



January 21, 2019

To  
Shri. Asit Kadayan,  
Advisor (QoS),  
Telecom Regulatory Authority of India (TRAI),  
Mahanagar Doorsanchar Bhawan,  
J.L. Nehru Marg, (Old Minto Road) New Delhi - 110002, India

Email: advqos@trai.gov.in

**Subject:** Access Now counter comments to TRAI's Consultation Paper on Regulatory Framework for Over-The-Top (OTT) communication Services

Dear Sir,

We write to you in connection with the consultation paper on regulatory framework for Over-The-Top (OTT) communication services, which the Telecom Regulatory Authority of India (TRAI) published on November 12, 2018 seeking public comments. Access Now participated in the initial comment and feedback process. This letter contains Access Now's counter comments to the comments received in response to the consultation paper, supplementing the initial comments we filed earlier this month.

We provide out counter-comments grouped by the questions relating to the relevant issues below:

**Q.1 Which service(s) when provided by the OTT service provider(s) should be regarded as the same or similar to service(s) being provided by the TSPs. Please list all such OTT services with descriptions comparing it with services being provided by TSPs.**

**Q.2 Should substitutability be treated as the primary criterion for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers? Please suggest factors or aspects, with justification, which should be considered to identify and discover the extent of substitutability.**

Many submissions, particularly from Telecom Service Providers (TSPs), submitted that licensed telecom services and internet applications are substitutes for one another, and thus must be subject to similar regulations. We believe that this proposition is incorrect and misleading, and

believe that TRAI must recognise the fact - pointed out by many comments filed by other stakeholders - that while some internet applications may provide similar services to those provided by licensed telecom services providers, they are inherently different services that relate to state level interests in a different manner.

As the International Telecommunication Union (ITU) "ICT Regulation Toolkit" states: "*OTT services are enabled by the de-layering of the industry. IP has separated carriage from content and allowed 'over-the-top' content and applications providers to deal directly with end users over networks whose owners and operators are excluded from these transactions.*"

For ease of reference, we provide an infographic previously published by us that visually lists the distinctions between internet applications and licensed telecom services as an annexure to these current counter-comments.

We further support the submission that: "*Equating OTT communications with traditional services is overly simplistic and ignores that OTTs often offer diverse functionalities, do not easily fall into straitjacketed categories, and may use messaging or calling merely to augment unrelated services and improve the consumer experience.*"<sup>1</sup> We strongly emphasise that TRAI must carefully review any of the proposals offered by certain telecom sector industry players under the banner of "Same Service, Same Rules/Protection", as the fact is that this slogan argues for a position does not apply in the case of internet applications and licenses telecommunication services.

We also caution regarding comments made by some stakeholders on TRAI adapting the framework of the European Union's recently enacted Electronic Communications Code. The TRAI Act restricts TRAI's regulatory powers to the areas laid out under Section 11, which would not allow it to currently issue regulations impacting internet services. If TRAI is to engage on broader communications law reforms - to the extent that EU institutions did legislatively by the ECC - it must then undertake a consultation on reforms and overhaul of the entire legal architecture of the Telegraph and TRAI Acts, and engage on what alternate legal structure must be considered and enacted by the Parliament of India.

Many submissions refer to the license fees as well as universal service obligation levied on TSPs as being onerous, creating a "non-level playing field" and causing a competitive disadvantage to telecom service providers with respect to internet applications. It is important to note that telecommunications regulation is based on the exploitation of public goods (land use easements; exploitation of spectrum, etc.) that are have scarcity or interference-related concerns. The levies are premised on the use of these public goods by TSPs for private profit. Internet services, on the other hand, do not generally use such public goods on an exclusive (or allocated) basis, and thus, should not generally be subject to telecom levies by the government, except that of general taxation (including corporate and sales tax regimes, which are otherwise

---

<sup>1</sup> Submission on behalf of Asia Internet Coalition

applicable on licensed telecom services that are allocated exclusive usage rights to public goods such as spectrum.

It would instead be beneficial if TRAI more carefully examines the issue of how certain legacy telecom regulatory mandates - of which several evolved as interpretative findings of the licensing authority - have impacted the range of non-telecom services offered by telecom firms. We note and recognise the concerns of certain TSPs wherein they submit that license fee charges are paid on services offered by TSPs which aren't predicated on the use of public goods, as discussed above. We submit that the TRAI should further study these concerns and consider looking at the parameters for charging license fee, to exclude services which don't come within the purview of the licenses issued to the TSP.

**Q.3 Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required from time to time for network capacity expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks? Please justify your answer with reasons.**

**Q.7 Is there an issue of non-level playing field between OTT providers and TSPs providing same or similar services? In case the answer is yes, should any regulatory or licensing norms be made applicable to OTT service providers to make it a level playing field? List all such regulation(s) and license(s), with justifications.**

**Q.8 In case, any regulation or licensing condition is suggested to made applicable to OTT service providers in response to Q.7 then whether such regulations or licensing conditions are required to be reviewed or redefined in context of OTT services or these may be applicable in the present form itself? If review or redefinition is suggested then propose or suggest the changes needed with justifications.**

In addition to our comments provided in our prior submission, we would like to emphasise that TRAI would benefit from the research highlighted in the submission made by the Internet Freedom Foundation to the initial comments solicited by the consultation paper. We quote their findings below:

*“Our economic, data driven analysis reveals the following:*

- *Massive growth post 16Q2: Use in both voice calling and data use is growing across the sector. This explodes after 16Q2 which is when Reliance Jio starts services. The rate of growth is increasingly and more people are coming online.*
- *Fall in average rate per user: This massive growth has coincided with a drop in per user revenue for the major telecom players. Such fall appears to be due to a hyper-competitive environment after the entry of Reliance Jio, however with a wave of consolidation this period may soon end. Such trends are as per statements in the press by leading executives of telecom companies and analyst reports such as Moody's and Fitch.*

- *Ambiguity in the amount of investment: While there is a need for continued investment, we do not know to what extent, to what number and in what period of time. The data here is spotty and while the number may be large to devise any public policy measure there needs to be evidence”*

These findings, in conjunction with investment figures quoted in the submission by the Asia Internet Coalition, lead us to submit that the reduction in Average Revenue Per User (ARPU), is due to hyper competition within the industry, with a “race to the bottom” pricing trend. We further support the various submission arguing that the growth of internet applications expands, the avenues for greater revenues for TSPs. This has been supported by many studies including a May 2017 paper from the consultancy, Communications Chambers.<sup>2</sup> The comments filed by Prof Rekha Jain and her colleagues at the IIM Ahmedabad IDEA Telecom Centre Excellence further establish that growth in data revenue owing to the increased use of “OTT services” is projected to compensate for the revenue lost due to reduction in usage of ILD voice services and SMS services. Across the telecom sector, we submit that many now recognize that focusing on APRU - and not ARPM (Average Revenue Per Minute) - can result in an incorrect understanding of the economic situation of telecom firms and result in bad regulatory strategy. And additionally, the IIM-A IDEA-T-COE team’s submission also reminds us that reduced TSPs revenue is not a market failure condition that establishes a need for intervention by TRAI.

In this context, we submit that the primary premise of the existence of a non-level playing field, as a justification for licensing or otherwise extending the ambit of telecom regulation to internet applications does not hold to scrutiny.

The comments filed by ShareChat and ISOC Delhi, among others, also represent the reality that that telecom services and internet applications don’t always play in the same field, and that like cars, planes and trains, they may provide similar functions at some point but work under different technologies, and are subject to separate considerations, and must not be clubbed for regulatory licensing purposes. More importantly, as we noted in our initial comments, requiring individuals and other associations in India to require a licenses in order to provide internet applications or other online services would gravely interfere with the right to free expression and access to information enshrined in India’s Constitution and protected under international law - including the International Covenant on Civil and Political Rights (ICCPR). The comments indicated in the 2011 report of the UN Special Rapporteur on Freedom of Expression emphasised that internet applications and online services are unlike broadcasting sector entities, since their operation in themselves do not require national governments to distribute limited frequency bands in order to prevent network interference.<sup>3</sup> TRAI must therefore be

---

<sup>2</sup> Brian Williamson: Communications Chambers, Deconstructing the “level playing field” argument – an application to online communications, May 2017, available at <http://static1.1.sqspcdn.com/static/f/1321365/27575015/1495793366237/LPFMay24.pdf?token=AxPym8wn4wb%2BAPWBXfpxyAkgLUE%3D>

<sup>3</sup> “Furthermore, unlike the broadcasting sector, for which registration or licensing has been necessary to allow States to distribute limited frequencies, such requirements cannot be justified in the case of the

extremely cautious when examining proposals seeking either telecom licensing or broadcast sector licensing of internet services as applications, as has been proposed by certain stakeholders in the first round of comments.

**Q.4 Would interoperability among OTT services and also interoperability of their services with TSPs services promote competition and benefit the users? What measures may be taken, if any, to promote such competition? Please justify your answer with reasons.**

We support the principles underlying interoperability and policy approaches that support users in being able to easily port their data in a manner where they are in control. We note that several stakeholders have further submitted that the regulation of data portability of firms besides licensed TSPs is outside the legal powers of both the TRAI and the Department of Telecom under current Indian law.

Specifically, we do not believe that interconnection between internet applications and TSPs should be mandated by force of law or regulation. However, we support the submissions made by Microsoft, to the extent that TSPs and internet application should be allowed to figure out interconnection mechanisms - such as voice calls over the internet being interconnected with PSTNs, under a regulatory framework that better supports increased usage of such solutions - including examining how interconnection charges would apply to such situations of internet application data more directly originating or terminating on licensed telecommunication infrastructure.

**Q.5 Are there issues related to lawful interception of OTT communication that are required to be resolved in the interest of national security or any other safeguards that need to be instituted? Should the responsibilities of OTT service providers and TSPs be separated? Please provide suggestions with justifications.**

We submit that the legal framework for lawful interception in India urgently requires an overhaul. It is necessary that legal and institutional safeguards be put in place to curb misuse of interception orders, provide mechanisms in case of genuine need for interception and ensure secure communications that safeguard the fundamental right to privacy of Indian residents.

We share the concerns raised by several stakeholders regarding the need for a proper framework for lawful interception requests in the country, and one that recognised the current legal reality regarding the tests laid down by our Supreme Court regarding the fundamental right to privacy after the 9-judge ruling in the *Puttaswamy* case. The current surveillance infrastructure in India lacks proper transparency and accountability. It is essential that the legal

---

Internet, as it can accommodate an unlimited number of points of entry and an essentially unlimited number of users". United Nations - Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf) (while noting that "this does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation").

framework for lawful interception provide institutional checks and balances, which addresses the problematic current situation of complete control of the executive in this process. Parliamentary and judicial involvement in this process is essential, with the executive serving the role of an applicant. Such applications for interception should be then adjudicated on the threshold of “necessity and proportionality”<sup>4</sup> - the requests should have a basis in law, must be necessary to achieve a legitimate aim, and proportionate to the aim pursued.<sup>5</sup> TRAI must engage with stakeholders on how current lawful interception mandates and legal provisions conflict with each other and do not respect standards of necessity and proportionality and other legal requirements of our fundamental right to privacy. That should include a review of the current provisions of the Telegraph Act as well as the powers under the Information Technology Act (consulting in collaboration with the Ministry of Electronics and Information Technology).

In this vein, we also support the submissions by various organisations, regarding the need for a comprehensive data protection and privacy framework in India. Many submissions note that while TSPs have certain data protection obligations under their licenses, it is essential that a horizontal and sector agnostic regulation for data protection and privacy be enacted to the fundamental right of privacy of users in India, that also overhauls and modernises India’s legal ecosystem regarding lawful interception. We also emphasise the points raised by several stakeholders that the current failure of Indian lawful interception practices and powers to respect Indian constitutional tests - leave aside international human rights law - would harm efforts to secure greater international cooperation on issues relating to law enforcement co-operation and cross-border data access.

### **Conclusion:**

We hope our counter-comments have been useful to TRAI. We are available to further expand on our initial comments and provide any other assistance useful towards this consultation.

Yours sincerely,

Raman Jit Singh Chima ([raman@accessnow.org](mailto:raman@accessnow.org))

Naman Mukul Aggarwal ([naman@accessnow.org](mailto:naman@accessnow.org))

---

<sup>4</sup> <https://necessaryandproportionate.org/principles>

<sup>5</sup> Universal Declaration of Human Rights Article 29; General Comment No. 27, Adopted by The Human Rights Committee Under Article 40, Paragraph 4, Of The International Covenant On Civil And Political Rights, CCPR/C/21/Rev.1/Add.9, November 2, 1999;



# THE "OVER-THE-TOP" DEBATE: WHY POLICYMAKERS SHOULD BE WARY ABOUT APPLYING TELECOM RULES TO INTERNET SERVICES

## "OTT" INTERNET SERVICES

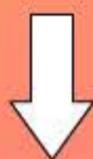
RUNNING SERVICES  
ON THE TOP LAYER  
OF THE INTERNET



ABUNDANCE  
OF RESOURCES



LOW BARRIERS  
TO ENTER THE MARKET



ENABLING COMPETITION



LACK OF REASONING  
FOR LICENSING-STYLE  
REGULATORY  
INTERVENTION

## TELECOMS SERVICES

OFFERING DIRECT  
VOICE CALLS AND SMS



LICENSED TO USE  
PUBLIC RESOURCES



HAVING "ECONOMY  
OF SCALE" ADVANTAGES



HIGH BARRIERS  
TO ENTER THE MARKET



LIMITED COMPETITION



STRONG PUBLIC  
INTEREST  
TO REGULATE

Due to all the above differences between OTT internet services and telecoms services, regulators shouldn't regard the two as competitive "substitutes" and thus adapt pre-existing rules and obligations to new internet services. Establishing legacy telecoms obligations, such as government-mandated registration, could chill free expression by imposing harsh obligations on independent media, startups, blogs and any intermediation service. Rules governing traditional media should not be directly transferred to the internet, but rather need to be specifically designed for it, as suggested by special rapporteurs on freedom of expression at the United Nations and other international bodies.

For more info on this issue: <https://www.accessnow.org/ott-vs-telecom-services/>