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Sent: Friday, August 4, 2023 8:48:57 PM

Subject: Spice Route Legal - Responses to the Consultation on the Regulatory Mechanism for OTT Communication Services and Selective Banning of OTT Services

Respected Sir,

SUB: Response to the Consultation on the Regulatory Mechanism for OTT Communication Services and Selective Banning of OTT Services.

I hope this email finds you well. By way of introduction, I am an associate at Spice Route Legal, a full service law firm with an extensive focus on telecommunication and technology laws. At Spice Route Legal, we are thankful for and happily welcome the opportunity to provide responses to the TRAI consultation on the Regulatory Mechanism for OTT Communication Services and Selective Banning of OTT Services. TRAI has long been a trusted regulator to safeguard the interests of Indian consumers and service providers in the telecom industry and we are delighted to be part of this consultation process.

Please see attached our comments on the consultation paper. Our responses are based on a thorough analysis of the Indian legal framework, international best practices, and our experience of advising Indian and multinational organisations in the OTT space.

Once again, Spice Route Legal would like to thank the office of TRAI for initiating this consultation and for giving stakeholders the opportunity to offer their inputs on the regulation of OTTs.

We would be grateful to be of further assistance to you in this regard.

Warm Regards,
Ajeeth



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RESPONSES TO CONSULTATION PAPER ON REGULATORY MECHANISM FOR OVER-THE-TOP (OTT) COMMUNICATION SERVICES, AND SELECTIVE BANNING OF OTT SERVICES

Introduction

Over the course of the pandemic and in recent years, the number of internet users in India has grown exponentially. Data from the International Telecommunications Union (“ITU”) shows that the percentage of internet users in India has risen from 20% to 46% in the span of three years, from 2018-2021.¹ According to a joint report by Internet and Mobile Association of India (“IAMAI”) and Kantar, the projected growth of the number of internet users in India for the year 2025 is 900 million, up from 759 million as of 2022.²

As noted by Telecom Regulatory Authority of India (“TRAI”) in its **Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services (“TRAI Consultation Paper”)**, in the previous ten years, as the use of internet-based calling and messaging apps has increased, the income share of telecom carriers from voice calls and SMS has decreased by around 80% and 94%, respectively.³

In light of this, Department of Telecommunications (“DoT”) and TRAI intend to explore options to level the playing field between traditional telecommunication service providers (“TSPs”) and over-the-top (“OTT”) service providers. While TSPs and OTT service providers offer similar services, they are not bound by the same statutory requirements. TRAI and DoT have recognized a lacuna in the regulatory framework and seek to ensure regulatory parity between the two.

Responses to Issues Raised in the TRAI Consultation Paper

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

The term “OTT Services” includes a broad category of services which may be included under its ambit. The term “OTT” may essentially be used to convey anything available over the internet on-demand, and does not need specific authorisation to function. The definition of OTT Services could function as an all-encompassing definition to include any service which bypasses traditional operators’ general distribution channels to provide services to individuals on-demand over the internet.

Such a definition would be useful, since the term OTT Services exists at the intersection of various sectors, including media and entertainment, interpersonal communication, social media platforms, cloud based services, and internet based applications that are available on demand. The definition of

¹ <https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=IN>

² https://www.iamai.in/sites/default/files/research/Internet%20in%20India%202022_Print%20version.pdf

³ Pg 12 of TRAI Consultation Paper.

an OTT Service may thereafter be modified contextually, depending on the nature of regulation being considered. For instance, within the ambit of telecommunication services, the definition of an OTT Service may be contextually interpreted as being an internet-based substitute for traditional international telecommunication services.⁴

For further nuance in respect of telecommunication services, OTT Services may largely be defined into 3 (Three) categories, taking inspiration from the European Union’s Electronic Communications Code (“EECC”).⁵ The EECC broadly defines the term “electronic communications services” to include (i) internet access services; (ii) interpersonal communications services; and (iii) services whose main purpose is to convey signals (such as the conveyance of signals used for the provision of broadcasting).⁶ The inclusion of such broad categories of the definition of the term “OTT Services” to be used by the TRAI and the DoT will assist the regulators in defining clearer limits to the extent of their regulation and prevent regulatory overlap with ministries such as the Ministry of Electronics and Information Technology (“MEITY”), which is already engaged in the regulation of OTT streaming services.

Separately, the term “on demand” is intrinsically linked to the definition of an OTT Service. This is because, to qualify as an OTT Service, it is broadly accepted that the service be available generally over the internet. A definition to the term “on demand” already exists within the Indian legal system, under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**Intermediary Rules, 2021**”). According to the Intermediary Rules, 2021, the term “on demand” has been defined to include “*a system where a user, subscriber or viewer is enabled to access, at a time chosen by such user, any content in electronic form, which is transmitted over a computer resource and is selected by the user*”.⁷ The generality of the foregoing definition is common across sectors, and can be accordingly utilised to further set boundaries to the definition of the term OTT Services.

In conclusion, we recommend that the term “OTT Services”, in the context of TRAI, be defined to include the following factors:

- (i) the availability of the services “on demand” to the general public;
- (ii) the ability of the services to substitute the services of traditional TSPs; and
- (iii) the provision of the broad categories of OTT players sought to be regulated by the TRAI and the DoT.

⁴ *International Telecommunications Union, Collaborative Framework for OTTs, Recommendation ITU – T D. 262.*

⁵ *Directive (EU) 2018/1972.*

⁶ *Directive (EU) 2018/1972, Article 2(4).*

⁷ *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Section 2 (p).*

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.

Article 14 of the Indian Constitution lays down various requirements in relation to the enactment of a legislation in India. While Article 14 of the Indian Constitution prevents the enactment of legislations based solely on “class”, legislations based on reasonable classification of different factors are permitted.⁸ The test of reasonable classification in accordance with judicial jurisprudence in India includes the following tests:⁹

- (i) The reasonable classification ought to be founded on the basis of intelligible differentia, raising distinctions between the classes grouped together for the purposes of the regulation, and the classes left out of the regulated group; and
- (ii) The intelligible differentia ought to have a rational nexus with the object that is sought to be achieved by the regulation.

These principles in Indian law arise out of one of the two primary pronouncements of Article 14 of the Indian Constitution: that equals ought to be treated equally in the eyes of the law. Furthering this doctrine under the Indian Constitution, the judiciary has also laid down the fact that such law based on reasonable classification cannot be arbitrary or evasive, since arbitrariness in the law is the antithesis to the term “equality.”¹⁰

Considering these well-established principles of Indian law, it is important that a law enacted by the TRAI or DoT lays down clear boundaries to its regulation of OTT Services. We recommend the following approach in relation to the reasonable classification test propounded under Indian jurisprudence:

(i) Intelligible Differentia:

The TRAI’s and DoT’s regulation of OTT Services ought to be specific, systematic, and limited to legislative grants traditionally granted to the DoT and the TRAI. Therefore, the intelligible differentia which the TRAI and the DoT may use in its endeavour to regulate OTT Services may include substitutes to the traditional TSPs: i.e., OTT Services that govern communication among individuals.

It would be incorrect to imply that TSPs and OTT Communications Services offer the same services or compete in the same market. OTTs rely on TSPs to provide their services and are not a substitute for TSPs. Consumers must first purchase internet access service from a TSP to be able to download OTT

⁸ *Ram Krishna Dalmia v. S.R. Tendolkar*, 1959 SCR 279.

⁹ *State of West Bengal v. Anwar Ali Sarkar*, (1952) 1 SCC 1.

¹⁰ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

applications. TSPs oversee the underlying broadband infrastructure, thus serving as gatekeepers to OTTs.

TSP licenses grant several unique rights that OTT players cannot hold. For instance, these involve (i) the right to purchase spectrum, (ii) the right to acquire numbering resources, (iii) the right to connect to the PSTN, and (iv) the right of way to construct infrastructure. Additionally, OTT services do not distribute natural resources but instead are services that are provided using the services that distribute spectrum; hence they cannot be regarded as resources or services that are owned and controlled by the central government or that the government has exclusive rights over.

Further, the need to separately regulate OTT Services ought to arise from the fact that OTT Services do not function in line with the already regulated TSPs. Therefore, regulating OTT communication services in the same manner as TSPs would not be appropriate.

(ii) Rational Nexus with the Object of the Law:

The object of the regulation of OTT Services in India as laid down under the TRAI Consultation Paper is the growing necessity to regulate the competition between traditional TSPs and OTT Services and to level the playing field between these classes of entities. The protection of TSPs' interests therefore ought to be at the forefront of such a regulation. This would ensure that the objectives of the regulation of OTT Services remain to the subjects generally governed by the TRAI or DoT in relation to traditional TSPs. This may include aspects such as unsolicited commercial communication as governed by the Telecom Commercial Communications Customer Preference Regulations, 2018, quality of service as governed by various quality of service regulations issued by TRAI, and the tariffs imposed by TSPs in relation to the services provided by them as governed by the Telecommunication Tariff Order, 1999.

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.

The definition of an "OTT Communication Service" should include such applications which are used to facilitate interpersonal communication between persons. Interpersonal communications services ("ICS") are products that allow for the interpersonal and interactive exchange of information. These services can include group chats, emails of any kind, and classic phone conversations between two or more individuals. Such an ICS must enable explicit response from the data recipient in order to engage in participatory conversation. Therefore, interpersonal communications services do not include products like linear television, video on demand, websites, social networks, blogs, or information sharing between machines.

The definition of an ICS therefore, must exclude any service outside the mere communication among persons such as connectivity services forming the primary basis of machine-to-machine and machine-to-person communications (such as chatbots on websites, A2P messaging services, and incidental communication pursuant to another primary business purpose). Such services ought to be categorised outside the purview of ICS.

Additionally, an offering should not be classified as an ICS if the interpersonal and interactive communication facility is merely an add-on to a different delivery that cannot be used independently due to unbiased technological constraints, and its incorporation is not intended to avoid the application of the regulations governing communications facilities (possible exceptions, depending on the specifics, include the chat-box available to players in online games). A mere commercial bundling with other services would, likewise, not be reasons sufficient to be regulated outside the ambit of ICS regulations. The interpersonal and interactive exchange of information between a limited number of people should be included as a further criteria to distinguish ICS from other services like social networks or video sharing platforms.

Further, the definition of ICS ought to also be subdivided, as is the case with the EECC in the European Union – into number based ICS, and number independent ICS. This form of separation is also important, since the standards governing ICS which can specifically be tied to one person's phone number ought to be different from the regulations governing ICS which may not be proven to specifically reside under the control of one specific person (through their phone number). A number-based service links or interfaces to numbers that are officially allocated: that is, digits in national or worldwide numbering schemes. Number-based ICS include both (i) services to which end-user numbers are assigned in order to ensure end-to-end connection; and (ii) services that allow end-users to contact individuals to whom such numbers have been assigned. Examples include "traditional" telephony and SMS, as well as VoIP services like WhatsApp calls, in which users are assigned and/or can call a "traditional" phone number. The use of a phone number as an identification does not constitute the same as using a phone for access to the public switched telephone network.

A number-independent ICS, on the other hand, is a service that does not connect or connect to publicly assigned numbers; that is, numbers in national or international numbering plans.

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.

In furtherance of the responses to questions 2 and 3 above, we recommend the following approach in determining the intelligible differentia for the reasonable classification of OTT Communication Services.

(i) Intelligible Differentia:

As stated in the response to question 2 above, the fundamental differentiating character of OTT Communication Services, or ICSs, must be based on the primary function of the OTT Service. The primary function of an ICS is the facilitation of communication between two or more specific natural persons, and cannot extend to situations wherein such personal communication extends to situations where such communication is incidental.

For instance, Netflix and Amazon Prime, two of the biggest OTT media streaming platforms in India, have enabled features known as Netflix Party, and Amazon Party to allow consumers to watch shows and movies together as a group, with a chat feature enabled to ensure communication between the watchers. Technically under such regulation, a strict interpretation may force their classification as a number independent ICS, making these OTT streaming platforms susceptible to TRAI and DoT regulation, creating far-reaching considerations for the inclusion of these features. If designated as ICS, the OTT streaming platforms will not only have to comply with the regulation of the TRAI and DoT, but also comply with various laws resulting from inter-ministerial regulation of the same kinds of services. However, with the onset of their roles as ICS, these OTT streaming platforms will be forced to create, maintain, and possibly generate infrastructure not relating to the content posted on these platforms.

(ii) Rational Nexus with the Object of the Law:

The object of the regulation of OTT Communication Services or ICSs should remain the same as laid down under the response to question 2.

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.

The regulation of OTT Communication Services ought to be light-touch, providing for baseline requirements to include requirements in relation to the aspects above mentioned, in order to maintain the market regime for OTT Communication Services.

We believe a qualitative evaluation of these aspects ought to be undertaken prior to introducing *ex-ante* regulatory requirements in this regard. In relation to regulatory aspects, we recommend the creation of a principle-based regulation in order to ensure the flexibility of the law in catching up to the modernisation of technology under the ambit of OTT Communication Services. Rather than laying down specific criteria in relation to privacy, security, and quality of service, we recommend the creation

of a regime where baseline requirements are gathered from an analysis of the relevant markets to facilitate ease of compliance while ensuring a regulatory hold over OTT Communication Services.

(i) Regulatory Aspects:

We recommend the following three principles be inculcated in the regulation of OTT Communication Services:

- (a) **Non-discrimination:** OTT Communication Services providers ought not to apply varying requirements or general conditions of access to, or use of, networks or services to end-users, unless such different treatment is objectively justified through the means of conveyance of specific purposes for the limitations. This may include limitations in instances relating to the use of virtual private networks, unapproved internet service providers, or non-compliance with the terms and conditions of the usage of the OTT Communication Service.
- (b) **Content of contracts:** Specific information to be provided by OTT Communication Services providers before being bound by contracts as well as the minimum information to be included in contracts with consumers, enterprises and non-profit organizations may be prescribed to ensure equitable access to the OTT Communication Service. In this regard, the TRAI or DoT may introduce provisions with regard to the content of contracts in order to address newly emerging issues.
- (c) **Transparency, comparison of offers and publication of information:** OTT Communication Service providers should be obliged to publish relevant information on the terms and conditions of the services. This information may be supervised by the TRAI or DoT or another competent authority before its publication. This will ensure the implementation of transparency and accountability obligations in relation to the provision of OTT Communication Services.

(ii) Economic Aspects:

One of the primary features of the OTT Communication Services market is that there exists no minimum financial requirements or other economic requirements prior to entering such markets, inevitably lowering and preventing the creation of entry barriers to this market. Presently, as the fully functioning OTT Communication Services market is governed solely by free market forces, the primary reason for innovation, accessibility, availability, and popularity of the OTT communication services market is the ability of any new market player to introduce their product to the general public without being forced to undertake economic burdens. The profitability and economic gains of entities within the OTT Communication Services market depend on the scalability of their individual products which

are presently not governed. We recommend retaining the status quo in regard to not regulating financial and economic aspects of the OTT Communication Services market to protect the integrity and scalability of the market players and to promote requisite competition within such relevant markets.

(iii) Privacy and Safety Aspects:

While a general law on data protection and privacy is in the process of introduction in India, there is a need to develop a notion of privacy and data protection within telecommunication law in India. The definition of “privacy” and “data protection” varies with the concerns within sectors, due to the quality of these protection varying among sectors. For instance, within the realm of telecommunication law, the term “privacy” ought to take into consideration legitimate concerns in relation to government interception and surveillance, which while a necessary power, has to be balanced against the right to privacy prevalent as a constitutional protection in India.

Generally, data protection and telecommunication law discourse is limited to concerns surrounding access to large repositories of data by governments by engaging in interception and surveillance activities. There needs to be a comprehensive definition, setting out the boundaries of privacy for a *quality-based* analysis of data protection and privacy within the realm of the telecommunication sector and lay down specific standards and principles governing such privacy and data protection considerations.

Data protection and privacy is usually affected through a qualitative approach, with the quality of services being offered varying within markets such as the OTT Communication Services market, resulting in an abuse of privacy principles. Any law in this regard, must take into account the actual harm which is resulted to end consumers, and the market, from a variation in the data protection and privacy services. Such a measure for telecommunication based laws, on the increase or decrease of quality – is an important and effective inclusion for aspects such as data protection and privacy.

Data protection, as a quality attribute, may take different forms, not just in respect of the volume of sensitive data gathered by private entities and state agencies, but also in respect of customers’ ability to self-govern their data, such as choosing to share it. The seamless integration of baseline data protection standards into laws relating to OTT Communication Services will, therefore, need to function on two sides of this market – by protecting the interests of individuals against providers of OTT Communication Services, and by regulating conditions relating to state access to data in an environment where increased privacy is expected by individuals. Principles laid down in this regard must take into consideration reasonable expectations of individuals, state interests, and data protection principles. It entails that principles of data protection and cybersecurity requirements, such as seeking consent and providing notice of processing are fundamental to achieving the standard of quality expected by individuals in the OTT Communication Services market.

(iv) Quality of Service Aspects:

One of the primary aspects of the OTT Communication Services market in its present unregulated form, is the ability of the market to innovate, without having regard to specific regulation in relation to the quality of services. We, therefore, do not recommend the creation of the quality of services regime implemented for TSPs to be inculcated here. Instead, we recommend that the TRAI or DoT require OTT Communication Services providers, to the extent that they control at least some elements of the network either directly or by virtue of a service level agreement to that effect, to publish comprehensive, comparable, reliable, user-friendly and up-to-date information for end-users on the quality of their services and on measures taken to ensure equivalence in access for end-users with disabilities.

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.

The Indian Telegraph Act 1885, the TRAI Act, and the Wireless Telegraphy Act, 1933 – the primary regulations providing the DoT and the TRAI power to regulate the licenced network spectrums – applied to telegraphs, which were defined as an appliance, instrument or apparatus used for the transmission of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, Radio waves or Hertzian waves, galvanic, electric, or magnetic means. It, therefore, had a very limited application.

Any regulation of the DoT or the TRAI ought to retain its roots of the Telegraph Act, 1885. According to the aforementioned legislations, the Central Government has the exclusive privilege to:

- (i) provide telecommunication services,
- (ii) establish & operate telecommunication networks and infrastructure, and
- (iii) use and allocate spectrum.

The Central Government exercises such privilege by allocating licenses for the operation of telecommunication services, and for the establishment, maintenance, and expansion of telecommunication networks.

Evident in the possible expansive scope of the definition of OTT Communication Services, and as further explained in the TRAI Consultation Paper, the legislation seeks to ensure that regulation in the sector catches up with technology. However, in providing a licensing regime to OTT Communication Services, the DoT will massively expand its licensing regime. Such a proposed licensing regime has the potential to include every type of organisation mentioned under the definition of OTT Communication Service.

The licenses will now include ICSs such as WhatsApp, Telegram, and Signal, Google Meet, Cisco WebEx, and Zoom, electronic mail services, video communication services such as Skype, broadband service providers, and other communication services, such as the communication services used by different devices on the same ecosystem. This is in addition to the already regulated TSPs requiring a license.

This massive expansion in the scope of licensing regime exhibits a high level of control which is sought to be exuded by the government on the OTT sector. The requirement of licenses for entities which function as OTT Communication Services, has the potential to harm the availability of such services, and negatively impact competition in the field, by erecting barriers to the entry of such players into the market (through the requirement of licences).

The inclusion of OTT players within the same market as traditional telecom service providers might prove problematic for the following reasons. Firstly, due to the structure of the market itself – there exist a limited number of telecom service providers within India. This allows for some success in the governance of the imposed licensing regime of TSPs. However, the structure of the OTT industry is markedly different – admittedly, its largest strength is that it has easier access, functions based on its popularity and likeability in the market, as opposed to functioning as a licensed operator of the government.

Secondly, the OTT industry offers services to customers based on some expected standards. For e.g., the offering of end-to-end encryption, enhanced privacy features, the facility to place calls through protected means, etc. However, the inclusion of the OTT industry under Indian telecommunications regulatory framework has not just privacy repercussions (as addressed below), but also on the offerings of the industry itself, since they would now be subject to a much higher level of scrutiny for the grant of a licence and may need to comply with all government demands to obtain and possess a licence for the provision of services to Indians. Additionally, many players in the OTT industry, who previously did not have a physical presence in India and operated services by virtue of capabilities over the internet might now need to specifically set up India based offices in order to facilitate the obtaining of a licence and meet the expectations of the Indian government.

As opposed to a licencing regime, we recommend the creation of a general authorisation (“GA”) regime, further taking inspiration from the European Union’s EECC. The GA regime indicates that enterprises ought not to wait for an official decision by a public body before commencing their operations. GA is not a measure of administration, but rather a legislative industry framework that establishes rights and duties for all networks and services. GA does not apply to individual circumstances – unlike licences – assuring equitable access to the marketplace. Operators who comply with GA requirements may begin providing networks or services after notifying the appropriate authorities of their desire to do so. This also protects the freedom to supply electronic communications networks and services, subject to the conditions specified in a legislation issued by the DoT or TRAI. To

that aim, authorities should not prohibit an undertaking from offering electronic communications networks or services unless it is required by law, such as certain public interest considerations. Any such limitation to the freedom to provide electronic communications networks and services should be duly reasoned and notified to the general public.

Therefore, such a system will not require providers of OTT Communication Services to obtain an explicit decision or any other administrative act by the TRAI or DoT or by any other authority before exercising the rights derived from the GA. A notification constitutes the maximum requirement that competent authorities can legitimately envisage on undertakings. Further, a notification ought not to be onerous and should simply facilitate government knowledge of the OTT Communication Services operating in India. This would allow the Indian government to exert *ex post facto* regulation over the OTT Communication Service, to ensure compliance with the law.

General or specific conditions may be attached to a GA, in specific situations, such as offering OTT Communication Services in restricted areas. GA gives providers of OTT Communication Services the right to provide electronic communications networks and services and the right to make an application with the TRAI or DoT to install facilities to provide public electronic communications network or public electronic communications services.

- 7. 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 the 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.**

In line with our recommendations in response to question 6, we do not recommend the creation of a licensing regime, and believe that a GA regime, allowing for *ex post facto* regulation be implemented. Further, in line with this reasoning we do not believe regulations in terms of (i) eligibility conditions, (ii) financial conditions, (iii) quality of services, and (iv) consumer grievance redressal ought to exist. This is because, these are earmarked specifically for the creation of a licence, and need not exist in the situation of a GA, which is aimed at promoting market growth over intensive scrutiny-based regulation of the OTT Communications Service market.

Further, at a time when one of the most highly awaited legislations in the country is a legislation to assuage the data protection concerns of Indians is becoming reality, this form of regulation needs to

define the bounds of reasonable privacy expectations. An analysis of the market for OTT Communication Services makes it evident that one of the primary offerings of the various entities in this market is added privacy protections. If furthered, it is suspected that in the interest of public safety the government can temporarily take over the control of all OTT Communication Services around the country or provide for a priority-based call routing scheme.

The ability to take over the control of OTT based systems, is an unprecedented intrusive power delegated to the government in a market hinging on convenience and privacy. The ability of the government to instinctively violate the constitutionally mandated right to privacy must be adjudged based on whether such a power actually makes it into the final form of the legislation.

Another important facet to also be considered is the power to order internet shutdowns and the provision of “emergency services”. The adequacy of safety prescriptions in laws such as the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 which have largely been viewed as moot.

Additionally, through the inclusion of the OTT industry within the same ambit of traditional TSPs, the government will have the power to further lay down clear identification directives, which may function as a direct impediment to some of the central features of such applications, such as end-to-end encryption. These regulations, in essence, take away the user’s opportunity to remain anonymous and impose a duty on service providers to identify every user with total certainty. In the absence of a data protection legislation, such a wide mandate fails to prioritise user safety and security. These provisions also set up a possible collision course between two regulators – DoT, and MEITY, since largely similar provisions already exist under the IT Rules, 2021 wherein significant social media intermediaries must be capable of identifying the originator of messages if required by the government. Considering the expansion in the definition of “telecommunication services” to include social media platforms, the mandate of interception now exists in two legislations.

Conclusion

Questions 8 and 9 of the TRAI Consultation Paper ponder over setting up a collaborative framework between OTT Communication Service providers and licensed TSPs while questions 10 to 14 deal with the issue of selective banning of OTT services.

These questions flow through the assumption that OTT Communication Services be brought within the licensing regime applicable to TSPs. We have chosen to leave these questions unanswered since we recommend that OTT Communication Services be regulated with a light hand and kept outside the scope of the licensing regime, in line with our responses to questions 5 and 6.