From: amritachoudhury@ccaoi.in
To: "Akhilesh Kumar Trivedi" <advmn@trai.gov.in>
Sent: Monday, August 21, 2023 11:02:18 AM
Subject: CCAOI's response to TRAI's consultation paper on 'Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.'

Dear Sir,

We thank the TRAI for providing us with the opportunity to provide our comments on the consultation paper on 'Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.'

CCAOI is a trust, engaged in capacity building, research and advocacy mostly in India especially related to Internet and digital policies. We represent the interest of different stakeholders of the Internet ecosystem in India, including connected and unconnected users. For over one and half decade, CCAOI has been advocating, organizing capacity-building initiatives, webinars, conferences, and events and conducting research on issues related to internet governance, telecom and digital policies.

We submit that while the Consultation Paper is well intended, however it may not serve to achieve these objectives, and potentially raise new concerns.

Please find enclosed our submission on questions raised in the Consultation Paper.

We had organized a stakeholder discussion to deliberate on the issues highlighted in the Consultation Paper, the report having the key findings can be viewed here: https://bit.ly/44cO1Ds. Have attached the report for your reference.

Thanking you and looking forward to favorable consideration of our suggestions in the interest of the growth of the digital ecosystem in the country.

With Regards,

Amrita Choudhury

Director CCAOI

amritachoudhury@ccaoi.in

CCAOI™

Representing the ecosystem of Internet -Bharat Model

Ref: CCAOI/ TRAI/ OTT Regulation & Selective Banning/8
21 August 2023

Shri Akhilesh Kumar Trivedi,
Advisor (Networks, Spectrum and Licensing),
Telecom Regulatory Authority of India

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Amrita Choudhury
Director CCAOI
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CCAOI'S Response to TRAI's Questions

Before responding to the questions raised in the Consultation Paper ('CP'), we from CCAOI wish to re-emphasize the point that Over-The-Top ('OTT') services and the services provided by Telecom Service Providers ('TSPs') are not the same, and hence, should not be subject to the same regulations.

While TSPs argue that OTT platforms' services are a direct replacement for those offered by telecom operators and demand 'same service, same rules', there are structural differences between the services provided by TSPs and OTTs.

- OTT services cannot function without the network infrastructure and connectivity provided by telecom operators, since they do neither own nor operate them. OTT services cannot be considered substitutes as they own neither the equipment nor networks that carry their services. Further, in most cases, OTT services are far richer in terms of features and functionality.

- TSPs and OTT services have a symbiotic relationship. Though the revenue from traditional voice and messaging services may have diminished for TSPs, their revenue has grown manifold from the data usage of OTT services.

- There is not enough evidence to suggest that network usage fees will solve the existing issues ailing the telecom operators.

- Charging a network usage fee from the OTT services by the telecom operators would be a violation of net neutrality principles laid down by the TRAI in 2017.

- On the argument that OTT services are not regulated like TSPs, it was pointed out that content applications are already governed by the Information Technology Act ('IT Act'), the Consumer Protection Act, and the Competition Act. Together with investment regulations, these already cover a vast amount of policy regulation. Parallel legislation under telecommunications laws would stymie the development of the technology ecosystem.
- On the issue of OTT services being effective substitutes for telecom services, particularly when it comes to voice and text messaging, OTT services cannot be considered substitutes as they do not own the equipment or networks that carry their services. Further, in most cases, OTT services are far richer in terms of features and functionality.

While there is no denying that TSPs are facing an increased regulatory burden in providing their services due to the complex licensing regime, problematic revenue share calculation, spectrum auction, etc., demanding OTT services be regulated and bear the costs, which will ultimately be passed on to the user, is unfair.

Additionally, attempting to introduce a licensing regime and making OTTs pay may not address the core issue ailing the telecom industry. On the contrary, it may undermine the competitive spirit among players, businesses, and technologies, especially as India strives to become a trillion-dollar economy.

As for the issue of selective blocking, TRAI has recommended the selective blocking of specific OTT applications and websites in specific regions where they could be used by miscreants. The consequences of such selective blocking could be adhocism, leaving users with little to no recourse due to numerous unanswered questions, an increase in the compliance burden on MSMEs, and an overall negative impact on user experience and choice.

ISSUES RELATED TO OTT PLATFORMS

Question 1: What should be the definition of over-the-top (OTT) services? Kindly provide a detailed response with justification.

CCAOI Response:
At the outset, we wish to state that the word 'OTT' is a misnomer since the term assumes that these applications and services ride for free in the telecom network. We therefore support using the term '**Content & Application Providers**' or '**CAPs**', proposed by the Body of European Regulators for Electronic Communication (BEREC) in their report dated October 2022.

CAPs should be defined as 'applications and services that are provided over the application layer to end users.' They are mere applications provided to end users over the internet using the network infrastructure of licensed TSPs. They neither operate on a network nor lease network capacity from a network operator for the provision of their services.

While we support the term CAP, for the ease of this CP, we will continue to use the term OTT. Further, we wish to reiterate certain facts:

a) **The definition of OTTs provided by TRAI in the Consultation Paper on Regulatory Framework for OTT Services, 2015, distinguishes OTTs from TSPs.** "OTT provider", is defined as a '*service provider which offers Information and Communication Technology services, but neither operates a network nor leases network capacity from a network operator'*. Additionally, TRAI stated that based on the kind of service they

provide, there are basically three types of OTT applications, namely, (i) messaging and voice services (communication services); (ii) application ecosystems (mainly non-real time), linked to social networks, e-commerce; and (iii) video/ audio content.

b) **OTTs and TSPs have a symbiotic relationship**. OTTs work on the application layer and can provide content and application services to end users with the support of the network layer, which is provided by the TSPs. Since the operation of OTTs is quite **distinct** from the definition of telegraph as provided in the Telegraph Act, they **cannot be subject to the same rules and principles governing TSPs.**

- Today, as a business model, most TSPs in India hardly charge a customer for voice and SMS; rather the customer is charged for the data usage. **OTTs are the biggest drivers and demand pullers of data over the TSP networks**. OTT platforms include a variety of interactive apps and services that generate one-of-a-kind offerings, innovative and useful services based on consumer preference, need, and interest.
- Therefore, **OTTs are in no way substitutes for TSPs since they depend on TSPs**. OTTs cannot be offered without access to the physical networks that *only* the TSPs deploy. TSPs control the underlying broadband access infrastructure and thus act as gatekeepers for broadband internet access and, by extension, OTTs.
- BEREC reports clearly show that OTTs are not the ones pushing internet traffic through telco pipes; rather, the traffic is due to telco customers pulling content and applications through telco networks for which they pay additional data charges to the telcos. This runs counter to the TSPs'' argument. There is no concrete evidence to hold OTT services accountable for free riding and has also highlighted a significant attribute, i.e., the CAPs/OTTs and TSPs are mutually dependent on each other.

c) **OTT Applications and Services cannot be governed by the same rules and principles as TSPs**. The two types of entities are placed in very different circumstances. For example, TSPs enjoy several exclusive rights that include the right to interference-free spectrum, the right to numbering resources, the right to interconnect with PSTN, and the right of way to set up infrastructure. However, OTT players neither have these privileges listed above nor own the network or control access to telecom infrastructure. Therefore, **the question of level playing field simply does not arise.**

d) Unlike TSP networks, **OTTs operate in a highly competitive market** in which many of the services are available to users free of cost. Users can easily switch between competing apps, and many people use multiple OTT communications apps from the same device.

As a result, the reasoning behind many legacy telecommunications regulations that apply to telcos does not apply to OTT communication apps.

e) Further, **it is a misnomer that OTTs ride the Telecom network for free** and all investments to ensure seamless services and experiences for the end user are made by the telcos. In fact, the OTTs are not only making huge investments but, even more importantly, these services are significant revenue generators for the telcos.
   - As per the findings of Analysys Mason, between 2014 and 2018, OSP invested more than USD 300 billion, or about USD 75 billion a year, in creating huge centers and transport infrastructure to haul data between these locations, including terrestrial fiber networks and submarine cables.
   - Moreover, they are driving investment in delivery networks to support quality of service by bringing content as close as possible to end users.
   - In view of the data explosion, it is expected that, going forward, OSPs' investment in infrastructure would be double the above level, i.e., about USD 150 billion a year. Thus, OTTs are clearly not free riders but **significant revenue generators and huge investors in futuristic digital infrastructure**.

Question 2: What could be the reasonable classification of OTT services based on an *intelligible differentia*? Please provide a list of the categories of OTT services based on such classification. Kindly provide a detailed response with justification.

CCAOI Response:
OTTs often offer diverse functionalities that do not easily fall into straitjacketed categories. An OTT application or service can have multiple functionalities that are inter-linked.

For example, a food delivery service connects delivery agents and patrons, allowing them to communicate and keep track of their orders, among other activities. The application would require all these features to work in tandem to provide a comprehensive experience.

Therefore, any attempt to delineate any of the above features (for instance, communication) from food-delivery services would be artificial and could lead to market fragmentation or even market failure for the OTT services. Thus, there cannot be a reasonable classification of OTT services based on any *intelligible differentia.*

Similarly, a ride-hailing service connects drivers and passengers allowing them to communicate, plan routes, enable payments, and more. For the application to provide seamless service, it requires all these features to work in tandem. In that light, any attempt to delineate any of the above features, such as the communications features, from the ride-hailing features would be detrimental and even lead to the failure of the service being provided by the OTT application.

Question 3: What should be the definition of OTT communication services? Please provide a list of features which may comprehensively characterize OTT communication services. Kindly provide a detailed response with justification.

CCAOI Response:
In our response to Question 1, we have addressed the definition of OTT services.

Similarly, in our response to Question 2, we explained why OTT services should not be classified, since many of the services have multiple functionalities that are interlinked and therefore difficult to segregate. Further, any attempt to categorize them may lead to market fragmentation and failure of the OTT application from providing the services. We also wish to highlight that communication services provided by OTT applications are incomparable and not substitutes of those provided by TSPs.

OTT services are dependent on the underlying networks of TSPs, hence are not in the same relevant market. TSPs control the underlying broadband access infrastructure, and are the gatekeepers to broadband internet access and, therefore, OTTs themselves. Therefore, they cannot be considered substitutes for TSPs' services.

Besides, the TSP licenses also confer several exclusive rights that OTT players do not enjoy such as: (i) the right to acquire spectrum, (ii) the right to obtain numbering resources, (iii) the right to interconnect with the PSTN, and (iv) the right of way to set up infrastructure.

As discussed earlier, OTTs often offer diverse functionalities that do not easily fall into straitjacketed categories. They may use messaging or calling merely to augment unrelated services and improve the consumer experience. Conceiving "communication services" as a sub-category of OTT applications creates an impractical distinction between communication functionalities and non-communication functionalities among OTT applications. For example, food delivery, ride hailing, gaming, document editing, photo sharing, social media and many other fundamentally dissimilar functionalities allow users to communicate with each other.

OTT services provide expansive experiences to customers that go beyond conventional messaging and communication options provided by TSPs. OTT communications applications such as WhatsApp, Signal, Hike Messenger, and Google Hangouts provide rich messaging features not available through SMS, and they also have a broad economic impact.

It may be mentioned that other jurisdictions, like the Australian Competition and Consumer Commission (***ACCC***) have also recognised the differences in the services offered by TSPs and OTT service providers. In its Communications Sector Market Study (April 2018), the ACCC

stated that: "*there is no basis for requiring equivalent regulatory treatment of OTT and traditional voice services*" because "*the extent of substitution from traditional voice services to OTT voice services is limited by technical shortfalls (such as any-to-any connectivity) and consequently we do not consider OTT services to be full substitutes for voice services at this time.*"[1]

Question 4: What could be the reasonable classification of OTT communication services based on an intelligible differentia? Please provide a list of the categories of OTT communication services based on such classification. Kindly provide a detailed response with justification.

CCAOI Response:

As pointed out in our responses to Questions 2 and 3, we believe there cannot be a reasonable classification of OTT communication services based on any *intelligible differentia*, as it could lead to unnecessary market fragmentation.

Question 5: Please provide your views on the following aspects of OTT communication services vis-à-vis licensed telecommunication services in India:

a) regulatory aspects;
b) economic aspects;
c) security aspects;
d) privacy aspects;
e) safety aspects;
f) quality of service aspects;
g) consumer grievance redressal aspects; and
h) any other aspects (please specify). Kindly provide a detailed response with justification.

CCAOI Response

a) Regulatory Aspects: OTTs services including communication services are already governed by the IT Act, the Consumer Protection Act and the Competition Act. Together with investment regulations, these already cover a vast amount of policy regulation. Parallel legislation under telecommunications laws would stymie the development of the technology ecosystem.

- TSPs have for ages demanded that OTT communication services be regulated under telecommunications law to create a level playing field. They place reliance

[1]Even the Government of Colombia's Comisión de Regulación de Comunicaciones (May 2020) has concluded that it is not necessary to regulate OTT services in line with the communications market merely because there is an increase in the use of OTT services. This determination was based on an earlier statement made by the same commission in 2018, whereby they stated that there is no evidence of substitutability between traditional telecom services and OTT services

on the principle of 'same service, same rules'. However, as explained in Question 3 above, there are significant fundamental differences between the services provided by TSPs and those provided by OTT communication services. As such, it would be difficult to regulate them under the same laws.

- As argued in our response to Question 3 above, technically speaking, TSPs and OTT service providers operate on different layers of the internet stack. TSPs, among other things, control and operate the network infrastructure that provides access to the internet. On the other hand, OTT service providers depend on the internet access provided by TSPs to disseminate content and services over the internet to users. The markets in which TSPs and OTT service providers operate are also distinct. TSPs have a limited market, which means that only a small group of participants have specific rights (such as the right to acquire spectrum and obtain numbering resources) that OTT service providers do not. As a result, TSPs in India are subject to a different regulatory and licensing framework. acquire spectrum and obtain numbering resources) that OTT service providers do not. By virtue of this, TSPs are subject to a different regulatory and licensing framework in India.
- Given the fact that OTT communication services are subject to a plethora of laws, we believe that the focus should be on harmonising the existing rules and regulations governing them, rather than imposing additional onerous obligations under a telecommunications framework. Such a step is likely to increase costs and adversely affect the ease of doing business for OTT communication services.

b) Economic Aspects: There is no need for economic regulation of OTT communication services. The market for OTT communication services/applications is highly competitive and more than one service can be used at any given time, unlike network service providers/TSPs. Additionally, OTT services do not make use of scarce natural resources (spectrum) but run on top of existing TSP networks.

- It is noted that one of the main arguments in support of regulating OTT communication services under telecom laws is that OTT service providers are free riding over the network infrastructure established and operated by TSPs. This argument adds to the position that OTT service providers should be made to compensate TSPs for the investments made and expenses incurred in establishing and maintaining such network infrastructure.
- As pointed out in our responses several times, this is an incorrect argument. OTT service providers contribute to the growth in revenues generated by TSPs, and do not ride free on the TSP network. Any rise in demand for OTT services (including

communication and messaging services) directly contributes to the increase in demand for internet access, and to revenue growth for TSPs.

- The growing popularity of OTT services and the increasing reliance placed on them by users have increased internet usage in India, and consequently benefited TSPs. This fact has been substantiated by TRAI through the following statistics in the CP:
  i. From 2012 to 2022, the monthly ARPU for wireless services in India grew by about 44% from INR 98 to INR 141.14.
  ii. From 2014 to 2022, the volume of monthly wireless data usage grew by about 156 times from 92.4 million GB to 14.4 trillion GB.
  iii. From 2014 to 2022, the average revenue from data usage per wireless subscriber per month increased about 5.6 times.

- Further, the CP refers to BEREC's paper on 'Preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs' (October 2022). The paper finds no evidence of free riding to support the implementation of a compensation mechanism between OTT service providers and TSPs. Instead, the paper notes that OTT service providers and TSPs are interdependent; the growing demand for content further drives the growing demand for internet access.
- In addition to this paper, BEREC's response to the European Commission's 'Exploratory Consultation on The Future of the Electronic Communication Sector and its Infrastructure' (May 2023) notes that different actors in the internet ecosystem contribute to such ecosystem in varying ways, such as by providing network access, or providing online content and applications.

- We believe that these differences should be accounted for when examining the contributions made by different sectors to the internet ecosystem.

c) **Security, and Safety Aspects:** The security and safety aspects of OTT communications services are covered under the IT Act. This includes various provisions of the IT Act, the CERT-In Rules and the CERT-In Directions.
   - Various provisions of the IT Act include security and safety requirements to ensure online user safety. Section 43A requires any entity handling sensitive personal data or information (SPDI) to pay compensation if it fails to implement reasonable security practices and procedures and causes wrongful loss or gain to any person. The SPDI Rules provide details of reasonable security practices and procedures, as well as other compliances regarding personal information (***PI***) and SPDI.

- OTT service providers handling PI or SPDI in the course of offering communication services are required to comply with the obligations under the SPDI Rules.
- Further, the IT Act, in the interests of national security, public order, etc, empowers the Government and its agencies to intercept, monitor, and decrypt under Section 69; block unlawful content available on a computer resource under Section 69A; and monitor and collect traffic data available on a computer resource for cyber-security purposes under Section 69B.
- Therefore, there are adequate provisions under the IT Act that are already applicable to OTT service providers with respect to safety and security obligations concerning PI or SPDI and for promoting cyber-security.
- The Digital Personal Data Protection Act ('DPDP Act') will impose further obligations on OTT service providers with respect to the implementation of reasonable security procedures.

- Several OTT communication services have also taken internal initiatives to implement safety features. One such example is the introduction of two-step verification by OTT communication services as an additional verification feature, with the option to report or block. OTT communication services are also constantly introducing security features with the goal of reducing spam and fake news on their platforms.

d) **Privacy Aspects:** Privacy features will now be covered under the DPDP Act, which will be implemented soon. This DPDP Act will impose further obligations on OTT service providers. Further, the IT Act is being overhauled, and we can expect the Digital India Act to address these issues soon. As of now, and as mentioned above, the SPDI Rules apply to OTT service providers with respect to collecting and processing PI and SPDI. Thus, OTT service providers have specific privacy obligations under the SPDI Rules.

e) **Quality of Service:** Because OTTs are delivered over the public internet, their quality of service is determined by the network infrastructure**.** The underlying network infrastructure, which is already regulated by TRAI, is not controlled by the application layer on which OTTs operate. Other quality of service aspects like consumer choice are determined by market forces in the case of OTTs, and consumers can easily download, delete, and move to another communication application that offers a similar service. We believe subjecting OTT service providers to onerous quality of service standards will decrease their innovation and likely increase operational costs. Quality of service should reside with the network infrastructure provider, i.e., the TSPs.

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f) **Consumer Grievance Aspects:** Existing laws such as the Consumer Protection Act (for paid online services) and the IG Rules (for intermediary services) impose grievance redressal measures on OTT communication services. As a result, no additional obligations are required in this regard. The current regulatory environment has allowed the market to grow organically and provide consumers with a variety of application options. Consumers have the ability to download and use multiple OTT communication services, as well as easily migrate between them, thanks to low switching costs and a high availability of alternatives.

Any additional regulatory intervention will negate these advantages by imposing entry costs. The TSP market is an example of how burdensome regulation could result in limited consumer choice, with only two or three alternative service providers and high switching costs.

Question 6: Whether there is a need to bring OTT communication services under any licensing/regulatory framework to promote a competitive landscape for the benefit of consumers and service innovation? Kindly provide a detailed response with justification.

CCAOI response:

Since OTT services are already governed and regulated by the IT Act & Rules, and other relevant sectoral legislations, there is no need to bring OTT services under any additional licensing or additional regulatory framework.

a) Additionally, since the goal of promoting a competitive landscape, beneficial for consumers and service innovation is already met in the OTT space which are key characteristics of digital markets, any further regulatory intervention at the behest of certain stakeholders will undermine the competitive forces in the market and lead to market fragmentation and market failure.
b) As pointed out earlier, the services of OTTs and TSPs are not substitutable. Rather, OTTs and TSPs have a symbiotic relationship. For the sake of brevity, we will not be repeating the relationship between the two services.

We believe that any shift away from the current regulatory regime governing OTT communication services will adversely impact innovation and ease of doing business in that sector. Moreover, the government is in the process of amending the IT Act, talks are on to bring in a Digital Competition Act, the Digital Personal Data Protection Act, 2023 will be implemented soon. In that light, there is no need to contemplate any additional licensing/ regulatory framework for OTT services. Therefore, OTT communication services should not be subject to any additional licensing and regulatory framework, especially if the framework was not originally designed for such services.

Question7: In case it is decided to bring OTT communication services under a licensing/ regulatory framework, what licensing/ regulatory framework(s) would be appropriate for the various classes of OTT communication services as envisaged in question number 4 above? Specifically, what should be the provisions in the licensing/ regulatory framework(s) for OTT Communication services in respect of the following aspects:

a) **lawful interception;**
b) **privacy and security;**
c) **emergency services;**
d) **unsolicited commercial communication;**
e) **customer verification;**
f) **quality of service;**
g) **consumer grievance redressal;**
h) **eligibility conditions;**
i) **financial conditions (such as application processing fee, entry fee, license fee, bank guarantees etc.); and**
j) **any other aspects (please specify). Kindly provide a detailed response in respect of each class of OTT communication services with justification**.

CCAOI Response:

As noted in our response to Question 6 above, there is no need to bring any OTT services under a licensing or additional regulatory framework. Regulations, including the IT Act & Rules address lawful interception, privacy and security, and other aspects. Any additional regulatory measures should be introduced through the existing regulations in the event of any gaps, keeping in mind technical differences that impact services. For example, as noted above, OTT quality of service depends on the underlying network (which OTT service providers do not control). Similarly, provision of emergency services is also dependent on underlying networks, which OTT communications services do not have control over.

We believe that OTT communication services do not require any additional licensing or regulatory framework. Our response to Question 6 above provides details as to our reasoning for the same. However, we have still commented on the above-mentioned aspects vis-à-vis OTT communication services and the fact that they are already sufficiently regulated.

a) **Lawful interception:** The Government and its agencies have powers under Section 69, 69A, and 69B, respectively, to: (i) intercept, monitor, and decrypt information in a computer resource for reasons such as national security and public order; (ii) block access to information in any computer resource for these same reasons; and (iii) monitor and collect traffic data or information in a computer resource for cyber security purposes.
b) **Privacy and security:** The SPDI Rules and the CERT-In framework impose several obligations on OTT service providers to ensure adequate safeguards against data breaches,

cyber-security incidents and to maintain the privacy of individuals. The Digital Personal Data Protection Act 2023 will further address any privacy issue.

c) **Emergency services**: TSPs under the Unified License regime are required to provide public utility and emergency services like toll free calls to emergency departments such as fire, police and ambulances, to ensure that individuals are able to make these critical calls during emergency situations without them being charged. Attempting to impose the same set of obligations on OTT communication services is problematic because OTT communication services require the internet to function, and there is no guarantee that internet access will be readily available during an emergency. Additionally, OTT communication services do not have the infrastructure to provide emergency calling services, in light of the fact that most of these services do not have interconnection functionalities. Further, in order to help individuals during emergencies, it is sometimes crucial to be able to identify their specific location (such as during search and rescue operations), but OTT communication services may not be able to perform this function for all their users based on their privacy settings on a platform.

d) **Unsolicited commercial communication:** OTT communication services have introduced features on their platforms that allow users to report or block numbers from which they receive unsolicited messages and calls. A few OTT communication services also offer users the option of unsubscribing from marketing messages as an alternative to blocking the number completely.

e) **Customer verification**: Users signing up to use OTT communication services are required to verify their identity through one-time passwords sent either to their phone number or email. Notably, the IG Rules require significant social media intermediaries to give users the option to voluntarily verify their accounts through appropriate mechanisms, such as a mobile number. Thus, OTT communication providers that fall within the ambit of significant social media intermediaries are already subject to verification requirements. Lastly, we note that certain OTT communication services cooperate with regulatory authorities to identify situations where users continue to use OTT communication services with disconnected numbers, and, in this regard, require users to re-verify these numbers.

f) **Quality of service**: Please refer to the response to Question 5 on ‘quality of service aspects’.

g) **Consumer grievance redressal:** Please refer to the response to Question 5 on ‘consumer grievance redressal aspects’.

h) **Eligibility conditions:** We do not believe there is a need for any additional licensing or regulatory framework for OTT communication services, and therefore this question is not relevant.

i) **Financial conditions:** We do not believe there is a need for any additional licensing or regulatory framework for OTT communication services, and therefore this question is not relevant.

Question 8: Whether there is a need for a collaborative framework between OTT communication service providers and licensed telecommunication service providers? If yes, what should be the provisions of such a collaborative framework? Kindly provide a detailed response with justification.

CCAOI Response:

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), offer functionalities on different devices and compete for different groups of customers.

OTTs and TSP have a symbiotic relationship. Without the telecom network to provide access to the Internet, OTT providers would be unable to reach their customers on cellular devices. Though the revenue from traditional voice and messaging services may have diminished for TSPs their revenue has grown manifold from the data usage from OTT services.

There is no need to come up with another regulatory framework, such as mandating network usage fees (NUF).

a) Firstly, there is not enough evidence to suggest that network usage fees will solve the existing issues ailing the telecom operators. Rather, as pointed out earlier, the root issues ailing the telecom industry need to be addressed.
b) Secondly, charging a network usage fee from the OTT services by the TSPs would be a violation of net neutrality principles laid down by the TRAI in 2017.
c) Thirdly, contrary to the TSP argument, OTT providers are already contributing to infrastructure expansion through the development of Content Delivery Networks (CDNs) and projects to lay deep-sea cables, among others. From 2011 to 2022, OTT providers have invested almost USD 900 billion into network infrastructure, with an average spend of about USD 120 billion a year from 2018 to 2021[2]. These investments are only increasing with the rise in consumption.
d) While TSPs provide the transmission capacity, OTT apps offer content that boosts user demand for this capacity. Therefore, both are mutually interdependent. Just as TSPs need the content to earn revenue from users, OTTs need the transmission pipes to reach end users.
e) As users use more bandwidth-intensive OTTs, such as video streaming services, they pay more for faster speeds and greater bandwidths. Simply put, TSPs are using the content provided by OTTs to increase their revenues, which in turn lead to higher investments in

[2] Esya Center, Regulation of OTT Communications Services: Justified Concern or Exaggerated Fear?, available at: https://www.esyacentre.org/documents/2023/1/31/regulation-of-ott-communications-services-justified-concern-or-exaggerated-fear

the TSPs' networks. As noted in the CP, TSPs' average revenue from data usage has increased tenfold, from 8.10% in June 2013 to 85.1% in December 2022, driven by content consumption on OTT services.

f) Around the world, OTT service providers are already investing in complementary internet infrastructure. In the Indian context, it has been reported that several OTT service providers have already invested in infrastructure to provide better internet access. In this regard, we note that the ITU's paper on the 'Economic impact of OTTs on national telecommunication/ICT markets' observes that the relationship between TSPs and OTT service providers is already complementary, owing to several collaborative efforts between TSPs and OTT service providers regarding network infrastructure investment.

g) Another report, 'The Impact of Tech Companies' Network Investment on the Economics of Broadband ISPs' (Analysys Mason, October 2022), examines the demand of ISPs for compensation from OTT service providers for using the underlying network to provide their services to users. We believe, however, that efficient content delivery to end users is critical for OTT service providers, and as such, they are committed to investing in hosting, transport, and delivery networks.

- According to the report, OTT service providers invested approximately $120 billion in such infrastructure each year between 2018 and 2021. Analysys Mason goes on to say that collaboration between OTT service providers and ISPs has aided the growth of the internet, which is being driven by an increase in demand for online services and internet access. More investment in internet infrastructure by OTT service providers means better delivery to end users and lower costs for ISPs.

h) In conclusion, the nature of the market encourages collaboration between OTT service providers and TSPs. Any imposition of additional obligations for further collaboration is not necessary and should be avoided.

Question 9: What could be the potential challenges arising out of the collaborative framework between OTT communication service providers and the licensed telecommunication service providers? How will it impact the aspects of net neutrality, consumer access and consumer choice etc? What measures can be taken to address such challenges? Kindly provide a detailed response with justification

CCAOI Response

The internet is a network of networks that connects both private and public entities to ensure free communication. Agreements governing network traffic exchange are based on voluntary, commercial negotiations, which form the foundation of the internet's networking model. As a result, any attempt to implement a network usage fee may significantly disrupt this model, irreversibly altering the fabric of the internet and its core success factors. Any attempt to

implement a network usage fee may significantly disrupt this model, irreversibly changing the fabric of the internet and its core elements of success.

Further, there is no evidence to hold streaming services accountable for free riding. In fact, reports of Analysys Mason & WIK Consult have found that it is the customers of the TSPs who are wanting and using the apps, thereby driving network utilization, which in turn is helping telcos generate more revenues. Moreover, *the customer is paying data usage charges (which increased by a healthy 40% in the last 3 years) to the telco and they have full freedom to charge enough to cover their costs.*

Analysys Mason reports that network-related costs for TSPs have remained stable over time, despite significant increases in traffic volumes. Data traffic accounts for a small portion of the provider's costs, which are further mitigated by CAP investments in internet infrastructure. If a user streams more content, the TSP incurs no additional costs because the user will likely pay the operator in the form of a higher data plan. This simply demonstrates that the TSPs are perfectly capable of handling steady traffic growth at a negligible incremental cost.

It can therefore safely be surmised that the demand for network fees from OTTs is merely a strategy to extract monopolistic rents, negatively impact the trajectory of innovation being pursued by the OTTs and impose higher data costs indirectly on the end-customers.

a) While TSPs claim that network fees help to unlock socio-economic opportunities for citizens and businesses. However, the opposite is true, as evidenced by South Korea's experiment with the concept, which gave results like consumer prices going up dramatically, content offering becoming less diverse and the internet itself becoming slower while investments in network infrastructure actually declined.
b) The imposition of network usage fees may impact competition negatively, especially for smaller players in the market. Smaller players may not be able to afford the network usage fees, making it difficult for them to compete with larger players who can afford to pay. This may result in smaller players being forced out of the market, foreclosing competition and freedom of choice for end-users.
c) The demand for a network usage fee goes against the principle of net neutrality. Net neutrality provides for the equal, non-discriminatory treatment of content by internet access providers. In India, the regulatory framework on Net Neutrality prohibits discrimination, restriction, or interference in the treatment of content – such as by blocking, degrading, slowing, or granting preferential speeds or quality to any content.
d) In light of the existing collaboration between OTT service providers and TSPs, there is no need for an additional collaborative framework. Additionally, there are several challenges that may arise due to a collaborative framework between OTT service

providers and TSPs, if such a framework results in a network usage fees or revenue sharing system.

e) A revenue sharing model has the potential to be advantageous for TSPs to double dip, since they will earn revenues from the users who are paying for internet access, as well as OTT communication service providers who will be required to reimburse TSPs for using their network to transmit content to the end user.

f) However, the current market conditions do not call for such a mechanism. There is also a fear that, if implemented, the profits earned by virtue of this model will be kept by the TSPs instead of being reinvested in improving network connectivity for users. TSPs would also not be motivated to invest in their own business.

g) Any revenue sharing model will violate the principle of net neutrality and go against the open and free nature of the internet. For instance, if different OTT communication services are charged different rates by TSPs (depending on their nature, size, etc.), net neutrality may be violated. Another concern (including from a competition law perspective) is that TSPs that have their own OTT communication services will be exempt from any such revenue sharing requirement.

h) Further, if a revenue sharing model or network usage fees model is implemented, there are high chances that OTT communication services may be forced to reduce their investment in improving the quality of their services and improving the underlying infrastructure they rely on to provide their services. We believe that any decrease in the quality of services provided to users will go against their welfare in the long run.

i) In the Indian context, there have been strong objections to the revenue sharing model suggested by TSPs by stakeholders from industry, civil society and think tanks.

j) At the recent CCAOI stakeholder discussion, stakeholders mentioned that introducing a licensing regime and making OTTs pay may not address the core issue ailing the telecom industry. On the contrary, it may hamper the sense of competitive spirit between players, businesses, and technologies, especially when India aims to be a trillion-dollar economy. To make the telecom networks sustainable, the fundamental challenges faced by the telecom industry need to be urgently addressed. Reopening a debate on network usage fees that TRAI has already addressed may not be prudent.

ISSUES RELATED TO SELECTIVE BANNING OF OTTs

Question 10: What are the technical challenges in selective banning of specific OTT services and websites in specific regions of the country for a specific period? Please elaborate your response and suggest technical solutions to mitigate the challenges.

CCAOI Response

Selective banning of OTT services or platforms/websites raises legal, policy, and technical challenges, as discussed below:

a) **Consumers will find ways around selective banning:**
- Consumers rely on OTT services as more than just a means of communication. Thus, consumers are likely to be more motivated to find workarounds to the imposition of selective bans on OTT services or websites. For example, when the U.S. Government announced a ban on China's most popular messaging app, 'WeChat', Chinese users switched to an alternative messaging service with ease and immediacy. Therefore, selective banning of apps will not stop people from communicating with each other. Instead, it will encourage users to look for alternate means of communication.
- Another popular workaround for selective bans is the use of VPNs. News reports suggest that Russia's ban on certain social media websites increased the demand for VPNs by a significant amount. Even in the Indian context, a similar trend was observed in Jammu and Kashmir when there were successive and prolonged internet shutdowns and only certain websites were made available for a while. Therefore, the reliance placed on VPNs to circumvent selective banning cannot be avoided, or even curtailed (despite attempts to regulate VPN services under the CERT-In Directions).
- Indeed, selective banning may have a negative impact on users (i.e., it will undermine user choice or inhibit the ability of local communities to access OTT services of their choice for legitimate purposes), and it may not be the best strategy to counter terrorism or stop the spread of misinformation or fake news in politically sensitive regions in the country or in areas of public unrest.

b) Selective banning may not pass the test of being compliant with our fundamental rights:
- The Supreme Court of India has held that the fundamental right to speech and expression, and the fundamental right to carry on trade, business, or occupation, are protected even over the internet (Anuradha Bhasin v. Union of India & Ors., W.P. (C) No. 1031 of 2019).
- Therefore, the Government has a duty to act proportionally with respect to all orders that selectively ban OTT services, and which may hamper individuals from

exercising these fundamental rights. This means that the Government must ensure that all restrictions placed are minimal, seek to achieve a legitimate goal, and there are no better alternatives. With regard to selective banning, we understand that there is no conclusive evidence to indicate that it is the most feasible alternative to measures such as internet shutdowns in times of public unrest.

- It would be appropriate to selectively ban an OTT service, if and only if, such service has willfully not complied with laws or legal requirements in India. Section 69A of the IT Act in any case permits selective blocking to take place on certain critical grounds – and the Government has, in the past, used its powers under this provision to block applications from China or with a connection to China.

Question 11: Whether there is a need to put in place a regulatory framework for selective banning of OTT services under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 or any other law, in force? Please provide a detailed response with justification.

CCAOI Response

a) The IT Act & Rules already contain provisions to address security concerns, including blocking of information in emergency situations under Section 69 of the IT Act. These provisions have also been used to block not only particular content or information, but entire websites and applications. Any shortcomings with these mechanisms should be addressed through the existing legislation. For instance, in the past there have been allegations that the government does not follow the due procedure outlined in the relevant rules.

b) Having said that, we would also like to highlight, and as noted in the CP, internet shutdowns or suspensions can have disproportionately negative effects. Similarly, banning specific services can have severe implications for civil liberties including free speech. In addition to this, there are significant economic costs. Estimates from the Internet Society suggest losses caused by internet shutdowns crossed INR 187 billion in 2022.

c) The provisions under the IT Act are sufficient for blocking of online content and entire OTT platforms, and as such there is no need for an additional regulatory framework for selective banning of OTT services.

d) As laid out in the response to Question 5 on 'security aspects' above, there are already existing provisions that allow the Government to issue blocking orders on specified grounds. For example, under Section 69A of the IT Act read with the Blocking Rules, "any information generated, transmitted, received, stored or hosted in any computer resource" can be blocked. This can include online content (such as a post) or an entire

website / platform, which may be blocked on grounds relating to the sovereignty and integrity of India, national security, public order, etc.

e) Further, under Section 79 of the IT Act read with the IG Rules, any access to online content can be blocked under certain grounds, and upon directions from the appropriate regulators or courts of law in India.

Question 12: In case it is decided to put in place a regulatory framework for selective banning of OTT services in the country, -

a) Which class(es) of OTT services should be covered under selective banning of OTT services? Please provide a detailed response with justification and illustrations.

b) What should be the provisions and mechanism for such a regulatory framework? Kindly provide a detailed response with justification.

CCAOI Response

As explained in our responses to Questions 10 and 11, as to why there is no need to implement a regulatory framework for selective banning of OTT services in India and the harms of implementing it, we will refrain from providing any inputs to this question.

Question 13: Whether there is a need to selectively ban specific websites apart from OTT services to meet the purposes? If yes, which class(es) of websites should be included for this purpose? Kindly provide a detailed response with justification.

CCAOI Response

As explained in our responses to Questions 10 and 11, as to why there is no need to implement a selective banning of OTT services in India and the harms of implementing it, we will refrain from providing any inputs to this question.

Question 14: Are there any other relevant issues or suggestions related to regulatory mechanisms for OTT communication services, and selective banning of OTT services? Please provide a detailed explanation and justification for any such concerns or suggestions.

CCAOI Response

As stated in our response to the earlier questions, we believe there is no need as of now to implement any additional regulatory framework for regulating OTT communication services and implementing selective banning of OTT services in India.

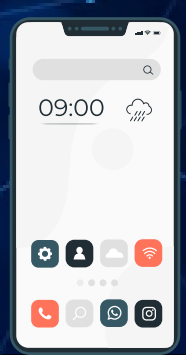
CCAOI™

Representing the ecosystem of Internet - Bharat Model

Summarised Report: CCAOI Stakeholder Consultation

on the

Manthan: Impact of Network usage Fees & Selective Blocking



On August 2, 2023, CCAOI carried out an online interactive stakeholder discussion titled **Manthan: Impact of Network Usage Fees and Selective Blocking** on a consultation paper titled 'Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services', drafted by the Telecom Regulatory Authority of India (TRAI). By way of the consultation paper, the TRAI has sought recommendations with respect to the selective banning of OTT services and websites in particular regions of the country for specified periods, and also which classes of OTT services should be covered under this move. The current consultation paper also seeks recommendations on provisions and mechanisms for creating such a regulatory framework.

The objective of this discussion was to provide participants with a better understanding of the consultation paper, to explain and eliminate aspects of the consultation paper, and to encourage stakeholders to make submissions by the deadline.

The 120 mins discussion was moderated by Amrita Choudhury. The introduction to network usage fees and selective blocking was provided by Gowree Gokhale, Nishith Desai & Associates. A high-level overview of the developments in the European Union related to network usage fees was offered by Alexandre Roure, Computer & Communications Industry Association. The expert speakers at the session included Anjali Hans, Vodafone Idea Limited; Dr. Mahesh Uppal; Parag Kar; Tejasi Panjiar, Internet Freedom Foundation; Uthara Ganesh, Snap Inc.; and Vertika Misra, NASSCOM. Over sixty participants (from different stakeholder communities) attended this discussion, many of whom shared their views during the discussion.

The chat moderators for the session were Akshara Prakash and Sherin Mary Joseph, and the rapporteur for the session was Anahida Bhardwaj.

The recording of the event can be viewed at this link.

Session Speakers:

Alexandre Roure
CCIA

Dr Mahesh Uppal

Anjali Hans
Vodafone Idea Limited

Tejasi Panjiar
Internet Freedom Foundation, India

Parag Kar

Gowree Gokhale
Nishith Desai & Associates

Uthara Ganesh
Snap Inc.

Vertika Misra
NASSCOM

Key Arguments made

1. **Definition and classification of 'OTT Service'**
    - Concerns over the functional definition and classification of OTT services were raised. Multiple functions are performed by a single service provider, and this may lead to unclear classifications. For instance, a service provider may provide voice calling and instant messaging, even though its primary functionality may be social networking.
    - The definition, or rather lack thereof, of OTT Communication Services runs counter to the goal of enabling innovation. The challenge is to develop not only a definition that is consistent across jurisdictions but also one that encompasses all types of services comprehensively.
    - Caution was expressed that function based classification of OTT services may disincentivize companies to innovate, and any form of additional licensing regulation of the tech industry by the telecommunication laws, could hamper the growth of the ecosystem.

2. **Network Usage Fees**
    - While telecom operators believe that OTT platforms' services are a direct replacement for those offered by telecom operators and demand 'same service, same rules', several experts pointed out the structural differences between the services provided by telecom operators and those provided by OTT platforms.
    - OTT services cannot function without the network infrastructure and connectivity provided by telecom operators, since they do not own or operate them.
    - Telecom operators and OTT services have a symbiotic relationship. Though the revenue from traditional voice and messaging services may have diminished for Telecom operators, their revenue has grown manifold from the data usage from OTT services.
    - There is no clear agreement that OTT services contribute to the increased costs borne by telecom operators.

- While telecom operators are demanding an India-specific discussion on network usage fees since network sustainability is an issue, it was pointed out that there is not enough evidence to suggest that network usage fees will solve the existing issues ailing the telecom operators.
- Charging a network usage fee from the OTT services by the telecom operators would be a violation of net neutrality principles laid down by the TRAI in 2017.
- An expert discussing the debate surrounding network usage fees in the European Union (EU) noted that smaller and medium-sized operators/internet service providers have expressed concern over network usage fees. Other stakeholders voicing strong concerns in the EU include regulators, consumer groups, digital rights NGOs, academics, the broadcasting and streaming industry, local vendors, etc. They see no market failure and are concerned that the proposal poses quite a few risks for competition, consumer welfare, quality of services, and prices (for online subscriptions and access to online services)
- It was pointed out that the adoption of the network usage fee model in South Korea has led to higher costs for users, increased network latency, and slowed down investment in network infrastructure.
- On the argument that OTT services are not regulated like telecom operators, it was pointed out that content applications are already governed by the Information Technology Act (IT Act), the Consumer Protection Act and the Competition Act. Together with investment regulations, these already cover a vast amount of policy regulation. Parallel legislation under telecommunications laws would stymie the development of the technology ecosystem.
- On the issue of OTT services being effective substitutes for telecom services, particularly when it comes to voice and text messaging, it was argued that OTT services cannot be considered substitutes as they do not own the equipment or networks that carry their services. Further, in most cases, OTT services are far richer in terms of features and functionality.
- A telecom speaker clarified that telecom operators are advocating to create a level playing field and not increase the compliance burden for OTT services.

3. On Selective Blocking

- Some experts opined that selective blocking may be a better option than complete internet shutdowns during periods of unrest/ crisis.

- It was pointed out that the test of proportionality, which says that the action must be equal in quantum to the reaction, is not satisfied when it comes to selective blocking. There has to be an analysis of all orders issued to see whether this is a justifiable action. Reliance is placed on Shreya Singhal vs. Union of India, (2015, Supreme Court) and Anuradha Bhasin vs. Union of India (2020, Supreme Court) to say that the extent of restriction and scope must relate to what is truly necessary.

- In the absence of a notified data protection law in India, lawful interception with respect to selective blocking is a concerning issue and is against consumer interest.

- The consequences of such selective blocking could be ad-hocism, leaving users with little to no recourse, an increase in the compliance burden on MSMEs, and an overall negative impact on user experience as well as choice.

- The Ministry of Electronics and Information Technology (MeitY) has pre-existing powers for regulating and moderating the kind of content that can be hosted and can order the same to be taken down or blocked. Said takedown is mandated under the provisions of the Information Technology Act, 2000 (IT Act). Therefore, providing additional powers to a telecommunications regulator seems inane.

- An expert pointed out the technical infeasibility of implementing selective blocking:

  - To enable selective blocking, the service provider should have access to the Caller ID or GPS of the user, at all times. This poses severe privacy and security concerns, and sensitive information can be misused by miscreants. Further, tracking one's location without their consent is a violation of one's fundamental right to privacy.

  - Attempting to selectively block people or sites in a particular region would require the IP addresses of destination servers, which are masked to ensure network security.

- Implementing deep packet inspection would increase the latency in the network and increase the network operations investment cost. These costs would ultimately have to be borne by the consumer.
- Furthermore, services hosted on the cloud are difficult to block selectively since they operate from multiple locations in multiple countries and shift their services continuously from one to another.

- There are several unanswered questions related to selective blocking, such as the procedure established for selective blocking, whether all or comparable services to the platform being selectively blocked will also be blocked, and what would happen in the event there are inconsistent techniques applied for selective blocking.

4. Need for the Consultation Paper

- While telecom operators are of the opinion that the consultation paper is the need of the hour, many experts opine that the present consultation paper is not necessary.
- An expert pointed out that the issues raised in the consultation paper have all previously been addressed in recommendations, except for the issue of shutting down or banning apps. Neither TRAI nor the DOT have provided any data or developments to support the introduction of this new paper.

5. Address core challenges faced by the Telecom Sector

- There was consensus on the urgent need for the government to address the core issues ailing the telecom sector.
- To make the telecom network sustainable, there is a need to reduce the regulatory burden faced by telecom operators on an urgent basis. These include reforming the complex licensing regime, problematic revenue sharing calculations, spectrum pricing structures, etc.
- There was an agreement to adopt a collaborative approach by including all relevant stakeholders, more dialogues and consultations in order to ensure the issues of telecom operators are addressed without imposing an additional burden on OTT service providers.

Summary of Discussion

A variety of themes and concerns from various stakeholder perspectives were discussed and contemplated. The complex issues before us primarily concern proposals for OTT services, their network usage fees, and selective blocking of OTT services.

The issues posed for consultation by TRAI were regarding the definition of OTT services, the definition and features of OTT communication services, and a reasonable classification based on intelligible differentia. TRAI also seeks views on comparable aspects of OTT communication services vis-à-vis licensed telecom services, the need for a similar licensing framework for OTT communication services, and the need for a collaborative framework between OTT players and telecom operators. With respect to selective banning, TRAI seeks answers on what the technical challenges are to selective blocking, whether there is a need for regulations on selective blocking, and whether there is a need to selectively ban websites other than OTT services.

While one does not deny that telecom operators are facing an increased regulatory burden in providing their services due to the complex licensing regime, problematic revenue share calculation, spectrum auction, etc., demanding OTT services be regulated and bear the costs, which will ultimately be passed on to the user, is unfair.

Introducing a licensing regime and making OTTs pay may not address the core issue ailing the telecom industry. On the contrary, it may hamper the sense of competitive spirit between players, businesses, and technologies, especially when India aims to be a trillion-dollar economy.

To make the telecom networks sustainable, the fundamental challenges faced by the telecom industry need to be urgently addressed. Reopening a debate on network usage fees that TRAI has already addressed may not be prudent.

As for the issue of selective blocking, TRAI has recommended the selective blocking of specific OTT applications and websites in specific regions, where they could be used by miscreants. The consequences of such selective blocking could be ad-hocism, leaving users with little to no recourse as there will be several unanswered questions, an increase in the compliance burden on MSMEs, and an overall negative impact on user experience as well as choice.

In summation, it was held that the kinds of alternatives being put before us are problematic. There is a need for collaboration in terms of consumer protection and benefits, as well as innovation. The argument comes down to how one can leverage the problem and come up with unique solutions, which are not provided in the consultation paper.