

TRAI Consultation Paper on “Privacy, Security, and Ownership of the Data in the Telecom Sector”

BIF- Counter-Comments

Introduction

We would like to take this opportunity 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 Paper**”). We have had the opportunity to review the comments provided by various stakeholders in the telecommunications ecosystem, and offer our brief comments as follows.

Guiding Principles for TRAI

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 emergence of the digital economy has driven unprecedented levels of job creation, entrepreneurship, innovation, and foreign investment in India. Today, India is seen as leading start-up and technology hub with much potential to grow further. The Government has been proactive in fostering this revolution through path breaking initiatives such as Make in India, and Digital India – aimed at boosting manufacturing, connectivity, digital literacy, and e-governance. Alongside, the government has made the improvement of India’s ease of doing business a key priority.

Within this context, it is of paramount importance that India’s legal and regulatory frameworks are aligned with these broader policy objectives. While ensuring consumer interests are protected from emerging harms, regulation must facilitate the culture of intellectual curiosity, innovation and invention that has characterised the Indian technology and telecommunications sectors. In order to ensure that this careful balance is maintained, regulation must be effected only on the basis of unambiguous evidence of specific harms or market failures. Overboard, overtly onerous, or unnecessary regulation will interfere with India’s present momentum by stymying innovation, and decreasing the ease of doing business in the country. The regulations should be in alignment with the aforementioned points and should be balanced so as to consider citizen’s needs, rights of the Service Providers as well as focus on Government’s priorities to bring broadband access to all.

Regulation must therefore ensure that all stakeholders-big or small must get equal opportunity. With this in mind, we request TRAI to adhere to the following broad principles before issuing any regulation:

- (i) **Balancing interests of all ecosystem participants:** As TRAI notes in its Consultation Paper, users form a key component of the telecommunications ecosystem. However, TRAI needs to balance the rights of users, service providers, and data controllers in a manner that ensures all stakeholders are equally given a chance at growth.

- (ii) **Ensuring India remains a competitive part of the global ecosystem:** A key priority of the government has been promoting foreign investments, and making India competitive on the global stage. TRAI must only consider regulation that continues to facilitate this push. Any intervention – such as forced localisation or OTT regulation – which raises

barriers to entry to the Indian market or isolates India, would cause significant harm to the country's economic competitiveness, and reputation.

(iii) Providing a conducive environment for innovation: In addition, TRAI must consider if regulation would have the effect of furthering innovative forces or impeding them. In order to avoid any risk that the latter may occur, any intervention must be made only on the basis of highest standards of evidence and stringent cost-benefit analyses. As applied to the present paper, TRAI must carefully study the extant data protection and its existing broad scope before deciding whether to recommend amendments or revisions. As examples around the world have shown, innovation thrives when the government intervenes *only* in cases of evidence of clear or potential harm. TRAI should emulate this approach by creating a regulatory framework that encourages innovation by promoting self-regulation and ex post intervention.

With these principles in mind, we offer the following specific counter-comments in light of representations received from various stakeholders.

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. More than a feature of the internet, cross-border flows are an integral part of its success. In fact, 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 on a reciprocal basis, thereby completely shutting foreign markets to India's large outsourcing sector.

It is critical for India to continue facilitating cross border data flows to ensure the growth of its IT/ITES/outsourcing sector - India is the world's largest sourcing destination for the IT industry, accounting for approximately 67 per cent of the \$124-130 billion market. The industry employs about 10 million in workforce. To increase market access for Indian IT companies in EU, the Indian government as part of the India-EU Free Trade Agreement (FTA) negotiations has demanded that the EU relaxes the restrictions on movement of data of European citizens to India. Finally, India's flourishing global Information Technology Industry cannot be placed at a competitive disadvantage with others in the APAC region. A data transfer framework that prohibits data transfers is bound to harm the domestic IT industry, who will not have the same level of choice of certain services due to those restrictions to foreign providers.

In fact, the feedbacks received by TRAI in response to the Consultation Paper evoke similar reactions with feeling of trepidation from a wide variety of stakeholders. Entities including leading Indian and foreign technology companies, industry associations, non-profit entities, and civil society representatives have highlighted the benefits of cross-border data flows and warned of the deleterious effects of any form of localisation or other measure which interferes with free cross-border flow of data. Concerns raised by various stakeholders include that:

- (i) Disruptions to cross border flows would impact innovation, economic competitiveness, and availability of technology and services to Indian users.
- (ii) Localisation will harm India's economy and has the potential to result in a negative effect of up to 0.8% of GDP.¹
- (iii) The threat of reciprocity by other jurisdictions which would cause heavy burdens on Indian industry and limit the efficacy of Make in India and Digital India initiatives.

Given this broad consensus, and the presence of adequate data transfer related norms within the IT Act and SPDI Rules, TRAI must not interfere in cross border flows of data, and permit market forces to determine business models. Privacy concerns (addressed below), if any, may be addressed by encouraging stakeholders to participate in self-regulatory and certification schemes. 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.

Contextualised and tailored policy responses

As many stakeholders have noted in their comments, the Indian digital ecosystem is unique in that, despite rapid gains in internet penetration, there remains a substantial population that is unconnected. These Indians are excluded from the benefits of connectivity primarily due to economic but also social, cultural, educational and other impediments. While several path-breaking connectivity and skill-building programs have been initiated by the Government of India, more needs to be done to ensure that the fruits of connectivity are not confined to a privileged few. Given this pressing need to improve connectivity levels, TRAI must ensure that any policy measure or regulation, is aligned to India's unique cultural, and socio-economic context. Policy that is overly burdensome will keep the internet out of the reach of a vast majority of Indians, while policy that is not well-thought out or founded on clear evidence, may have undocumented adverse effects on internet adoption.

As applied to the current consultation, privacy norms which are overly onerous, burdensome, or not aligned to India's current needs will complicate internet adoption for a variety of reasons. At the outset, it is important to realize that innovative service offerings and technologies developed by SMEs are likely to be a key part of efforts to address India's low internet penetration – especially in rural and remote areas. As discussed in our counter-comments below, additional privacy regulation would impede the SME/start-up segment by erecting new legal barriers to market entry, and driving up compliance costs for existing players. The net effect of these changes would be SMEs devoting less time, and resources to social innovation projects including those centered on connectivity – which, as a general rule, require long-term outlook.

The same effects are likely to arise if TRAI were to adopt a foreign regulatory approach to data protection such as the GDPR in the EU. It is important to realize that different jurisdictions have enacted data protection frameworks in the context of their specific cultural and economic requirements. For example, the GDPR is proposed to be applied in the EU which has an average internet penetration rate of more than 70% - more than thrice of India's current levels. Moreover, evidence shows that the GDPR is likely to increase costs by up to 40% for European SMEs and start-

¹ See Bauer et al (2017) http://www.ecipe.org/app/uploads/2014/12/OCC32014_1.pdf

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ups (*Christensen* et al.), and impede research in key fields such as AI (*Nick Wallace* on Tech 360). Europe's cookie law which mandated certain types of disclosures to users is also estimated to have resulted in significant harm for the EU's emerging companies. Where such harms of onerous data protection have been documented in the EU, TRAI adopting any of these standards would be a death-blow to Indian SMEs and would perhaps be counter-productive to the government's start-up centric policy initiatives.

Lastly it must also be noted that, today, large amounts of content on the internet are free to access and use on account of the presence of online advertising. Advertising relies on a number of individual data points to provide customized suggestions to internet users. Any framework which interferes with this business model poses grave implications for the ecosystem in India. Rules that restrict user's access to data must be done away with. As we discuss below, the current Indian approach to data protection is adequate to protect user interests (through privacy policy disclosure, consent, and transfer norms) while, at the same time, balancing rights of other stakeholders in the ecosystem. Any alteration to the status quo for the sake of any potential reform would perhaps upset this balance. Therefore, we urge TRAI to refrain from making any change to the Indian data protection framework as it stands. 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 national interests and goals.

Ensuring balance in regulating various stakeholders within the ecosystem

In the Consultation Paper, TRAI queries stakeholders on the need to ensure parity between various constituents of the telecommunications ecosystem. In response, a majority of stakeholders have responded that the current framework of the IT Act, and SPDI Rules are adequate as they are comprehensive in nature. In addition, it may be noted that this framework applies to all bodies corporate handling 'personal information' or SPDI within India – without regard to sector or size. As a result, entities ranging from TSPs to content providers and other service providers are covered. There is no gap in coverage – and, therefore, no policy rationale to expand scope of the Act or Rules.

Certain stakeholders have also commented on the need to extend TSP-like regulatory requirements to OTT constituents of the ecosystem. On this issue, TRAI must be guided by the principle of regulating on the basis of harm, and in a manner that permits innovation to continue to thrive in India. Enacting licensing or other regulatory requirements for OTT service providers would only act to set up new barriers to business in India, and slow down the pace of innovative forces by introducing red tape and bureaucratic processes with no tangible benefits.

A recent report by ICRIER (2017) reveals that OTTs contributed a minimum of USD 20.4 billion (Rs. 1357.6 billion) to India's GDP in the year 2015-16, which will increase to USD 270.9 billion (Rs.18275.9 billion) by the year 2020. In another report, WIK (2017), through a consumer surplus survey and analysis, finds that OTT usage in India saves on average 803.9 minutes per week in comparison to traditional alternatives (e.g. sending letters, physically meeting etc). Based on the average annual income in India (INR94,130), this translates into an annual consumer surplus of US\$98 billion in 2017. Thus, each user of OTTs in India receives on average US\$249 of consumer surplus annually. Applied to the entire population—not just OTT users—this results in US\$74 per

capita. Given this trend, any overburdening regulations should be avoided that would create a compliance burden and form barriers to entry, affecting market efficiency and competition.

Arguments by certain TSPs calling for ‘same service same rules’ are misconceived given the inherent structural differences between telecommunications service providers and OTT players – such as access to spectrum, ability to interconnect with PSTN, use of numbering resources etc.² Most fundamentally, telecom operators control the underlying broadband access infrastructure, and are the gatekeepers to broadband internet access. A consumer cannot even get to OTT services without first purchasing internet access service from a network operator. In contrast, OTT services do not control the underlying broadband internet access points.

TRAI in its recommendations on VoIP has very correctly recognised that OTTs and TSPs share a “symbiotic relationship” and that OTTs are driving traffic for TSPs; rejecting the misconceived loss-of-revenue narrative. The following quote from TRAI is important in this regard: *“The Authority is of the view that the increasing revenue realizations from data services due to increasing Internet traffic will not only compensate for the loss of conventional voice traffic but will also increase the revenue potential of the last mile access networks. This symbiotic relationship will increase broadband proliferation and will also contribute to the overall health of the telecom sector along with increase in consumer choice. The separation of network and service layers of telecom service offerings is the natural progression of the technological changes in this domain. It is now possible to separate provision of service contents, configuration and modification of service attributes regardless of the network catering to such service.”* TRAI (2017, VoIP - para 3.24)

Further, proposals for creating any arbitrary distinction between “OTT Communication services” and “other OTT services” are flawed as most OTT services tend to develop platform characteristics that incorporate communication as only one aspect of the wider service provided. For example, most gaming and ecommerce OTTs also include options to exchange text and voice messages between community members. Conversely, TRAI should recognise that OTTs provide rich interactions beyond text and voice communication on the application layer – and that’s the innovation which should not be curbed. OTTs services should not be seen as like-for-like with traditional telecommunications, but instead as innovative rich interactions that are qualitatively and significantly different in terms of objectives and the richness of it, from conventional voice or text communications. This is a distinction that arises not from service providers but from consumers themselves. As a result, asking for regulatory parity on the basis of the “same service, same rules” argument is incorrect and does not justify a higher regulatory burden on OTT players.

Lastly, we submit that the issue of OTT regulation in general is clearly outside the scope of the present TRAI Consultation. TRAI’s queries only relate to regulatory parity as far as data protection norms are concerned. TRAI must disregard comment calling for general OTT regulation as being outside the scope of the present inquiry.

Lack of policy rationale for government-mandated data sandboxes

² See Report on Deconstructing the “level playing field” argument – an application to online communications – by Brian Williamson of Communication Chambers, May 2017 in which he deconstructs the “level playing field” and “same service same rules” arguments in relation to online communications and rich interaction apps. The paper concludes that these arguments do not stand up to scrutiny - technology and market differences matter.

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A regulatory intervention suggested by TRAI is the need for ‘government’ or its authorised authorities to set up data sandboxes which allows companies to create anonymised data sets to be used for development of newer services. As we have submitted in our initial comments, not only is such a move undesirable for innovation in India but it would perhaps not be compliant to legal aspects w.r.t Constitutional Right to Property

Along these very lines, the vast majority of stakeholder comments have expressed a failure to see a valid policy justification for the government to mandate data sandboxes. Most commenters have also rejected the proposal outright insofar as it makes sharing of data sets mandatory for companies, while many have also pointed out that such a requirement may offend constitutional principles relating to the right to property as sensitive proprietary data will be affected. Many stakeholders have also expressed concern that the resultant loss of proprietary information would hamper innovation, choke inflow of investments, decrease consumer choice, and increase security risks. In light of these overwhelmingly negative views, TRAI should refrain from recommending for any government-mandated sandboxing or similar requirement.

If TRAI’s concern is promoting the growth of the big data and analytics segment, the same may be achieved by creating a conducive framework for companies to innovate in these sectors. A recognition that anonymised data sets are subject to lower processing and privacy compliance requirements would provide a major boost to the sector, and lead to improvements in service offerings for consumers. In contrast, requiring mandatory participation in sandboxing would destroy a thriving sector without any tangible benefits accruing to its constituents, users, or the government.

Current data protection framework in India is adequate

Lastly, we would also like to highlight that numerous stakeholders who, in their comments, have highlighted the adequacy of the extant Indian data protection framework. Numerous parties have also highlighted that the definition of personal information (and SPDI) under Indian law is in line with international standards. We believe these views reaffirm our stance, and provide a clear mandate for TRAI to decline to intervene on the issue. If anything, TRAI may consider recommending that existing data protection standards be made more flexible by encouraging more forms of self-regulation and self-certification.

As covered in our initial comments, we would like to reiterate that the present framework embodies the Privacy Principles laid down by the Group of Experts (under Justice AP Shah) in 2012 and includes elements such as notice, consent, use limitation, data minimisation, and the need to implement reasonable security safeguards. Additionally, transfers of sensitive data to third parties require that the latter have in place adequate safeguards. Moreover, users have the right to access and correct any incorrect personal information being held by bodies corporate.

As the Indian data economy is still nascent, the need of the hour is for a light-touch data protection framework which balances consumer and commercial interests while encouraging the development of robust privacy practices through self-regulation such as certification schemes and seals. Numerous studies abroad have shown the impact that onerous data protection frameworks have on economic growth – especially as applied to start-ups and SMEs. These have been established as applied to the EU’s Cookie directive, and are likely to be the case in relation to the GDPR as well.

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As applied to the Indian context, TRAI must look not to mandatory standards but permit competitive forces to drive the adoption of robust privacy practices. In this regard, the IT Act and SPDI rules create minimum standards for entities to fulfil, while providing for liability in cases of abuse. Specifically, under the current framework, provisions like Section 43A and Section 72A of the IT Act provide recourse for abuses relating to personal information and SPDI.

Summary of Recommendations:

- TRAI must recognise that the current privacy framework is adequate with contains most elements embodying international best practices.
- TRAI must look to encourage self-regulation and self-certification to promote a balanced framework for telecommunications sector constituents.
- TRAI must not seek to mandate data sandboxing for private entities as the same is likely to harm innovation.
- TRAI must not seek to interfere with cross-border data flows through policies such as forced localisation. These will isolate the Indian market and harm the economy's global competitiveness.
