating the emergency call.<sup>2</sup> Also, services provided by OTT communication service providers are intrinsically dependent on the network of the TSP and therefore, an obligation only on the OTT to provide emergency services, without a corresponding obligation on the TSP, is not a favourable approach.

7. **Is there an issue of non-level playing field between OTT providers and TSPs providing same or similar services? In case the answer is yes, should any regulatory or licensing norms be made applicable to OTT service providers to make it a level playing field? List all such regulation(s) and license(s), with justifications.**

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<sup>2</sup> As highlighted by TRAI in the 'Recommendations on Regulatory framework for Internet Telephony', on obligation of internet telephony service providers to provide emergency services.

and

8. In case, any regulation or licensing condition is suggested to be made applicable to OTT service providers in response to Q.7 then whether such regulations or licensing conditions are required to be reviewed or redefined in context of OTT services or these may be applicable in the present form itself? If review or redefinition is suggested then propose or suggest the changes needed with justifications.

and

9. Are there any other issues that you would like to bring to the attention of the Authority?

OTT application service providers have proved critical for the growth and adoption of internet services, and will play an increasingly important role in bringing localized and fresh content. OTT application providers have so far thrived in a largely unregulated environment, and caution must be exercised to ensure that any regulation does not hamper competition or innovation among these stakeholders. As provided in the 'Recommendations of the DoT Committee on Net Neutrality':

*"For OTT application services, there is no case for prescribing regulatory oversight similar to conventional communication services."*

We are therefore of the view that a light touch regulatory approach should be adopted in so far as the OTT application services are concerned. This will give the right environment for the nascent OTT application service industry to grow and drive increased revenues for the TSPs.

However, there should be a regulatory framework governing different aspects of operations of OTT communication service providers, to the extent the regulations relate to the services provided (*and not the network or infrastructure used to deliver such services*) and to the extent the regulations are relevant to the distinct nature of OTT communication services.

In response to Question 8, we believe that the adoption of the 'same service same rules' approach through the application of traditional regulatory and licensing requirements to new age technology will be a huge step backwards. All licensing conditions applicable to TSPs (*particularly those linked to the use of the network to provide services*) may not be relevant to the OTT's and therefore the regulations should be redefined and customised relevant to OTTs. We have highlighted some of them below:

**Data Protection and Data Localisation:**

- a. It is noteworthy that the right to privacy has been recognized as a fundamental right under the Constitution of India, and this principle is the core of the proposed law on personal data protection in India. Currently, aspects relating to data privacy of personal information are governed by the IT Act and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 and once the proposed law comes into force, it will be applicable to OTTs as well. Therefore, we do not believe that there is a need for separate data privacy provisions under the proposed regulations for OTTs.
- b. In terms of data localisation, we are of the view that the restrictions are contrary to economies of scale and against the objective of encouraging cloud services. It may be sufficient to prescribe

certain tests including “comparable level of protection” test and “adequacy” test proposed under the ‘White Paper on Data Protection Framework for India’ to ensure data protection.

- c. There should be no difference in treatment of ‘communication services’ and ‘application services’ to the extent that it relates to data protection related laws. As mentioned above, there is no need to specifically cover this in the proposed regulation governing the OTTs.

**Grievance Redressal:** OTT communication service providers should be mandated to adopt a consumer grievance redressal mechanism at an internal level, to the extent the services rendered by such OTTs are regulated.

**Unsolicited Commercial Communications:** As mentioned above, reliance on OTT communication services for all types of communication has significantly increased. A number of service providers are moving towards using OTT communication services to provide services and also provide information relating to services, instead of using traditional messaging services. Accordingly, there should be obligations on OTT communication service providers to regulate unsolicited commercial communications on their respective platforms on the lines of the Telecom Commercial Communication Customer Preference Regulation, 2010, to avoid bypass of the regulatory framework applicable to TSPs.

**Technology standards:** As mentioned above, the proposed regulation for OTTs should prescribe the following:

- a. Internationally accepted standards for operation of OTT platforms, keeping in mind security and data related issues;
- b. Guidelines for providing emergency services, which can also include the minimum level of technology for allowing inter-operability; and
- c. Technology for encryption of electronic communication.

We are of view that regulations and parameters applicable to TSPs such as Quality of Service (QoS), universal service obligation, etc., that have a close co-relation to the underlying network, should not be extended and made applicable to OTT communication service providers. Specifically, on interconnection, interconnection only happens at the peer level, for instance, voice to voice or data to data. While OTT communication service providers are application providers offering voice, TSPs are the bearer service providers. So, the association between OTT and TSP cannot be seen as interconnection.