



ITU-APT Foundation of India

## **ITU-APT Foundation of India**

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

ITU-APT Foundation of India (ITU-APT) is a non-profit, non-political registered society, is working for last 10 years in India with the prime objective of encouraging involvement of professionals, corporate, public/private sector industries, R&D organizations, academic institutions, and such other agencies engaged in development of Indian Telecom sector in the activities of the International Telecommunication Union (ITU) and the Asia Pacific Telecommunity (APT). The society has been registered with the registrar of the societies with its secretariat working at New Delhi. Globally, the counterpart organizations of ITU-APT are the ITU Associations in Japan and in the USA, where predominantly private industries engaged in Telecom sector are their members. ITU-APT is working to foster closer relationship with them.

ITU-APT Foundation of India (ITU-APT) is sector Member of the ITU Development Bureau (ITU-D) and ITU Telecommunication Standardization Bureau (ITU-T) which manifests its usefulness of the Indian Telecom industry. The Foundation members are entitled to participate in the activities of ITU-D, ITU-T and ITU-R.

ITU-APT Foundation of India (ITU-APT) offers its counter-comments in response to the comments submitted in the TRAI Consultation Paper on “Privacy, Security, and Ownership of the Data in the Telecom Sector”. We appreciate the opportunity to participate in the consultation and commend TRAI's commitment to develop policy through a transparent and open consultation process.

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The Telecom Regulatory Authority of India (TRAI) is charged with ensuring the orderly development of the Indian telecommunications ecosystem. Under the terms of the TRAI Act, 1997 (as amended), TRAI is empowered to regulate on various issues related to the telecom sector including tariffing, consumer protection, quality of service, interconnection, and licensing of service providers. However, regulation in these sectors must not occur in a silo-ed fashion. It is well documented that connectivity and internet access provides a multiplier effect for general socio-economic development of a community. Given the large unconnected population in India, these effects are doubly important in the Indian context. As a result, TRAI's interventions in these areas will be critical in determining the course of the sector and – to a large extent – that of the Indian economy as a whole.

At the same time, TRAI must ensure that it fulfils its regulatory mandate within two broad parameters. This is to minimise spill-over effects of regulation and the most efficient use of the regulator's assets and expertise.

#### **(i) TRAI must focus on issues within its regulatory mandate**

In other to effect efficient regulatory interventions, TRAI must look to concentrate its efforts on issues clearly within its mandate to regulate and enforce. While consultations are required to be carried out in the broader policy context, ancillary policy questions must only be analysed with respect to issues confronting the Indian telecom sector. TRAI seeking to consult stakeholders on issues beyond its mandate would only dilute the

quality of comments received – and ultimately the quality and persuasive value of TRAI’s own recommendations.

In the context of the present consultation, TRAI should forebear on taking a position on issues such as mandatory data sandboxing, general approach to privacy regulation, and forced localisation. Under the current scheme, it is the responsibility of the Ministry of Electronics and Information Technology to formulate government policy relating to the internet. Moreover, the issue of OTT licensing is outside the scope of the present consultation which is only to deal with privacy, security, and data ownership issues in the *Telecom Sector*. Within these circumstances, we urge TRAI to focus its efforts on issues directly related to the telecoms sector in general – and only with respect to privacy in the sector as part of this consultation process.

**(ii) Need for evidence-based policy making**

Policy or regulation is only effective when it achieves its primary purpose while not causing any unintended or secondary harms. These harms could either be confined to the same sector, or spill-over into other connected sectors. Therefore, what is required is careful impact analysis of any potential issue before passing regulation. Public consultations such as the present are one example of how potential impact of any regulation may be estimated – however, it is insufficient.

In addition to considering stakeholder consensus, TRAI must seek to base any decision on clear evidence of a harm or failure. Evidence from around the world has shown that failure to do so results in serious unintended economic harms. For example, the EU’s cookie related privacy directive is estimated to have significantly driven up costs for European SMEs and start-ups and raised barriers to entry and compliance costs. Similarly, the GDPR is likely to drive up costs for SMEs by up to 40%. Given the large unorganised sector in India and the enhanced role played by SMEs and start-ups, even a marginal increase in costs will eat into revenues and lead to unemployment.

This is a potential effect which cannot be foreseen except with careful economic analysis prior to policy reform. For instance, if TRAI were to recommend a broader and more onerous regulatory framework for OTT operators, SMEs would find it harder to break into the market. Those looking to launch start-ups would think twice given the blinkered focus on enhanced user rights. Overall, innovation and entrepreneurship would suffer. These undoubtedly run counter to the government’s stated focus on SMEs and start-ups through the Start Up India and related initiatives. Therefore TRAI must not undertake policy making which is likely to affect (even marginally) SMEs, start-ups, and other players common within the Indian economic ecosystem.

*With these broad comments on TRAI and its functioning, we offer the following specific counter comments highlighting trends observed in stakeholder submissions. We respectfully urge TRAI to constructively consider all comments and stakeholder views as representative of the Indian ecosystem.*

**OTT Regulation and Licensing: A non-starter**

At the outset, we urge TRAI to completely segregate the present consultation from any issues relating to the need to license or regulate OTT service-providers. The present consultation is intended to only focus on privacy, security, and data ownership issues in relation to the telecommunication sector – and is premised on securing consumer interests. The issue of OTT regulation is unrelated to this. If anything, OTT regulation would only harm consumer interests by increasing compliance costs, barriers to entry and excluding smaller service providers from operating in India.

In fact the weight of available evidence focusses on the benefits of OTT service providers. A recent report by ICRIER (2017) reveals that OTTs contributed a minimum of USD 20.4 billion (Rs. 1357.6 billion) to India’s GDP in the year 2015-16, which will increase to USD 270.9 billion (Rs.18275.9 billion) by the year 2020. In another

report, WIK (2017), through a consumer surplus survey and analysis, finds that OTT usage in India saves on average 803.9 minutes per week in comparison to traditional alternatives (e.g. sending letters, physically meeting etc.). Based on the average annual income in India (INR94,130), this translates into an annual consumer surplus of US\$98 billion in 2017. Thus, each user of OTTs in India receives on average US\$249 of consumer surplus annually. Applied to the entire population—not just OTT users—this results in US\$74 per capita. Given this trend, any overburdening regulations should be avoided that would create a compliance burden and form barriers to entry, affecting market efficiency and competition.

In addition, TRAI and other institutions have been considering the issue of OTT regulation through various processes. We would urge that the two issues be not linked. Where entire processes have been devoted to the issue, it is inappropriate and inefficient to consider the same within the present consultation process. We respectfully urge that TRAI not consider any arguments for OTT licensing or same-service-same-rules within the context of the present consultation. TRAI must, instead, focus on the privacy and security issues as related to the Indian telecom sector.

### **Preserving Global Cross Border Data Flows**

A few stakeholders have filed comments seeking the need to regulate cross-border data flows. At present, Indian industry thrives only because of the ease with which foreign data can be imported into India and vice versa. This is presently achieved through a variety of mechanisms and protective schemes. Under Indian law, entities may only transfer certain types of data if the receiving entity can ensure an adequate level of protection. Similarly, transfers from advanced privacy jurisdictions like the EU are regulated through a variety of mechanisms including binding corporate rules, model clauses, and jurisdictional adequacy assessments. In other words, the system as it stands today permits transfers of data cross-border if certain minimum conditions are satisfied.

These protections ensure that key global markets are linked, and preserves digital trade flows. It becomes critically important in a major outsourcing service jurisdiction such as India which would not be possible if data were not allowed to move freely across borders. If anything, TRAI must look to create additional grounds on which cross-border data transfers may be allowed and provide flexibility for market forces to decide the optimal solution. Today, privacy is a criteria of product differentiation, and providing a flexible light-touch framework would encourage companies to adopt the highest protections as a feature for their consumers. Any attempt to micro-manage transfers or interfere in their free flow would affect India's standing as an outsourcing service provider, as well as a stable investment destination.

The most balanced manner in which TRAI can encourage these flows, and privacy at the same time is by promoting the use of standards and certifications which companies may self-certify to. This will ensure the maintenance of minimum standards, transparency vis-à-vis consumers, and preservation of innovative forces. Any other intervention would disrupt the existing ecosystem and harm all stakeholders – driving up compliance and technical costs, and ultimately reducing consumer choice.

### **Data Sandboxing: Unnecessary and Harmful**

Another issue which deserves closer scrutiny relates to TRAI's suggestion for mandatory government-sandboxes to share anonymised data sets generated by private enterprises. While no doubt well-intentioned, such a measure will lead to a complete erosion of trust in the Indian legal and regulatory system for both Indian and foreign companies. Forcing companies to part with data – whether anonymised or not – is a guaranteed step to ensure that companies think twice before doing business in India. It borders on expropriation of proprietary information, and is likely to fly in the face of numerous international and domestic legal norms. It is akin to forcing companies to part with protected trade secrets with no tangible benefit flowing to them.

Stakeholder submissions – in vast majority – reflect this understanding. TRAI should consider these comments as a warning sign of potential industry reaction to a move such as mandatory sand-boxing.

At the same time, there may be alternative ways to achieve the underlying objective of TRAI's suggestion – even if the suggested regulatory outcome is inappropriate. Public welfare can benefit from the sharing of data sets in anonymised form. But, contrary to TRAI's suggestions, such sharing should come from the Government of India and State Governments. Sharing of data in relation to public welfare schemes in relation to healthcare, banking, education, and literacy would go a long way towards helping craft solutions to many of India's pressing socio-economic problems. Therefore, TRAI may consider recommending a mechanism to ensure that all government departments and ministries with public-facing schemes mandatory and proactively disclose data points available.

### **Evolving rational approach to privacy**

As discussed above, the focus of the present consultation must be restricted to privacy, security, and data issues within the Indian telecom sector. In this regard, it is important for TRAI to arrive at a regulatory approach which balances the needs and policy priorities of India viz. protecting consumer privacy interests, ensuring a stable regulatory environment, promoting innovation, facilitating ease of doing business, and helping connect India's large unconnected population.

Stakeholder comments are illuminative on these points. There is wide consensus among most private sector stakeholders that the present approach to data protection is sufficient and the scope of regulations (including the definition of key terms such as 'personal information') adequate and in line with international standards. If in TRAI's view, there is a need to promote parity amongst various stakeholders, the required approach may be to deregulate or liberalise standards for sectors which are regulated over and above the horizontal framework contained in the IT Act, and SPDI Rules. If data-centric innovation, and entrepreneurship have flourished in India at all, it is because there has been no regulatory impediments from extant privacy and data protection frameworks. At the same time, the existing law enforcement machinery has proved sufficient in investigating cyber-crime and other data-related complaints. Improperly scoped or overly burdensome privacy regulation around the world has been shown to disproportionately impact SMEs and start-ups. TRAI must tread carefully as any regulation implemented without a proper impact analysis – and in the face of stakeholder comment – could backfire and harm the sector as a whole.

Spill-over effects of creating impediments for SMEs would be less investment in rural and remote areas – where large entities do not have adequate business justification to enter or operate in. This would preserve the existing status quo of a large unconnected population excluded from the galvanising power of the internet. Therefore, TRAI must look to deregulate overly-regulated sectors and allow the existing innovation status quo to continue for all other sectors. Anything short of this would be disastrous for the Indian economy as a whole.

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