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Mr. Asit Kadayan,
Advisor (QoS),
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Mahanagar Door Sanchar Bhawan,
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New Delhi – 110002

Sub: Consultation Paper on Regulatory Framework for Over-The-Top (OTT) communication Services

Dear Sir,

The GSMA welcomes the opportunity to respond to the TRAI's Consultation Paper on Regulatory Framework for Over-The-Top (OTT) communication Services dated 12th November 2018.

The Internet economy is innovating and developing at such a pace that traditional telecoms regulation is no longer fit for purpose. In light of the changes to the Internet ecosystem, a new regulatory framework is needed, that is fit for purpose for a digital world. This framework must be driven by clear policy requirements around consumer protection, innovation, investment and competition.

In this context, policymakers' efforts to understand and adapt to the new realities deserve encouragement and support. New policies that take into account the whole ecosystem from traditional telecommunications to OTTs are needed.

A new regulatory approach should incorporate three main principles. **First**, it should be functionality-based, rather than structure-based. **Second**, it should recognise that the dynamism of the digital ecosystem demands that regulation also be dynamic and flexible. Often, ex post enforcement of broadly defined regulatory structures will prove to be more flexible than prescriptive, ex ante regimes. **Third**, it should recognise that many of today's legacy regulatory structures are outdated, and take a bottom-up or 'clean-slate' approach by assessing both current and potential new regulations, and regulating only when it can be demonstrated that the benefits will exceed the costs.

In the following pages, we provide our comments for the corresponding questions identified in the consultation paper. Please do not hesitate to contact us if you have any questions on the above issues.

With kind regards,

(Manoj Kr Misra)

Sr. Public Policy Director-India
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Copy to: (i) Chairman, TRAI (ii) Member TRAI, (iii) Secretary, TRAI

Enclosed: GSMA response to Consultation paper

GSMA Response to Consultation Paper on 'Regulatory Framework for Over-The-Top (OTT) communication Services'

Introduction

The GSMA is pleased to reply to the TRAI's consultation on **Regulatory Framework for Over-The-Top (OTT) communication Services** dated 12 November 2018.

To date, mobile operators have connected 5 billion people around the world. Through the dynamic process of competition and investments, mobile operators continue to meet the needs of customers.

The GSMA represents the interests of mobile operators worldwide, uniting more than 750 operators with almost 300 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA and its members are committed to connecting everyone and everything to a better future through all of our programmes in partnership with our members.

Background

We note that presently the telecommunications industry is undergoing an evolution due to the proliferation of Internet Protocol (IP) based services, generally referred to as Over-The-Top (OTT) services. OTT services can be described as content, services or applications that are provided to end users over the Internet independently of the access network service provider. This means that the term OTT does not refer to a particular type of service but to a method of provision, namely provision over the public Internet. We further note that services provided via the internet are delivered without control over the underlying network and they are therefore referred to as OTT services.

The rapid growth of smartphones and improved quality of mobile communications has enabled OTT providers to leverage this evolution to develop communication services that compete directly with traditional communication services. **Typically, OTT Communication services are perceived by customers as functional substitutes to their current voice and text services.**

We note that through this consultation paper, TRAI has made an attempt to describe the OTT services which should be regarded as similar to service(s) being provided by TSPs and further to understand how they should be treated under a present and future regulatory frameworks. Additionally, it considers whether there should be a 'level playing field' for services which have similar functionality and which compete with each other, i.e. should traditional communication services and OTT services be subject to the same regulatory obligations along with associated issues.

OTT Voice and Messaging Communications Applications

First, the GSMA offers public policy views regarding applications that enable equivalent OTT voice and messaging communications. The combination of mobile broadband access, smartphones and Internet technology has led to the emergence of a new breed of consumer mobile voice and messaging communication services provided by Internet-based companies, often referred to as over-the-top service providers (OTTs). These services are providing consumers with additional choices in how they communicate with each other. Independent consultancy Ovum estimates that in 2020 the volume of OTT messaging will be 12-times larger than the global SMS volume.¹

¹ <https://ovum.informa.com/resources/product-content/ott-messaging-will-be-12-times-bigger-than-sms-by-2020>

OTT communications services typically are offered in competition with, and are perceived by end-users as direct substitutes to, the circuit-switched voice and SMS services provided by mobile operators, but they are not properly considered in the market analysis carried out by regulators. The growth in competition in equivalent communications services between different types of providers calls for same rules for same services and thus a move towards shared rules that are lighter touch than those applicable in less competitive environments.

An Approach for a fit for purpose regulatory framework

In light of the changes to the Internet ecosystem, a new regulatory approach is needed. In 2015, GSMA commissioned a report entitled “A new regulatory framework for the digital ecosystem”² prepared by NERA Economic Consulting. While the views expressed therein are exclusively those of its authors, GSMA notes the value of the report’s proposed three main principles to guide policymakers and regulators.

First, a regulatory approach suited to the digital ecosystem should be functionality-based, rather than structure-based. **Second**, it should recognise that the dynamism of the digital ecosystem demands that regulation also be dynamic and flexible. Often, ex post enforcement of broadly defined regulatory structures will prove to be more flexible than prescriptive, ex ante regimes. **Third**, it should recognise that many of today’s legacy regulatory structures are outdated, and instead take a bottom-up or ‘clean slate’ approach by assessing both current and potential new regulations, and regulating only when it can be demonstrated that the benefits will exceed the costs.

A regulatory framework based on these principles will be inherently market- and technology-neutral, in that it will apply to all elements of the Internet ecosystem; cost-effective, in that it will achieve regulatory goals and objectives at the lowest possible cost; and flexible, in that it will allow markets and technologies to evolve while preserving and enhancing regulators’ ability to achieve their functional objectives.

A new regulatory approach also needs to take into account the oncoming rollout of 5G network services. 5G is more than just a generational step; it represents a fundamental transformation of the role that mobile technology plays in society. As demand for Ubiquitous connectivity grows, 5G is an opportunity to create agile, purpose-built networks tailored to the different needs of citizens and the economy. Mobile operators see their role in the industry as extending beyond that of connectivity provider to encompass the provision of digital services directly to consumers and enterprises, and as an enabling platform that provides B2B and B2B2C services. In the lead up to (and during) the 5G era, operators will seek to compete strongly with Internet companies and other ecosystem players, to provide the services that customers want. This competition will be most intense for services that benefit from global scale such as communications. In addition, operators will be well-positioned to leverage local assets and knowledge to deliver services that require a more localised approach. These will mostly be services targeted at enterprise customers, services for IoT, or those that require big data and artificial intelligence. **To unlock these opportunities, operators will need to be able to, on commercial terms, collaborate across the ecosystem to develop new technical solutions and commercial models.**

Summing-up

The Internet economy is innovating and developing at such a pace that traditional telecoms regulation is no longer fit for purpose. In light of the changes to the Internet ecosystem, a new regulatory

² https://www.gsma.com/publicpolicy/wp-content/uploads/2016/09/GSMA2016_Report_NewRegulatoryFrameworkForTheDigitalEcosystem_English.pdf

framework is needed. The ultimate goal of government intervention in the economy is to identify and remediate, when possible, shortcomings in competitive markets, and thereby enhance social and economic welfare. Regulatory policies and institutions designed for a bygone era, when competition was less intense and markets were not so dynamic and interrelated, cannot achieve those objectives.

Today's regulatory policies are, in many cases, having the opposite of their intended effects by distorting markets and inhibiting competition and innovation. **In this context, policymakers' efforts to understand and adapt to the new realities deserve encouragement and support. New policies that take into account the whole ecosystem from traditional telecommunications to OTTs are needed and we have laid out three broad principles described above to support their development.**

Response to individual questions:

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.

GSMA's Response:

We believe that in the case of OTT Voice/ Video Calling and Messaging Communication Applications (OTT services) which are perceived by the customers as a functional substitutes to their current voice/ video calling and text/Message services may be considered as the same or similar to service(s) being provided by the TSPs such as voice/video telephony and messaging (SMS) services. For example Mobile messaging is a service mainly delivered to customers in two ways: SMS / MMS service built in mobile networks of 2G and 3G/4G technologies, and OTT Messaging applications such as WhatsApp, Face time or Viber, which use a mobile internet data connection. Those applications may be resident in the device or in web servers at the network edge.

From the customer's point of view, **those services are broadly substitutes because they deliver the same functionality:** sending short messages to other users. The reasons to choose one or another depend on many parameters: the community of users you can reach with each service, price, user-friendliness, and additional features like creating and managing distribution lists, etc.

We believe that TRAI will have a very good understanding of the services provided by TSPs, both at the wholesale level and at the retail level. Given that the TRAI is the regulator of the telecommunications sector, the most relevant services that OTT service providers offer that are the same or similar to the services provided by TSPs are what the European Union calls Electronic Communication Services, as defined³. Electronic communications services encompass Internet access services and interpersonal communications services, in addition to those conveying signals. Interpersonal communications services are further subdivided between "number-dependent" and "number-independent" services. The former includes standard telephony services, while the latter encompasses OTT services like Skype, WhatsApp, etc.

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.

GSMA's Response:

Substitutability

We note that substitutability is a tool for defining markets in competition policy: where consumers see a service as substitutable for another service, then the services are likely to be in the same market.

Substitutability is one of the key criterion for market definition in terms of demand-side analysis and supply-side analysis. Demand-side analysis focuses on the characteristics of demand, all the products'

³ The European Electronic Communications Code (EECC) was formally adopted in December 2018; Member states have two years to incorporate it into national law.

substitutes available to the end users. Demand substitutability should be key for market definition in the digital age: when different technologies are used interchangeably, then all providers of these technologies compete in the same market whereas supply side analysis takes into account all the current and potential suppliers of the relevant product and their business models. As demand-side substitutability should be the key criterion for the analysis in the digital age, supply substitutability should be assessed as a complementary tool.

We believe that generally, substitutability determines the boundaries of competition between services provided by the OTTs and the services provided by the TSPs and should be the main criterion to determine the Constraints faced by the OTTs and TSPs that provide such services.

Regulation in Practice

One important issue is whether the existing regulatory and licensing norms, which were created in a very different technological era, are still relevant to the digital world and therefore it is very important to carry out a review of such regulatory and licensing norms. Only if the norms are still relevant in the new marketplace, they should be considered for their applicability to providers of electronic communication services.

Regulatory and licensing norms are only relevant if they can be enforced. For example Ofcom in the 2008 regulation imposed an obligation to allow 999 and 112 emergency call on certain VoIP service providers, excluding those that use peer-to-peer services to make and receive calls over the Internet and the BEREC report ECC 273 relates to OTTs that use E.164 numbers [REF: TRAI, para. 5.1.1]. Thus the TRAI should consider enforcement aspect also.

Concerning 'factors or aspects' to 'identify and discover' the extent of substitutability, the GSMA has identified issues with the traditional approach to assessing substitutability. The GSMA has published a report on "Resetting competition policy frameworks for the digital ecosystem"⁴ in which it highlights that in the standard market-definition exercise, the focus is on price as the main driver of switching by consumers. However, in digital markets where there is no monetary price or where competition takes place over non-price factors such as quality, the factor should be whether consumers would switch in response to changes in quality levels, for example, or in non-monetary privacy costs. This should determine the main drivers of consumers' switching.

We therefore believe that any comparison of regulatory or licensing norms applicable to TSPs and OTT service providers in the digital age should be functionality based, rather than structure-based.

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.

GSMA's Response:

We note that as per present regulatory & legal framework, TSPs are responsible for establishing, maintaining and working of telecommunications.

TRAI has rightly noted that a business can decide to invest in expanding capacity, depending on a cost-benefit analysis of options [para. 3.2]. In Para 3.2.6, the TRAI correctly points out that TSPs need to

⁴ Resetting competition policy frameworks for the digital ecosystem, October 2016

invest in the infrastructure to handle increasing demand of data traffic and this may be done by enhancing the capacity of networks or by upgrading with the latest technology (or a combination of both). The investment required may be dependent upon the nature and variety of traffic, types and characteristics of services being delivered.

Without wishing to enter into an academic debate about the relationship between investment and profits, economic theory teaches both that investment and return on investments are important for the economic system and that there is a strong relation between the two.

As the TRAI points out [para. 3.1], 'average price per GB has sharply declined' from the average of Rs 75.57 per GB in 2016 to Rs 12.06 per GB in 2018. This has impacted revenue at a time when costs have increased. There are various reasons for this and the TRAI does not carry out an analysis of these. Undoubtedly, the increase in OTT services has impacted the revenue model of operators, particularly the traditional ones, in India but, as the TRAI also points out, the growth in OTT services and the consequent increase in data traffic is also growth for the TSPs' business.

We note that the TRAI does not consider that OTTs themselves invest in infrastructure⁵. Having said that, Indian operators have existing networks, understand the technology, and are already updating the networks with 4G capability and soon will be starting the cycle of investment in 5G networks. It makes sense for Indian operators to invest in telecoms networks in India.

However, whilst TSPs are best placed to invest in networks, the burdensome regulatory and licensing obligations on TSPs in India are impacting their ability to invest in networks.

The TRAI in Chapter 4 focuses on the telecoms obligations that mobile operators have to comply with. There is always a cost to complying with a strict regulatory regime: extending such a regime to companies currently outside it will not result in increased investment in telecoms networks, but it would increase the costs for the companies in question and potentially decrease investment in other areas for them.

The GSMA therefore considers it is very important that the regime governing TSPs should be considered in the whole (and not just as relates to the role of TRAI as the telecoms regulator) and existing obligations are reviewed. The GSMA considers that a starting point should be that the regime of regulation should be market and technology neutral as much as possible as detailed in para 5.1.3 of the TRAI consultation. Indeed, in that paragraph, TRAI quotes the GSMA principles for a regulatory framework that is market and technology neutral. The TRAI highlights a number of tax and fees that apply to TSPs – a good starting point would be to review that at least some of these licence fees should be subsumed under GST.

Furthermore, it is important to recognise that, quite apart from licensing fees and spectrum fees and the costs of compliance with interception, privacy and security obligations, etc. as listed in Chapter 4, telcos in India are subject to a number of other taxes and that there are a number of pending legal and regulatory issues that impair the ability of the telcos to free capital currently frozen in their accounts and to seek investment opportunities.

The National Digital Communications Policy - 2018 (NDCP-18) stipulates that *"...given the sector's capital-intensive nature, the Policy aims to attract long-term, high quality and sustainable investments. To serve this objective, the Policy further aims to pursue regulatory reforms to ensure*

⁵ The Analysys Mason report "[Infrastructure Investment By Online Service Providers](#)", December 2018 states Online Service Providers have invested USD19.9bn in hosting services for the period 2014-17. In comparison, Mobile network service providers have invested more than USD300 bn [Source: [GSMA Mobile Economy 2018 - Asia Pacific 2018](#)]

that the regulatory structures and processes remain relevant, transparent, accountable and forward-looking. Additionally, the Policy aims to remove regulatory barriers and reduce the regulatory burden that hampers investments, innovation and consumer interest. ...” (Emphasis added).

In view of above facts and analysis, it is desirable that present regulatory outflows i.e. License fee including USO, Spectrum Usage Charge (SUC), should be rationalised. Furthermore, present regulatory or licensing imbalances (as indicated in Chapter 4) should also be aligned in accordance with the NDCP-18.

Q.4. Would inter-operability 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.

GSMA’s Response:

We understand that these issues of interoperability among OTT services and interoperability between TSPs and OTT services have been raised from the point of competition among the relevant stakeholders.

We note from this consultation paper, and further from the various industry discussions/reports, that there is no lack of competition in this segment among the OTT service providers and also with TSPs, therefore, given the lack of market failure, **it is recommended that interoperability related issues should be left to market forces and on commercial or operational flexibilities.**

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.

GSMA’s Response:

We believe that consistent application of regulatory obligations will also support legitimate law enforcement and national security activities, which will improve consumer confidence and trust in using internet-based services.

While the same rules should apply to the same services, **these are not necessarily the rules that apply today to telecommunications services.** There is a need for a forward-looking regulatory framework for communications services that is fit for purpose for a digital world. **This framework must be driven by clear policy requirements around consumer data protection, lawful interception, security, privacy, innovation, investment & competition and be made equally applicable to all sectors of the economy, as relevant, in a horizontal manner.**

Q.6. Should there be provisions for emergency services to be made accessible via OTT platforms at par with the requirements prescribed for telecom service providers? Please provide suggestions with justification.

GSMA's Response:

Emergency services are an important part of the digital ecosystem, however, we note from TRAI's recommendations on 'Regulatory Framework for Internet Telephony dated 24th October 2017'⁶, where TRAI has recommended that *"...the access service providers providing Internet Telephony service may be encouraged to facilitate access to emergency number calls using location services; however they may not be mandated to provide such services at present. The subscribers may be informed about the limitations of providing access to emergency services to Internet Telephony subscribers in unambiguous terms."*

In view of above, it is submitted that the above recommendations may be extended to OTT services i.e. OTT service providers have to inform their users that emergency services are not available on their platform.

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.

"And"

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.

GSMA's Response:

As explained in our introduction and response to Q.1 and Q.2. we believe that the principle of 'Same Rules for the Same Service' maintains that where regulation is considered to be necessary, all equivalent consumer voice and messaging services should be subject to the same regulatory and fiscal obligations, regardless of the underlying technology, geographic origin or whether they are delivered by a mobile operator or OTT service provider. This will help improve consumer confidence in using internet based services.

Regulatory policy should be designed to achieve the desired objective (e.g., protecting privacy, promoting universal adoption, providing incentives for investment and innovation) in the most efficient way, regardless of the technology, industry structure, or legacy regulatory regime.

Regulation must be flexible enough to accommodate these changes while creating the regulatory certainty and predictability that companies need to take risks.

⁶ https://tra.gov.in/sites/default/files/Recommendations_24_10_2017_0.pdf

In light of the immense changes to the Internet ecosystem, a new regulatory approach is needed which should incorporate three main principles. First, it should be functionality-based, rather than structure-based. Second, it should recognise that the dynamism of the digital ecosystem demands that regulation also be dynamic and flexible. Often, ex post enforcement of broadly defined regulatory structures will prove to be more flexible than prescriptive, ex ante regimes. Third, it should recognise that many of today's legacy regulatory structures are outdated, and take a bottom-up or 'clean-slate' approach by assessing both current and potential new regulations, and regulating only when it can be demonstrated that the benefits will exceed the costs.

Q.9 Are there any other issues that you would like to bring to the attention of the authority?

GSMA's Response:

No comments
