

Counter Comments

TRAI Consultation Paper on Regulatory Framework
for Over-The-Top (“OTT”) communication Services



Cyber Peace
Foundation

We thank TRAI for providing us the opportunity to submit our counter comments in response to the submissions on the consultation paper pertaining to the Regulatory Framework for OTT communication services.

Please find below our counter comments with respect to the primary arguments made in the submissions.

Telecom and OTT services are same / similar / substitutable

CPF's Counter Comment

The submissions which have taken the view that legacy telecom services and OTT services are same or similar, thereby leading them to be substitutable with each other, **have ignored the very fundamental differences between the two kinds of services**. We would like to present our arguments in order to demonstrate that OTT services and telecom services are not similar, substitutable or even comparable.

- Firstly the comments do not engage with the question of **how to distinguish between communication and non-communication OTT services**. While the test of substantial and ancillary functions has been proposed in the Consultation Paper, the challenges associated with it have been highlighted by several parties in their comments. With the way, the OTT market exists currently, the diverse services cannot be segregated into two neat categories, in order that one of the categories is subject to highly restrictive regulations and one is not.
- OTT services also provide **qualitatively different services** to consumers. They provide specialized services that could involve communication aspects, such as media-sharing apps or house renting apps which have a chat feature, or provide many additional features to more conventional messaging, such as group chat, stickers, etc.
- From a **technological perspective, OTT services and telecom services cannot be substitutable** as they operate in different layers (telecom in the network layer and OTTs in the application layer, respectively), offer functionalities on different devices and compete for different groups of customers. Without the telecom network to provide access to the Internet, OTT providers would be unable to reach their consumers on their cellular devices.
- From the consumer's perspective, it is clear that **telecom services are essential services** that provide connectivity. Consumers rely on them as they provide a vital service. However, OTT providers do not provide essential services and consumers use them for varied purposes as an add-on to their internet experience.
- The OTT economy is a **highly competitive economy**, wherein multiple apps provides the same or similar features. Consumers can easily switch between them without significant costs. This is in complete contrast to the telecom industry, in which switching between TSPs is neither easy nor free, and there are significant barriers to entry and operation. Thus, OTT service providers and TSPs cannot be compared on the same plane.
- In particular, OTT applications that **do not provide any-to-any connectivity** cannot be considered the "same or similar" to interconnected TSP services.
- The question of **non-level playing field does not arise** as TSPs are free to provide OTT services, but OTT service providers are not permitted to access spectrum without a license. Any efforts made at levelling the playing field would create barriers to entry and expansion for OTT service providers (especially start-ups) and increase costs by way of the obtaining of a license or incorporation of local entities, etc. This could result in Indian consumers not being able to access the full benefit of global online applications, depriving the Indian public of innovative and useful technology.

The services provided by the OTT service providers and TSPs cannot be considered same.

- Telecom network and OTT applications operate in different layers, offer services in different devices and are for the different groups of customers.
- Internet Platform communication services only facilitate communication within their community of users and are often even device specific. Internet Platform communication services typically cannot be used to connect to conventional devices such as landlines, fax machines, or feature phones and thus cannot be treated on the same footing as the service being offered by TSPs.

- The features and experience provided by OTTs are far better than the conventional messaging and communication options provided by TSPs.

Comment: Telecom and OTT services should be regulated under similar frameworks as currently there is a non-level playing field between them

CPF's Counter Comment

• Many comments have advocated the adoption of a **lighter regulatory approach towards Telecom Service Providers** ("TSPs"), which are presently heavily burdened by the licensing requirements, license fees, spectrum usage charges, USOF obligations etc. **We agree to the same. However, we do not agree to the suggestion of imposing similar obligations on OTT service providers.**

• If the above-mentioned liabilities are no longer practicable for TSPs in today's economic scenario, then they should be reformed by the government so that TSPs can function productively in the highly competitive and innovation-driven economy of today.

• The existing regulatory liabilities applicable to TSPs are on account of the fact that they control the network, which depends on the usage of naturally scarce resources such as spectrum and land. It is critical here to distinguish between network and service. As OTT service providers do not control the network, or scarce resources, there is no justification for extending network-related liabilities to OTT services.

• The demand made for OTT service providers to be governed by onerous laws is a case of rent-seeking by TSPs, which is aimed at increasing the cost of operating OTT businesses. The OTT service providers will then have to transfer the costs to consumers, who will be adversely impacted by the sudden non-availability of free or inexpensive services.

• The comments have recommended the extension of the following liabilities on OTT service providers:

a. Data privacy laws

Data privacy and protection is already governed by the Information Technology Act, 2000 ("IT Act") and the rules notified thereunder. It is also proposed to be governed by the proposed Personal Data Protection Bill, 2018 ("the Privacy Bill") on which separate consultations are underway.

b. Localization requirements

The TRAI itself in its earlier Consultation Paper on Privacy, Security and Ownership of the Data in the Telecom Sector avoided recommending localization. We believe that they should not be imposed on OTTs. In any case, localisation is already a subject of the Privacy Bill and we believe that there should not be parallel legal frameworks dealing with the same issue.

c. Rollout of the network and QoS obligations (i.e. All obligations applicable to telecom players network / infra structure related obligations)

Firstly, OTT services are so varied in their scope that it will not be practical to create standards for all of them.

Additionally, if such standards are mentioned for only some services, the purpose of such standards will remain unfulfilled.

Thirdly, the rollout obligations for OTT services are neither necessary nor practicable, as all users with Internet access can already use them, and it is not clear how OTT services can be rolled out to users who have not been reached by telecom networks.

d. Interoperability

Consumers can use multiple OTT applications in one device (multi-home) and such applications allow the same service and same account to be used via multiple devices (synchronous device usage). Therefore, in these terms, OTT services are already interoperable, without any legal mandate to do so.

However, the context in which these services have been made applicable to TSPs are completely different, such as the essential nature of the service, lack of multi homing options, and higher switching costs. Therefore, in this context, it becomes apparent that telecom regulations cannot simply be transplanted onto an entirely disparate industry.

e. Meeting all requirements related to traceability of subscribers and procedures for sharing customer details with the Law Enforcement Agencies (LEAs)

Firstly, as the subject of law enforcement has already been accounted for by criminal procedure laws as well as the IT Act's framework, there is no reason to create parallel processes under the telecom framework as well.

The extension of telecom obligations to only "communication services" (where communication is the primary objective as opposed to an ancillary function) while excluding the rest, would also not serve any purpose. For instance, anti-social elements could be communicating on the chat feature on, for example Google Pay which cannot be classified as a "communication service" by any of the tests suggested in the comments. To comprehensively capture all such concerns, the correct legal framework to deal with law enforcement issues should be broad overarching ones like the IT Act and criminal procedure law. A consultation undertaken specifically for the purpose of regulating communications services would not be the appropriate place or the correct mechanism to address these concerns.

The only point on which both (TSPs and OTTs) regulation must cope should be National Security and Privacy norms.

Comment: TSPs have faced loss of revenue and dwindling business because of OTT services

CPF's Counter Comment

- The rise of OTT services has not led to loss of revenue, minutes and limited the business of TSPs. The changes in the telecom industry, we believe, can be explained by a combination of multiple factors, such as hyper-competition in telecom industry, possible changes in user behavior – such as fewer people use the calling feature these days.
- OTT services are not "free-riders", as these services attract consumers to use more data, for which consumers pay the TSPs. This provision of offering digital services is a legitimate use of the Internet, and does not constitute "free-riding". Since the TSPs are already earning a subscription and usage fees for accessing data by consumers, the OTT service providers have no obligation to share revenue for value added services with TSPs.
- Additionally, TSPs are also always open to launch their own OTT Services which can provide the dual benefit of earning revenue from the existing Telecom services and also getting benefit out of the OTT Services and providing customers additional services.
- OTT service providers have also invested significantly in the physical infrastructure required for providing Internet access, such as subsea cables, cloud infrastructure, etc. Thus, it is incorrect to discredit their investments in maintaining the digital communications economy.
- The lowering of telecom services costs and availability of OTT services, have helped the adoption and usage of the internet in the country, immensely benefitting the consumers. In that light the TRAI should have no cause to regulate OTT services.

Conclusion:

The OTT economy is a manifestation of the innovation and flexibility that has driven the Internet revolution. The growth of OTT services in India has brought economic as well as social development, empowering people and improving the quality of their lives. These services have made many amenities accessible to consumers, in their personal, professional and business related activities.

At this stage, when Indian businesses and consumers are reaping the benefits of unprecedented innovation, inclusion, expression, and connectivity that characterizes today's Internet, and the government wants to connect each and every citizen and harness the digital economy, extension of unsuitable and harsh liabilities on this economy will serve to stifle this growing sector. This will harm not just the budding start-up economy in India, but also the Indian population and the economy as a whole.

As OTT services are **already regulated** by the Ministry of Electronics and Information Technology ("MeitY") under the framework of the IT Act, **there is no reason to create parallel regulatory processes** under the Telegraph Act and regulations thereunder.

In conclusion, we would like to respectfully submit **that OTT services should continue to be regulated by the IT Act and not be subjected to telecom regulations**. Any specific consumer harms that are identified by the MeitY can be redressed by particular Rules framed under the IT Act.

Additionally, for the future growth and development of the Telecom industry TRAI should carry out an assessment, to **consider reducing the legacy regulatory barriers on TSPs, especially license fees, spectrum usage charges, other levies and taxes, to improve the business case for TSPs**.



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