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Sent: Friday, September 29, 2023 1:44:54 PM

Subject: Counter Comments on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services

Dear Mr. Trivedi,

I hope you are well. I am writing to you submit our counter comments on TRAI's consultation paper on 'Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services'.

We hope our comments are useful for the consultation. Additionally, we would like to request you to send us an invite for any consultation that is happening on the subject.

Thank you

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Executive Summary

The Telecom Regulatory Authority of India released a consultation paper on the Regulation Mechanism for Over-The-Top (OTT) Communication Services, and the Selective Banning of OTT Services in July, 2023. The paper was released with the view that a fresh consultation process is needed to frame new and suitable guidelines for OTT regulation in the country. SFLC.in submitted its comments for the Consultation which are available [here](#).

Briefly, our initial submission focused on the regulatory landscape of Over-The-Top (OTT) services and Telecom Service Providers (TSPs) in India. Currently, OTT services are regulated under the Information Technology Act, 2000, while TSPs are governed by various laws, including the Indian Telegraph Act, 1885. The Telecom Regulatory Authority of India (TRAI) has been considering regulating OTT services since 2015 but has not done so yet.

OTT services and TSPs both offer communication services, they have significant differences, primarily that TSPs are licensed service providers, whereas OTTs operate over TSPs' infrastructure. This Requires that distinct privacy and security standards are required for regulation.

Privacy, and encryption in the digital economy are important and there are concerns about potential surveillance and interception provisions that could infringe on free speech and privacy rights. We oppose any licensing that would weaken encryption or grant excessive interception powers to the government. TRAI's proposed regulations could hinder the growth of OTT services, and any actions beyond the scope of the Information Technology Act would require new laws and fall under different ministries which are outside TRAI's scope.

Governments across the world while negotiating the International Telecommunication Regulations (ITRs) at the World Conference on International Telecommunications 2012 chose to keep Information Services from the ambit of the Regulations and restricted it to only the traditional telephony. Even Indian Telecommunications Operators (represented by the Cellular Operators Association of India at the conference) were against inclusion of Information Services under the

ITRs. The proposal to regulate cloud service providers is against the stance adopted by India and the telecommunication companies at an International forum.

Our counter comments based on the different submissions are below -

Regulation of OTT Services: [Bharat Sanchar Nigam Limited \(“BSNL”\)](#) states that OTT services should be subject to regulation similar to the present framework as applicable to TSPs, since they do not pay the ‘heft fees’ that a TSP does in the form of annual licence fees and frequency spectrum charges, nor any of the huge costs involved in developing the network, customer provisioning and regulatory compliances. They believe OTT services provide a similar type of service over the public internet, and they state that it is a fact that TSP revenue has declined considerably. They do concede that there are similar security and privacy related regulatory obligations imposed on OTT service providers, however the general comment is that OTTs must be subject to regulation to ‘level’ the playing field between OTTs and TSPs. [Bharti Airtel Limited \(“Airtel”\)](#) states that there is a regulatory lacunae when it comes to OTT services, and that OTT communication services should be regulated, because the functionality and utility and substitutability of services should remit regulatory and licensing frameworks between TSPs and OTTs, and irrespective of the underlying technology/resources being used. Further, they state that the telecom industry must maintain the pace of investment into ensuring the sustainability of the digital ecosystem in the face of 5G rollouts and so on, and it can only be possible if they receive a fair proportion of return on their investment. [Reliance Jio Infocomm Limited \(“Jio”\)](#) also echoes a similar sentiment as the above-mentioned companies- that to ‘level’ the playing field, OTT services must be regulated at par with TSPs, and that TSPs deserve compensation for the cost expended by them into establishing network infrastructures. They further propose a classification of certain OTT services into ‘Significant’ OTT players in a manner similar to the creation of the categories ‘Significant Social Media Intermediary’ under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 and ‘Significant Data Fiduciaries’ under the Digital Personal Data Protection Act, 2023.

We have noted in our comments that OTT services’ regulation does not fall within the ambit of TRAI’s domain and powers. Moreover, OTTs are subject to regulation through the Information Technology Act, along with the Rules laid under this Act. We reiterate that there cannot be a level-playing field for TSPs and OTT services, because the two do not play in the same field- OTT service providers will never run a TSP out of business, and an OTT service cannot exist without a TSP. If there are regulations for TSP that are perceived to be unfair, they must be examined and addressed separately.

Selective Banning: [BSNL](#) states that the current TSP infrastructure did not envisage selective bans. They say that with many OTT services hosted on the cloud, it is difficult to band selectively because they ‘operate from multiple locations in multiple countries and continuously shift from one service to the other.’ They believe implementing such measures will impact the processing power of the resources, and will necessitate a ‘huge augmentation’ on the TSPs end. Crucially, they note that such a measure can be done for a limited time, and for limited OTT services to be banned at a time, both of which must be defined to help in designing and expanding such infrastructure on their end. All classes of OTT services may be covered under a regulatory framework for such measures in the interest of national security, and BSNL recommends that in laying out such a framework: a. An order by the designated authority should clearly mention the name, b. URL and class of OTT service to be banned, c. the location where it must be banned, d. the time period for the ban and e. some implementation time period must be provided as well.

[Airtel’s](#) opinion is that while selective banning is a desirable alternative, it must be done at a source level to be an effective measure, and the OTT services and entities should be directly involved in blocking (as appropriate stakeholders), as opposed to TSPs/ISPs. [Jio](#) notes that while internet shutdowns are a legitimate tool for law enforcement, they have been exercised for flimsy reasons and pretexts such as cheating in exams, and therefore state that service barring orders should be issued for the ‘most necessary cases’, avoiding massive disruptions and impact on genuine users. Further, uniform instructions should be issued to the relevant authorities to use service barring judiciously, and limited to security related concerns, while other methods must be used for non-critical requirements. They state that selective banning is preferable, but say there are issues at a network level in implementation. Therefore, they believe that it can be best achieved through OTT service providers themselves and must be implemented at an app level, as opposed to a network layer.

[COAI](#) submitted in its comments that the rise of OTT Services over the last few years has resulted in a situation of seismic shifts in the sources of revenue for TSP’s. They point out an inequality, where TSP’s incur heavy costs in terms of licence fee, spectrum, telecom equipment and security apparatus, while no costs are to be borne by OTT service providers for similar services. Further, the increase in data intensive services also requires TSP’s to invest heavily in data infrastructure. They also claim an erosion of revenue, as traditional telecom services such as voice calls and messages are increasingly being done over OTT platforms. They comment that “thus, the impact of OTT on

telecom companies is a double-edged sword, causing erosion of traditional revenue sources while necessitating higher capital investments to accommodate surging data traffic.” They claim substitutability of the services offered by OTT Communication platforms and TSP’s.

Comments submitted by [Super Cable Network](#) mention that as of now there is no regulation to govern OTT services in India. They are of the view that OTT apps should have a similar regulatory regime as per the one which has been in place for TSP’s. They have also added that the parallel OTT apps broadcasting should be controlled and a pricing mechanism should be in place similar to the cable TV.

CAOI submitted that the lack of a definition of OTT services, and the fact that they had been provided unfettered access to the market had resulted in them becoming significant players that needed to be regulated. It was claimed that while OTT platforms in general were subjected to sectoral regulators, Communications OTT Platforms were unique in the sense that they faced none of the bars that TSP’s did in terms of licensing and abiding by regulations governing Quality of Service Parameters, Security, and lawful interception, TCCCPR to curb UCC etc. These regulatory disparities are sought to be remedied by TSP’s, through a collaborative framework and adequate definitional clarity.

The scenario presented by COAI is not correct. TSPs get their ability to provide these services through the use of a limited natural resource, i.e. through their use of the telecom spectrum. Since this is a natural resource, there is limited competition for TSPs as the use of the spectrum is limited by laws of physics. OTT services are limited by the availability of Internet, bandwidth and latency. While bandwidth and latency affect calls and messages over TSP networks, calls and text messages sent through the networks of TSPs are prioritised over other data packets. This, along with limited competition, are advantages that TSPs have over OTT services. Calls and messaging over a TSP network are always available to a user, while calls and messaging over OTT services are only available when a user has an Internet connection. Additionally, OTT services provide a richer experience that is absent in TSP services, such as sending documents. This shows that the services provided by OTT platforms are different in nature and usage compared to the services offered by TSP’s. TSPs do not suffer from any competition from OTT services. The primary service provided by a TSP now is access to the Internet. This is a sphere that OTT services cannot compete in. TSPs are the gatekeepers to the Internet. The secondary service provided by a TSP is communication.

Here, too, TSPs have a distinct advantage as: (a) their service is always available even in the absence of the Internet (by falling back to older technologies such as SMS); and (b) their services are prioritised over other data packets. Further, OTT service providers are not unregulated, but rather already regulated under the Information Technology Act, 2000 along with the Rules laid down under the said Act. TRAI does not have the jurisdiction to regulate OTT services. The Digital Personal Data Protection Act, 2023 has been enacted which will also be a legislation in the area. Further, the IT Rules, 2021 also govern the ways in which OTT platforms can operate. Unfair regulation of a TSP is a concern that needs to be examined separately.

TSPs and OTT providers are not in direct competition with each other. One of them has an oligopoly over the use of a limited natural resource in the form of spectrum, while the other faces unlimited competition. TSPs and OTT services cannot be seen to be competing with each other and do not require to be brought to the same playing field under the same restrictions and regulations, as the domains in which they are operating are not the same. TSPs are the sole gatekeepers of the Internet, with an ability to charge appropriately for that privilege.

Further comments on the Framework proposed for OTT regulation raise a concern about the erosion of net neutrality. It is stated in CAOI's submissions that "There should be a policy framework to enable fair share contribution from large OTT service providers to telecommunication network operators based on assessable criteria like no. of subscribers or data usage. Since this is an issue of critical importance for the sustainability of the sector in the long run, to ensure fairness and compensate for the increased data demands, it is justifiable for OTTs to pay a fair and reasonable fair share charge to TSPs. Similar to entities charging the users for the commercial use of their property or infrastructure, TSPs who invest in nationwide telecom infrastructure, should get a fair and reasonable share charge from the users utilising their network infrastructure. It must be kept in mind that, the funds received by TSPs from OTTs will support the expansion of networks and enhance contribution to the exchequer since these revenues will be a part of TSPs' AGR calculations which contribute directly to the national treasury. To cater to innovation and support start-ups or smaller OTT providers, we suggest exempting them from the " fair share charge," thus ensuring that innovation and entrepreneurship remain unaffected."

A Framework that mandates OTT's to pay TSP's for services that they offer will result in a scenario where consumers will end up paying more, and the internet will be fragmented. Such

revenue models have already been dealt with by TRAI under earlier Net Neutrality consultations. Any such revenue model would run afoul of Net Neutrality principles that have been established in India. The harms arising out of this are multifold-

Firstly, it results in a situation of OTT platforms having to increase their spending, inevitably resulting in a reduction to the revenue they can utilise to innovate. Consumers already pay for the data that is used to access OTT services, resulting in TSP's gaining double the revenue for providing no further services. This would not be a Fair Share charge, but would rather be a tax on innovation and development. A situation like this would inevitably result in OTT's transferring a share of the increased costs onto consumers. Further, this opens the door for preferential treatment of OTT platforms by TSP's.

[COAI](#) stated in its comments that there is a need to put in place a framework for selective banning of OTT services. It was stated that a solution of selective barring is available through OTTs themselves. The OTTs obtain the location of the customers and can easily bar access for selective barring. Once the OTT communication services are under licence this barring will be much easier to implement. The TSP's networks are capable of selectively blocking the OTT-CS/websites subject to proper identification details (list of IPs) being provided by the Competent Authority. Thus, the onus of giving proper identification (i.e. list of IP addresses, domain names) should be with the competent Authorities. For getting the list of IP addresses, suitable instructions should be issued by the competent authorities to OTT-CS/websites. Further, the Government should consider source-level blocking, i.e., it should directly engage with the concerned OTT service provider or website or hosting server /operator or with the OS providers so that the desired outcome may be achieved without any significant difficulties.

We believe that internet shutdowns, of any nature, pose disproportionate human costs, (as acknowledged in the consultation paper as well). Internet shutdowns, especially when prolonged, have resulted in the disruption of services in critical areas such as healthcare, public services, business and employment¹. It has been noted in studies that in healthcare, there has been a significant impact on the mobilisation of urgent medical care, disruption on the delivery of essential services, and also limitations on health information being exchanged between medical personnel. This also decreases access to emergency health support and protection for women and girls². Mandated shutdowns have also caused disruptions that have had serious repercussions on the economy, with recent estimates suggesting that in 19 countries, shutdowns have come at a cost of \$2.4 billion in GDP in 2016.

Selective bans are premised on the idea that it would be useful to shut down the internet and/or certain services in specific circumstances, which generally relate to law and order issues. However, it has been evidenced that internet shutdowns have also been affected for reasons such as preventing cheating in examinations. There has also not been any evidence of internet shutdowns facilitating the control of situations of unrest in any regions. Irrespective of whether the shutdown is applicable to major communication channels or entire communication networks, this impact is unlikely to be prevented. Further, there is a lack of clarity on how OTT bans can be implemented. Crucially, in the absence of any evidence to support meaningful positive impact through selective bans to curb unrest, it cannot be ascertained what nature of consequences selective bans may pose. In light of the above, we recommend that a regulatory framework to permit such measures not be considered.

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